School Consolidation & Minnesota's Fire Safety Inspection Law: A Step Too Far

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"Under the rubric of school 'improvement,' many places that once provided schooling no longer do; for they have been improved out of existence."[1]

"You can't have forced mergers. This is America."[2]

Consolidation of school districts has historically been considered an effective means of improving schools.[3] It is, however, an unpopular means that mostly affects small school districts[4] and frequently results in the elimination of individual school buildings or entire school districts.[5] Understandably, many communities view the elimination of their schools as a threat to the vitality of their communities.[6] Consolidation, therefore, is a school improve-

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1. Alan J. DeYoung & Craig B. Howley, The Political Economy of Rural School Consolidation 3 (1992), *microformed on* ERIC Docs. No. ED 347018 (Educational Resources Info. Center, U.S. Dep't of Educ.)

2. Sam Colman, N.Y. Assemblyman, *quoted in* Billy House, *Sobol Retreats from Forced School Mergers*, GANNETT NEWS SERVICE, Jan. 7, 1993 (LEXIS).

3. The first round of consolidations began around 1918. Erik Nelson, School Consolidation 3 (1985), *microformed on* ERIC Docs., No. ED 282346 (Educational Resources Info. Center, U.S. Dep't of Educ.).

4. School consolidation at the turn of the century was aimed at elimination of one-room schoolhouses. *See* O.L. Kunkel & W.W. Charters, *Rural School Consolidation in Missouri*, U. MO. BULL., EDUC. SERIES, Nov. 1911, at 3. School consolidation at the middle of the century was aimed at "remote, underpopulated rural counties with a plethora of tiny schools." ALAN PESHKIN, THE IMPERFECT UNION: SCHOOL CONSOLIDATION & COMMUNITY CONFLICT 6-7 (1982).

5. From 1945 to 1980, the student population rose from 23 million to 40 million. Nelson, *supra* note 3, at 3. During this same time, the number of school districts decreased from 100,000 to 16,000. Diane Ravitch, *What We've Accomplished Since WWII*, 63 PRINCIPAL 7, 11-12 (1984). The number of schools decreased from 185,000 to 86,000. *Id.*

6. The school may be an important part of the economic health of a small town. PESHKIN, *supra* note 4, at 161. Parents who come to town to pick up children from after-school activities often do their shopping there at the same time. *Id.* Property owners believe that having a school in town will attract new families and keep property values up. *Id.*

It has also been stated that consolidations are not popular because they gener-

ment technique that is often more popular with legislators[7] than with their constituents.[8]

A Modern Education Fable

The Salesperson

Once upon a time there was a salesperson who sold goods door-to-door. The goods the salesperson sold were a mixed lot. Some goods were just what people wanted and were easily sold. Some goods were of questionable value and did not sell. When the goods did not sell, the salesperson abandoned them.

One day, the salesperson obtained some goods the salesperson believed would help provide a better education to the children in the salesperson's territory. The salesperson went door-to-door trying to convince people to buy those goods. But the salesperson had no luck.

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ally involve the closing of a school, and that school may help "define the lives of a neighborhood or a small town." William Celis III, *North Dakota Districts are Facing Rising Tide in Nation: Consolidation*, N.Y. TIMES, Apr. 3, 1991, at 7B.

7. A recent survey of the Midwestern states showed many of them were considering passing or had passed laws to consolidate small schools. Karl Oxnevad, *School District Consolidations Rise as Enrollments Decline and Funding Sources Dry Up*, BOND BUYER, Sept. 16, 1991, at 3A. School consolidation is perceived as a way to deal with declining enrollments and the financial difficulties many schools face. *Id.*

8. The stories of controversy are many. *See, e.g.*, Weldon Beckner & Linda O'Neal, *A New View of Smaller Schools*, 64 NASSP BULL. 1, 5 (1980). *See generally* PESHKIN, *supra* note 4 (describing the decades-long fight over consolidation of the schools of five Illinois villages); Roald Mykkeltvedt & Doyle Mathis, *Courts as Political Instruments: The Politics of School Consolidation*, 1 OCCASIONAL PAPERS ON GEORGIA GOVERNMENT (1970) (describing the ongoing legal struggle over the consolidation of two school districts in Georgia); House, *supra* note 2 (describing the retreat of the New York Commissioner of Education from a request for power to consolidate schools when faced with public outrage over the request).

The reasons for controversy are probably numerous. One reason may be the perceived threat to the vitality of the community. *See supra* note 6. PESHKIN, *supra* note 4, at 154, speculates that once people in a community take a stand, pride prevents them from relenting. He also notes that some people just love a good fight, the strength of a controversy depends upon the organizational skills of those leading the fight, and some people just like the convenience of having a school nearby. *Id.*

Regardless of the reasons for controversy, there is no reason to believe the current push to consolidate will lead to fewer controversies. In fact, there is reason to believe controversies will increase. Whereas previous rounds of consolidations wiped out one-room schoolhouses and tiny schools, *see supra* note 4, the present round is aimed at larger systems; it is now not unusual for systems of equal size to be forced to consolidate, *cf.* PESHKIN, *supra* note 4, at 6-7. Generally, when a larger and smaller school consolidate, conflict is minimal because the larger school can dominate the decision process as to whether school buildings are closed, what the curriculum should be, etc. *Id.* When schools of approximately equal size merge, neither is the dominant partner and bickering is more likely to result. *Id.*

Even though the salesperson had no sound reason for believing the goods actually would help provide a better education, the salesperson decided to persist. At the very next house, the salesperson went to the front door, as usual, and rang the bell. When the people of the house answered, the salesperson tried to sell them the education goods. The people said, "No, we don't want these goods. You have not convinced us our children will receive a better education."

Well, the salesperson could not accept this answer. The salesperson believed that if the goods could be forced upon the people, they would be grateful. So the salesperson left the people's house but walked around to the back door. The salesperson opened the back door, walked into the house, and left the goods before the people knew what was happening.

When the people figured out what the salesperson had done, they were incensed. At the next opportunity, they told the salesperson that although they would continue to buy goods, they would not buy goods from the salesperson again.

Like the salesperson, numerous states have tried to sell school consolidation to the public. When the public has rejected consolidation, many state legislatures have passed laws that encourage school consolidation rather than force it.[9] Minnesota was one of those states.[10] In 1990, however, after school consolidation failed to win support,[11] the Minnesota legislature decided not to take "no" for an answer. The legislature then proceeded to consolidate schools through the back door of fire safety in the schools.[12]

Another Modern Education Fable

The Big School and the Little School

There was once a "big" school and a "little" school. The "big" school served an average of eighty-five pupils per grade and the "little" school served an average of seventy-five pupils per grade. Other than the size difference, the two schools were alike. Both had

9. Most of these laws take the form of financial incentives. Others, like open enrollment, exert more subtle pressure to consolidate.

10. For a more complete discussion of Minnesota's laws, see *infra* notes 91-121 and accompanying text.

11. Rob Hotakainen & James Walsh, *The Price of Safety: Schools Fighting Consolidation Fear Inspectors Will Force Issue*, STAR TRIB., Sept. 1, 1991, at 1A, 10A.

12. The 1991 legislature passed a bill mandating that all schools be inspected for fire safety. MINN. STAT. § 121.1502 (1992). Critics charge that the fire safety inspections are "nothing more than a backdoor approach to mandatory consolidation." Hotakainen & Walsh, *supra* note 11, at 10A. There is nothing in the bill's history which refutes this charge.

provided a fine education to their pupils for many years. Both had old school buildings, and the government had determined that the water each provided to its students was not safe.

Unfortunately, both schools were having financial difficulties and would find it difficult to raise sufficient money from their taxpayers to cover the expense of making their water safe again. Both schools turned to the government for help because they knew that the government, in its wisdom, had provided for such an occurrence.

When the two schools went to the government, it said, "We have a nice deep well of water. We shall divide it between you. Big school, you may have the water. Little school, you may have the shaft."

Minnesota had never before required inspection of school buildings for fire safety.[13] The state legislature understood that the new inspection program would result in great expense for many school districts and that many districts would be unable to bear this expense.[14] But rather than provide assistance to all districts requiring it, the legislature chose an arbitrary minimum size and made capital loans available only to those schools that met that minimum.[15] Faced with an "unsafe" building and no funds with which to make it safe, small districts will have no alternative but to consolidate with nearby school districts.

Two aspects of this situation seem especially inequitable. First, by forcing school consolidation through the backdoor, the legislature effectively stifled public discussion of the issue. Second, the new capital loan requirements that permit loans only to larger school districts will have an unequal impact. Not all small school buildings will be closed — only those in financially dis-

13. According to Jon Nisja, Supervisor of School Inspections, most of Minnesota's school buildings have never been inspected. Interview with Jon Nisja, Supervisor of School Inspections, State Fire Marshal Division, in St. Paul, Minn. (Oct. 15, 1991) (notes on file with author). There was no building code for schools until the 1970s. *Id.*

14. At one committee meeting on the bill, much of the discussion focused on whether schools should be automatically condemned for failure to pass an inspection and how or whether funds could be made available to help school districts that needed assistance to bring their buildings into compliance with the fire code. *Subcommittee Hearing of the Education Finance Division of the Education Committee of the House of Representatives, State of Minnesota*, March 9, 1990 (audiotape available at State Office Building, St. Paul, Minn.).

15. One form of state financial assistance available to schools is a capital loan. These loans are to be used to improve school buildings. MINN. STAT. § 124.431 (1992). Prior to 1991, these loans were available to schools of any size. MINN. STAT. § 124.43 (1988) (repealed 1990). The 1990 legislature changed the loan requirements so that they are available only to schools which serve an average of 80 or more pupils per grade. MINN. STAT. § 124.431, subd. 2 (1992).

tressed, nonisolated, small districts. Small schools which are isolated,[16] part of a larger district,[17] or not in financially distressed districts[18] will remain open. All small schools have an equal need for safe school buildings.

This article explores the educational and legal issues surrounding school consolidation and argues that Minnesota's linkage of school consolidation and fire safety is unnecessary, and violates the Equal Protection and Special Legislation Clauses of the Minnesota Constitution. Part I discusses the advantages and disadvantages of school consolidation and whether consolidation of schools actually leads to school improvement. Part II examines the legal aspects of school consolidation in Minnesota: the legislature's authority to force consolidation, how the law has been used to encourage consolidation, and the constitutionality of the linkage between fire safety and school consolidation. Part III recommends that the legislature sever the linkage between fire safety and consolidation, allow public discussion of the necessity to consolidate schools, and thoroughly consider its next step before enacting further school consolidation legislation.

Part I. Education Issues Related to School Consolidation

Consolidation of schools began at the turn of this century.[19] Over the years, many of the perceived advantages and disadvantages of consolidation have changed.[20] Modern proponents and opponents of school consolidation, however, agree about most of the advantages and disadvantages of consolidation. The most com-

16. Isolated schools are eligible for sparsity revenue and will, therefore, qualify for a capital loan. MINN. STAT. § 124.431, subd. 2(a)(2) (1992). Minnesota provides both elementary sparsity revenue and secondary sparsity revenue. MINN. STAT. § 124A.22, subd. 1 (1992). The determination that an elementary or secondary school qualifies for sparsity revenue is based upon the number of pupils the school serves and the distance to the nearest elementary or high school. *Id.* at subds. 5 and 6.

17. Capital loans are available to qualifying "districts" rather than qualifying buildings. MINN. STAT. § 124.431, subd. 1 (1992). Therefore, a school building which needs extensive repairs and which is located in a larger district, i.e., a district which serves at least 80 pupils per grade, will qualify for a capital loan. *Id.* at subd. 2(a)(2). Buildings located in districts which do not serve at least 80 pupils per grade will not qulaify. *Id.*

18. Schools in districts which are not financially distressed will be able to fund the needed repairs themselves.

19. *See supra* note 3.

20. A 1911 bulletin notes that although consolidated schools will cost more, students will receive better services. Kunkel & Charters, *supra* note 4, at 3. The bulletin points to, among other advantages, fewer colds and less sickness (because children would not have to walk through mud and snow to get to school), better teachers, better equipment, and the fact that children would like school better. *Id.* at 4-9. Among the potential objections to consolidation were increased costs, fear of

monly cited advantages[21] are that consolidation:

1. improves the curriculum because a wider variety of classes can be offered at the junior high and high school levels.[22]
2. provides more extracurricular opportunities to students.[23]
3. increases administrative efficiency.[24]
4. produces a school that is more likely to win state or national recognition in some area such as athletics, music or academic achievement.[25]

The most commonly cited disadvantages[26] are that school consolidation:

1. increases discipline problems and the amount of vandalism.[27]
2. increases the number of dropouts.[28]

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contagious diseases on the wagons which would transport children to school, and fear of careless drivers. *Id.* at 9-14.

Modern proponents and opponents of consolidation still argue about costs and services, see *infra* notes 24-45 and accompanying text, but concern about disease, illness, and horse-drawn wagons is nonexistent.

21. The most commonly cited advantages benefit high school students. One wonders whether consolidation ever benefits elementary students.

22. Natalie C. Holmes, *Consolidate, Cooperate or Collaborate*, SCH. ADMIN., Nov. 1990, at 8, 9; Allan C. Ornstein, *School Size and Effectiveness: Policy Implications*, 22 URBAN REV. 239, 241-42 (1990); James S. Streifel et al., *The Financial Effects of Consolidation*, J. RES. RURAL ED., Winter 1991, at 13-14.

23. Nelson, *supra* note 3, at 3; Ornstein, *supra* note 22, at 242. For example, a school that did not have a chess club may have one following consolidation. For the corresponding disadvantage, see *infra* note 31 and accompanying text.

24. Ornstein, *supra* note 22, at 241; Streifel et al., *supra* note 22, at 13. An example of this increased administrative efficiency was offered by Gene Mammenga, Minnesota's Commissioner of Education. Mammenga stated that when a high school has at least one hundred students per grade it is easier to schedule classes to minimize conflicts so that students get those classes they want. Interview with Gene Mammenga, Minnesota Commissioner of Education, in St. Paul, Minn., Oct. 24, 1991 (notes on file with author).

25. Ornstein, *supra* note 22, at 242. This outcome is more likely because a larger student body creates a larger pool of talent. The downside, of course, is that fewer students get to participate in many of these activities.

26. Some of the most commonly cited disadvantages such as decreased opportunity to participate in a variety of activities affect only high school students. Many of them, however, have an equal impact upon elementary and secondary students. For example, the decreased support for bond issues affects all students because a bond issue is likely to be for the benefit of all students in the district.

27. Streifel et al., *supra* note 22, at 14. Diane Ravitch links the increase in discipline problems and vandalism to many of the other disadvantages of consolidation: impersonalization, increased bureaucracy, decreased contact between teachers and students and weakened bonds between the school and the community. Ravitch, *supra* note 5, at 12.

28. Allan C. Ornstein, *School District and School Size: Is Bigger Better?*, PTA TODAY, Oct. 1989, at 16. The increased dropout rate may be the result of less human contact between teachers and students. One educator contends this produces frustration, alienation, and decreased morale on the part of students and

3. decreases parental involvement because the school is no longer the focus of community life.[29]
4. decreases support for bond issues.[30]
5. decreases opportunities for students to participate in a variety of activities and to undertake leadership roles.[31]
6. decreases the sense of community between teachers and students.[32]
7. increases bureaucracy, making it harder to initiate and implement new programs.[33]

There is, however, disagreement in three areas as to whether consolidation increases or decreases a school's effectiveness. First, proponents argue that a larger school saves money because fewer buildings must be maintained,[34] and the cost per pupil is generally lower than in small schools.[35] Opponents argue that larger schools are more expensive because transportation costs increase,[36] offering more activities increases expenses,[37] and more specialized, expensive teachers and administrators are hired.[38]

Second, whether consolidation leads to increased academic

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staff. Nelson, *supra* note 3, at 3. This could lead to increased dropout rates on the part of students and to burnout on the part of teachers.

29. Nora Hutto, *Rural Schools Can Be Effective Schools, Too*, RURAL EDUCATOR, Spr. 1990, at 6, 7-8; Ornstein, *supra* note 22, at 241-42.

30. Streifel et al., *supra* note 22, at 14.

31. Ornstein, *supra* note 22, at 242. A 1980 synthesis of previous research concluded:

> 1. Students in small schools are involved in a greater number and variety of activities.
> 2. Students in small schools assume a greater number of positions of responsibility.
> 3. Students in small schools are less alienated than students in large schools.
> 4. Student participation in curricular activities and student alienation are negatively correlated.

Leslie Huling, *How School Size Affects Student Participation, Alienation*, 64 NASSP BULL., 13, 17 (1980).

32. Hutto, *supra* note 29, at 7 (stating teachers are more in tune with their students in a smaller school); Ornstein, *supra*, note 22, at 241 (stating one advantage of smaller schools is the sense of community).

33. Hutto, *supra* note 29, at 7; Nelson, *supra* note 3, at 3 (noting that school consolidation may result in more red tape).

34. Streifel et al., *supra* note 22, at 14 (contending less is spent on capital improvements because maintenance of duplicate facilities is not needed).

35. *Id.*

36. Holmes, *supra* note 22, at 8-9; Streifel et al., *supra* note 22, at 14.

37. Ornstein, *supra* note 22, at 240 (larger schools offer more activities and facilities to students). It is common sense that these activities and facilities are not free and, therefore, larger schools will be more expensive. Ornstein also notes that "with the exception of a few talented ball players, scholars and social elites, most students do not participate or receive recognition from their teachers or counselors; thus, the costs for the extra facilities and activities are high." *Id.* at 242.

38. Streifel et al., *supra* note 22, at 14.

achievement is disputed. Proponents cite studies showing higher academic achievement in larger schools.[39] Opponents cite studies showing the opposite result.[40]

Third, whether it is more advantageous to teachers to work in large or small schools is disputed. Proponents point out that teachers in large schools can specialize in one area of the curriculum and teach multiple sections of one or two subjects rather than four or five different subjects each day.[41] This means fewer preparations for the teacher. Also, large schools can generally provide higher salaries than can smaller schools.[42] Opponents point out that teachers in smaller schools get to know their students and other teachers better than do teachers in larger schools.[43] This increased contact leads to a sense of belonging, or community,[44] within the school environment and, consequently, to higher job satisfaction. Because it is generally less expensive to live in a small community, the lower salary may not mean that teachers in small school districts suffer a lower standard of living.[45]

The discussion regarding the advantages and disadvantages of

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39. In his discussion of the relationship between school size and achievement, Ornstein cites a study which found that students in high schools with fewer than 495 students scored lowest on standardized tests while students in high schools of 495 to 1280 students scored highest. The opposite result occurred at the elementary school level. Ornstein, *supra* note 22, at 241.

40. Streifel cites the example of increased academic achievement when New York City decentralized its school district from one district into 32 districts. Streifel et al., *supra* note 22, at 14. A recent study of school consolidation in Wisconsin found that student achievement declined following consolidation. Stanley J. Hallett, CHI. TRIB., June 24, 1991 (Perspectives), at 10. *See* Ornstein, *supra* note 22, at 240.

41. This remark was made by Gene Mammenga, Commissioner of Education in the State of Minnesota. Interview with Mammenga, *supra* note 24.

42. A study of teacher pay in Minnesota found that, overall, salaries of teachers outside the Twin Cities area were 17 percent lower than the salaries of teachers in the metro area. PROGRAM EVAL. DIV., OFC. OF THE LEG. AUDITOR, STATE OF MINN., STATEWIDE COST OF LIVING DIFFERENCES 26 (1989) [hereinafter STATEWIDE COSTS]. The study concluded half of the difference was due to the greater experience of teachers in the metro area and the other half was the result of higher salary schedules in the metro area. *Id.* The study also compared the salaries of outstate teachers by school size. *Id.* Teacher pay in schools serving a thousand students or more was 88 percent of the metro average. *Id.* Teacher pay in schools serving fewer than three hundred students was 69 percent of the metro average. *Id.*

43. Hutto, *supra* note 29, at 7.

44. *See supra* note 32.

45. In Minnesota, the cost of living for those outside the Twin Cities metro area is 11 percent lower than metro costs. STATEWIDE COSTS, *supra* note 42, at 23. Much of this difference is due to the lower cost of shelter (home price or rent) which is 40 percent lower in outstate Minnesota. *Id.* When teacher salaries in Minnesota were adjusted to consider cost of living differences, researchers concluded that teachers in outstate Minnesota actually received salaries that were one to two percent higher than those in the metro area. *Id.*

consolidating smaller school districts has been just that — a discussion. The literature on consolidation has been remarkable for the lack of proof offered by either side in support of its claims. The support that has been offered is generally theoretical,[46] anecdotal,[47] or based upon past experience which may not still be valid.[48]

In addition, the lack of a consensus on the definition of "small" or "large" is an impediment to a coherent discussion of school consolidation. The definition of small or large depends upon who does the defining and/or the context in which the definition occurs.[49] One author notes that historically the optimal minimum size of a school district tends to be 10,000 to 12,000 students and the optimal maximum size 40,000 to 50,000 students.[50] The same author, in a different article, states that a school is too

46. The general rationale for consolidating schools is the belief that bigger is better. Huling, *supra* note 31, at 13; Betsy White, *Georgia May Stop Thinking Bigger is Better When it Comes to Schools*, ATLANTA CONST., Oct. 14, 1991 at D6. Few of consolidation's proponents have pointed to solid evidence that this is so. The evidence used is generally of a predictive rather than confirmative nature. For example, a North Dakota official estimated consolidation of six rural districts would save money by consolidating administration and by closing the smallest school. Celis, *supra* note 6, at 7B. This estimation did not consider increased transportation costs. *Id.*

47. An example of anecdotal evidence is provided by a *New York Times* article. Celis, *supra* note 6, at 7B. The article describes the consolidation of the Gotebo, Oklahoma school, a system of 108 students, with a nearby school. *Id.* The experience of one student is provided. She is represented as having been unhappy at the closing of her old school but as now being happy at her new school. *Id.* She can now take accounting and was able to win a scholarship to college; things her old school could not provide. *Id.*

48. The general claim of bigger is better, *see supra* note 46, translates into claims of financial savings and broader curriculum choices. Earlier rounds of consolidation may, in fact, have resulted in savings and/or broader curriculum choices. The first round of consolidations at the turn of the century was aimed at eliminating the one-room schoolhouses. *See* Kunkel & Charters, note 4, at 1. Elimination of the one-room schoolhouses probably did not result in savings, see *id.*, but in most cases must have resulted in more choices for older students. The consolidations at the middle of this century were aimed "at remote, underpopulated rural counties with a plethora of tiny schools." PESHKIN, *supra* note 3, at 6-7. Again, it is not hard to believe these consolidations led to savings and/or broader curriculum choices.

The current round of consolidations, however, is aimed at both larger and smaller systems. *Id.* It seems likely that the benefits of consolidation will vary depending upon the pre-consolidation size of the participants and that consolidation of larger systems will lead to fewer benefits. The last statement, of course, is speculative. The truth is that the claim that "bigger is better" is mostly unsupported by cold, hard facts.

49. Generally, the determination of optimum size is based upon the consideration of maximizing the quality of the curriculum and/or economy of costs. *See* Beckner & O'Neal, *supra* note 8, at 3. One of the most influential studies was that done by James Conant in 1959. *Id.* Conant studied 20 different features including curriculum, staff, and facilities. He concluded "no high school should have fewer than 100 in the graduating class." *Id.*

50. Ornstein, *supra* note 28, at 16.

small where the underutilization of staff and curriculum occurs; a school is too large when loss of personal or school identity among students occurs.[51] The same author refers to studies which contain different descriptions of the number of students that are served by large and small schools.[52] Before a useful discussion of the advantages and disadvantages of consolidation can occur, all sides must reach a mutually-understood definition of "large" and "small."

Two recent studies of school consolidations have refuted the contentions of the proponents of consolidation regarding financial savings and improved curriculum. One study focused on the financial effects of school consolidation.[53] Researchers found consistent financial savings following consolidation in only one of six expenditure categories — school administration expenditures.[54] In five other categories (instruction, transportation, operations and maintenance, total costs, and capital projects) the existence or amount of savings depended upon the circumstances.[55]

Another recent study found that combining small schools does not automatically result in improved academic programs.[56] This study looked at 682 public high schools across the country and concluded that it is "not advisable to make broad generalizations about the effects of high school size on educational opportunities."[57] The researchers, Monk[58] and Haller, also concluded that

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51. *Id.* at 239.

52. *Id.* at 240-41. One study notes that the medium size of schools is 463 students. Another study notes that districts serving 5,000 students or less is small. *Id.*

53. Streifel et al., *supra* note 22.

54. *Id.* at 15. The researchers compared costs in six categories from years before and after schools consolidated to the average cost in those categories during the same years in the state in which the schools were located. *Id.* The researchers found that while administrative costs rose an average of ten percent in the consolidated districts, the average increase statewide was 31 percent. *Id.* Whether this saving of adminstrative costs is great enough to justify legislating statewide school consolidations is a matter for public debate. Administrative costs may be less than five percent of a school budget and may not impact overall expenditures to a large degree. *Id.*

55. In these categories, overall increase in costs in the consolidated districts varied by school and category; some increases were above state averages, some were below. *Id.*

56. Billy House, *Study: School Mergers Create Mixed Bag of Academic Results*, Gannett News Service, Aug. 11, 1992, *available in* LEXIS, Nexis Library, GNS File. The study, by David Monk and Emil Haller, has not yet been published; it will be published in the *American Educational Research Journal*. *Id.*

57. *Id.* The reported results of the study are mixed. Larger schools devote smaller shares of the curriculum to mathematics, but larger schools appear to better meet the needs of the less talented in mathematics. *Id.* "The proportion of remedial science courses declined slightly in the largest schools, though advanced science courses increased." *Id.*

58. Previous research by Monk suggesting an average of 100 students per grade as the optimal school size has been cited by some proponents of school consolida-

factors other than school size affected academic programs.[59]

In a series of workshops around the state of Minnesota during the fall of 1992, Monk stated that his previous research is not as "clear-cut as some people seem to think."[60] Monk pointed out that although earlier studies seemed to show broader academic opportunities for students in larger schools, more recent studies showed the gains to be uneven.[61] Monk stated that it is what happens in the schools, not their size, that matters.[62]

The results of these two studies are consistent with current anecdotal reports about school consolidation in various states. The most recent controversy over school consolidation occurred in New York where the Education Commissioner, Thomas Sobol, proposed that he be given the power to force schools to consolidate.[63] Sobol dropped this request because of the public furor and political opposition it generated.[64] An additional and probably equally important factor in Sobol's decision may have been a state study of recent mergers in New York which concluded that these mergers had not resulted in reduced costs.[65]

Other states are also beginning to abandon the "bigger is better" theme. Georgia spent $280 million in the last five years to encourage small rural schools to consolidate.[66] Research shows, however, that the anticipated payoffs, i.e., broader curriculum offerings and efficiency of scale, have not materialized.[67] The research also points to some unanticipated intangible costs such as anonymity, apathy, decreasing parental involvement, and rigid teaching methods.[68] Consequently, some Georgia officials are con-

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tion. For example, Gene Mammenga, Minnesota Commissioner of Education, cited Monk's previous research, when he said that he would like to see Minnesota high schools serve an average of 100 pupils per grade. Interview with Mammenga, *supra* note 24. Monk's newest study is an intriguing contribution to the discussion of consolidation as it seems to refute his previous suggestion.

59. House, *supra* note 56. These factors include the wealth of the school district, experience of the teacher pool, strength of local teachers' unions, and state mandates. *Id.*

60. Mary Jane Smetanka, *Small-Town School Officials Hear Encouraging Words*, STAR TRIB., Nov. 20, 1992, at 1B.

61. *Id.*

62. *Id.*

63. House, *supra* note 2.

64. *Id.* Stated one assemblyman, "[Sobol's proposal] was a stupid position. You can't have forced mergers. This is America." *Id.*

65. John Hildebrand, *Sobol's Merger Proposal*, NEWSDAY, Dec. 15, 1992, at 19 Billy House, *School-Mergers Plan Would Identify Targets in July*, Gannett News Service, Nov. 19, 1992, *available in* LEXIS, Nexis Library, GNS File.

66. *Downsizing: Is Smaller Smarter?*, Daily Rep. Card, May 5, 1992, *available in* LEXIS, Nexis Library, RPTCRD File.

67. White, *supra* note 46, at D6.

68. *Id.*

sidering abandoning the "bigger is better" notion in favor of setting maximum enrollment levels.[69]

Georgia is not alone in its potential move to favoring smaller over bigger. The newest trend is to break larger schools into smaller subunits.[70] Increased caring and connectiveness and better accountability are often offered as the rationale for this new idea of "smaller is smarter."[71]

Part II. Legal Aspects of School Consolidation

The United States Supreme Court has long held that control of education is a state, rather than federal, matter.[72] Additionally, the Court has held that education is not a fundamental right.[73] Consolidation of schools does not discriminate against any suspect class.[74] Consequently, a rational basis test[75] should be applied to

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69. *Id.*

70. A North Carolina school district is experimenting with keeping potential dropouts with the same teachers during junior high school. *Downsizing, supra* note 66. One Massachusetts school has divided itself into smaller, specialized houses. *Id.* A Florida system has created an independent ninth grade center in two of its high schools and has broken down some elementary schools into multi-grade clusters. *Id.*

71. *Id.*

72. In Epperson v. Arkansas, the Court specifically stated, "[P]ublic education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." 393 U.S. 97, 104 (1968) (holding a law prohibiting the teaching of evolution in the schools violates the First Amendment of the U.S. Constitution).

73. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973). In *Rodriguez*, the Court was asked to rule on the consitutionality of Texas' school funding scheme which plaintiffs charged discriminated against poorer school districts. *Id.* at 4-5. The Court reasoned education is not a fundamental right because it is not expressly or implicitly guaranteed by the Constitution, nor does it bear a sufficiently close nexus to other consitutionally guaranteed rights such as voting to be considered a fundamental right. *Id.* at 35-37. For a definition of a fundamental right, see *infra* note 158.

74. It could be argued that consolidation of schools discriminates against the poor. To make that argument it would be necessary to show that consolidation has an unequal impact upon poor districts. Even if this could be shown, the Court's reasoning in *Rodriguez* indicates it would not find that a consolidation law was affecting a suspect class. In its review of wealth discrimination cases in *Rodriguez*, the Court noted that two factors are considered when deciding whether a law unconsitutionally discriminates against the poor. 411 U.S. at 19. They are: (1) whether a law affects a definable category of poor, and (2) whether the poor are experiencing the "absolute deprivation" of a benefit. *Id.* The Court believed neither factor applied to the school districts affected by Texas' funding scheme because there is no reason to believe the poorest people live in the poorest districts, *id.* at 23, and because the poor were not being absolutely deprived of an education, *id.* at 23-24.

For a description of suspect classes, *see infra* note 157 (defining protected groups). For a discussion of the constitutionality of funding schemes under state

any constitutional challenge to a state school consolidation law brought under the U.S. Constitution. Because this standard is so low, a challenge to a state school consolidation law is not likely to succeed.

Because education is a state matter and federal law allows states complete control over education,[76] it is necessary to explore the legal aspects of school consolidation at the state level. Although there is much similarity in the education laws of the different states, each state has its own idiosyncracies.[77] With its recent linkage of fire safety and school consolidation, Minnesota has taken its *encouragement* of school consolidation one step beyond that of other states. Consequently, the following discussion focuses on the laws of Minnesota.

Minnesota's constitutional provision regarding education is twofold: the legislature is to "establish a general and uniform system of public schools" and "secure a thorough and efficient system of public schools throughout the state."[78] Decisions interpreting these phrases indicate that Minnesota courts would be reluctant to strike down a statute forcing schools to consolidate.[79] This places a heavy burden of proof upon any district or person who may wish to question the legality of an act requiring schools to consolidate.

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constitutions, *see* David Dormont, *Separate and Unequal: School District Financing*, 11 LAW & INEQ. 261 (1992).

75. Under a rational basis test of a law's constitutionality, a court will analyze the law to determine whether it bears a rational relationship to a conceivable legitimate state interest. 16 AM. JUR. 2D *Constitutional Law* § 750 (1979). A law need not be drawn with precision in order to pass this test. *Id.*

When a law affects a fundamental right or a suspect class, strict scrutiny is applied to that law. *Id.* Under this test, it must be shown the law is necessary to the achievement of a compelling state interest. *Id.* at n.84.

It is rare for a law to fail a rational basis test or to pass strict scrutiny.

76. The only limit federal law places upon state control of education is that the state cannot use education laws to deprive persons of rights guaranteed by the U.S. Constitution. *See supra* note 72.

77. For example, all states dictate the length of the school year, but the length varies by state. Likewise, many states encourage smaller schools to consolidate, but the incentives vary somewhat by state.

78. The full text of the relevant provision follows:

> The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.

MINN. CONST. art. XIII, § 1.

79. As early as 1878, the Minnesota Supreme Court stated that matters relating to the government and adminstration of the schools are considered legislative, and not judicial, matters. Curryer v. Merrill, 25 Minn. 1, 5 (1878). The court has stated that "unless a law is unconstitutional beyond a reasonable doubt it must be sustained." *In re* Taxes on Property of Cold Spring Granite Co., 136 N.W.2d 782, 787 (Minn. 1965). Every presumption is in favor of the challenged act. *Id.*

In an early case dealing with the legislature's power to create special school districts, the Minnesota Supreme Court stated that the object of the education clause was to ensure a regular method throughout the state whereby all could acquire an education.[80] The court also stated that it could not perceive how the "public schools would be less general, uniform, thorough, and efficient if . . . the limits of half the school-districts in the state were directly prescribed by the legislature."[81] This language directly supports the legislature's ability to consolidate school districts because consolidation is, in effect, "prescribing the limits of a school district."

In *Curryer v. Merrill*, the Minnesota Supreme Court stated that the "rule of uniformity" referred to the system provided by the state, not to district organizations that might be established.[82] The district organization could vary as to size, grade, corporate powers and franchise as seemed best to the legislature under different circumstances and conditions.[83] Again, this language supports the legislature's power to consolidate the schools because the court says all school districts do not need to be the same in all respects. The legislature can do what it deems best under the circumstances.[84] Presumably, if the legislature deems it best, it may

80. Board of Educ. of Sauk Centre v. Moore, 17 Minn. 391, 394 (1871).

81. *Id.* at 395. The court's rationale was that it made no difference under the constitution whether the limits under which local boards of education managed the schools were created by one power derived from the people or another, i.e. from local communities or from the state legislature. *Id.*

This reasoning seems to imply that local communities are on an equal footing with the state legislature regarding control of schools. This case occurred, however, during a time in which control of schools was in a transitional period. From the settlement of the United States until the Civil War, in most of the country schools were very much a local matter. Federal and state control was nonexistent or minimal. State regulation did not occur until the enactment of the federal Land Grant Act of 1853, which set aside land for school purposes. After that act, many states began to play a more active role in education and a shift in the control of schools from the local to state level began. *Moore* seems to reflect this shift in that it reasons that the state has as much power to control education as the local community. Subsequent cases completed the shift so that the state is now firmly established as the regulator of education. For information on the shift from local to state control, *see* EDWARD J. POWER, A LEGACY OF LEARNING: A HISTORY OF WESTERN EDUCATION 260-63 (1991) (discussing 18th and 19th century education); EUGENE F. PROVENZO, JR., AN INTRODUCTION TO EDUCATION IN AMERICAN SOCIETY 59-87 (1986) (discussing local, state, and federal control).

82. *Curryer*, 25 Minn. at 6 (holding that the state could require all public schools in the state, except those schools with special charters, to use certain textbooks).

83. *Id.* The court went on to say that the principle of uniformity is not violated so long as the law adopted was applied throughout the state. *Id.* The important criterion is that similarly situated schools be treated similarly. *Id.* In effect, the Minnesota Supreme Court said that the uniformity requirement is an equal protection safeguard.

84. This is a remarkable statement. It begins by claiming that the requirement

legislate consolidation.

In later cases, the Minnesota Supreme Court stated that the education clause should be interpreted not only as a grant of power, but as a mandate to the legislature.[85] Furthermore, under the court's interpretation, education is a matter of state, not local, concern.[86] Education is not a part of local self-government except to the extent that the legislature may make it so.[87] The court also stated that the legislature possesses almost unlimited powers regarding education; the only restrictions are those imposed by the state constitution.[88] All of these statements indicate that the legislature's decisions regarding education will override the decisions of local officials. If the state says consolidate, then the local districts have no choice but to consolidate. The only exception is where the state's means of consolidating the schools violates another constitutional provision.

Judicial definitions of the role of local school boards further support the state's ability to mandate school consolidation. The Minnesota Supreme Court has held that local schools are corporate entities with the sole purpose of the management and control of the local schools.[89] The powers of local boards are circum-

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of uniformity does not mean that schools must be the same in all respects. It ends, however, by giving the legislature the power to do just that if the legislature deems this appropriate in the circumstances. Essentially, the statement begins by giving small schools hope and ends by taking that hope away.

85. Board of Educ. v. Erickson, 295 N.W. 302, 303-04 (Minn. 1940) (holding the Minneapolis school board could not exceed the levy limit fixed by the Minneapolis city charter); State *ex rel.* Smith v. City of St. Paul, 150 N.W. 389, 391 (Minn. 1914) (holding St. Paul could transfer control of the schools from a board of seven inspectors to the city commissioners); Associated Schools v. School Dist. No. 83, 142 N.W. 325, 327 (Minn. 1913) (holding that an associated school district may charge nonresident pupils tuition for classes taken in the agriculture department).

The court has never explained what exactly it means when it states that the constitutional provisions provide a mandate to the state legislature. The court seems content to invoke this statement like some sort of incantation and then to move on to the next idea.

Judging by the outcome of cases in which the statement has been invoked, the court seems to be saying that the power to control the schools lies with state rather than local authorities. However, that does not mean local authorities must keep their hands off the schools. Local authorities seem to be able to regulate the schools in terms of managing the school. *Smith*, 150 N.W. at 390-91. Local authorities also can regulate the schools unless their regulation conflicts with a state constitutional provision or with a state law. *Erickson*, 295 N.W. at 304.

86. *See infra* note 87.

87. *Smith*, 150 N.W. at 391. *See* Board of Educ. v. Houghton, 233 N.W. 834, 836 (Minn. 1930).

In *Erickson*, the court notes that the power over education may be delegated by the state legislature to local authorities, but the legislature's plenary power over education is not thereby limited. *Erickson*, 295 N.W. 302, 304.

88. *Houghton*, 233 N.W. at 835.

89. Bank v. Brainerd Sch. Dist., 51 N.W. 814, 816 (Minn. 1892) (holding that

scribed by the statutes of the state of Minnesota.[90] Again, this means that the state can force local schools to consolidate unless a constitutional or statutory provision deems otherwise.

Although the Minnesota legislature has never exercised its power to force schools to consolidate, it has passed a series of laws related to consolidation. In addition to a law setting forth the procedure to follow for districts wishing to consolidate, Minnesota has enacted a series of laws which directly or indirectly encourage school consolidation.

Section 122.23 of Minnesota's Education Code, which deals specifically with school consolidation, provides no incentives or disincentives to consolidate. Instead, this section sets forth the procedures to be followed when two or more districts wish to consolidate.[91] The procedures include safeguards to avoid forcing consolidation on any district or its citizens.[92] Essentially, the safeguards require that all involved school boards, the majority of citizens in consolidating districts, and the state board of education directly or indirectly approve a proposed consolidation.[93] If any of these entities disapproves a proposed consolidation, it will

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school districts are not liable for injuries caused by neglect to repair the school building and grounds). In Muehring v. School Dist. No. 31 of Stearns County, 28 N.W.2d 655, 657 (Minn. 1947), the court stated that schools are "public corporations clothed with governmental power to perform the public duty of providing public schools."

90. *See supra* note 85.

91. Consolidation proceedings can be initiated by a school board or by the voters in a school district. MINN. STAT. § 122.23, subd. 2(a) (1992). The initiator presents a petition to the appropriate county auditor who then prepares a plat and supporting statement describing the proposed consolidation. *Id.* at subd. 3. The auditor gives a copy of the plat and statement to the Commissioner of Education and to the auditor of each county involved in the consolidation. *Id.* at subd. 4. The auditor of each county notifies the county board. *Id.* at subd. 5. The state board of education can approve, modify, or reject the proposed plat. *Id.* at subd. 6. Any of the persons involved, including the voters of affected counties, may request a hearing. *Id.* If the state board approves or modifies a plat, it goes back to the appropriate school boards for their approval. *Id.* at subd. 8. If any board rejects the plat or fails to act upon it, the proceedings are terminated. *Id.* If both school boards or voters in an affected district ask for one, a consolidation election will be held. *Id.* at subd. 9. If an election is held, and the majority of voters in a district disapprove of the consolidation, the proceedings are terminated. *Id.* at subd. 13.

92. The built-in safeguards are the ability of local school boards or local voters to terminate consolidation proceedings. *See supra* note 91.

93. The state board of education gives direct approval or disapproval. MINN. STAT. § 122.23, subd. 6 (1992). Local boards of education also give direct approval of a consolidation proceeding. *Id.* at subd. 8. Local voters, however, may be accorded only indirect approval. The voters' involvement in consolidation proceedings can be limited or nonexistent if the voters do not initiate the consolidation or if they do not request a hearing or a consolidation election or do not force the school boards to request a consolidation election. *See supra* note 91.

not happen.[94]

Among the laws which encourage consolidation are the Enrollment Options Program[95] and Post-Secondary Enrollment Options Act (PEO).[96] These two Minnesota laws, on their face, are praiseworthy, nonfinancially-oriented programs unrelated to school consolidation. The Enrollment Options Program, more commonly referred to as open enrollment, allows any pupil to attend a school or program in a district in which the pupil does not reside, subject to some limitations.[97] The PEO allows high school juniors and seniors to take college courses for high school credit.[98]

Although neither program directly encourages consolidation of small schools, both may have that effect.[99] The State of Minnesota, like most states, provides financial aid to its school districts. This aid is figured on a per pupil basis.[100] Under both PEO and open enrollment, state aid to a particular school district is adjusted. Under PEO, state aid is reduced by a specified percentage for each pupil attending a post-secondary institution.[101] Likewise,

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94. This provision does not mean that the new fire safety inspection law will not be able to force school districts to consolidate. If a district's building is found to be unsafe, and the district cannot raise the necessary funds to improve the building, and the state will not help the district, then from a practical standpoint, its taxpayers will have no choice but to approve a consolidation.

95. MINN. STAT. § 120.062 (1992).

96. MINN. STAT. § 123.3514 (1992).

97. MINN. STAT. § 120.062, subd. 2 (1992). The limitations include special procedures for districts with desegregation programs, deadlines for requesting transfers to other districts, and the option that a school board may decide that no nonresident pupils may attend its schools. *Id.* at subds. 3-5.

98. MINN. STAT. § 123.3514, subd. 5 (1992). High school students may also take college courses for post-secondary credit. *Id.* Students can receive credit towards high school graduation regardless of whether or not the high school offers a comparable course. *Id.*

99. Lewis Finch, Superintendent of the Anoka-Hennepin School District in Minnesota, contends that Minnesota is using both programs to force a more "effective and efficient restructuring" of its public schools. Lewis W. Finch, *Choice: Claims of Success, Predictions of Failure*, EDUC. DIG., Nov. 1989, at 12, 13. Finch points out that no indepth analysis has been undertaken for either program. People should, therefore, be wary of claims regarding the success of the programs. *Id.* at 12. Finch notes that under open enrollment, geographic location and parental convenience, rather than educational quality, often determine school selection. *Id.* at 12-13. Students enrolling in college courses often do so for the free credits and greater freedom. *Id.* at 14. Finch also states that as schools compete for students no one will want the unprofitable students, such as the mentally handicapped, whose cost to educate exceeds the amount of aid provided by the state. *Id.* at 13.

100. The statutory provisions related to school financing in the state of Minnesota are found in Chapter 124 of the laws of Minnesota.

101. MINN. STAT. § 123.3514, subd. 6 (1992). Payment is made to post-secondary institutions only when a pupil takes a course for secondary credit. *Id.* When that is the case the law specifies:

> A public post-secondary system or private post-secondary institution shall receive the following:

under open enrollment the per pupil aid provided by the state is adjusted.[102] In addition to the potential loss of revenue, a school district may also experience more subtle pressures to consolidate under these two programs. In order to attract more students under the open enrollment program, or to avoid losing students under either program, schools often attempt to upgrade the programs they offer.[103] The money to do this must come from somewhere. Consequently, schools may decide to use money that should be spent on building maintenance,[104] or they may decide to share programs and costs.[105] Sharing programs may be the first step to consolidation.[106]

In addition to these indirect laws to encourage consolidation,

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> (1) for an institution granting quarter credit, the reimbursement per credit hour shall be an amount equal to 88 percent of the product of the formula allowance, multiplied by 1.3, and divided by 45; or
> (2) for an institution granting semester credit, the reimbursement per credit hour shall be an amount equal to 88 percent of the product of the general revenue formula allowance, multiplied by 1.3, and divided by 30.
> . . .
> A school district shall receive:
> (1) for a pupil who is not enrolled in classes at a secondary school, 12 percent of the formula allowance, according to section 124A.22, subdivision 2, times 1.3; or
> (2) for a pupil who attends a secondary school part time, the formula allowance, according to section 124A.22, subdivision 2, times 1.3, times the ratio of the total number of hours the pupil is in membership for courses taken by the pupil for credit, to 1,020 hours.

Id.

102. MINN. STAT. § 120.062, subd. 12 (1992). Adjustments are made to the general education aid, capital expenditures aid, and equipment aid to both the resident and nonresident districts.

103. This may have been one of the motives for passing these programs. In fact, the PEO states that its purpose is "to promote rigorous academic pursuits and to provide a wider variety of options to high school pupils." MINN. STAT. § 123.3514, subd. 2 (1992).

104. An unidentified legislator at a subcommittee meeting commented that schools trying to attract students or keep from losing students because of open enrollment were letting their buildings deteriorate. *Hearing of the Education Finance Division of the Education Committee of the House of Representatives, State of Minnesota*, March 9, 1990 (audiotape available at State Office Building, St. Paul, Minn.).

105. A recent article analyzing the controversy over Minnesota's post-secondary enrollment options law notes that in the first year of its operation only 3.2 percent of the state's eleventh and twelfth graders participated. None of the pre-enactment predictions of large losses of pupils had come true. The article notes, however, that high schools in small rural areas are collaborating to offer courses they formerly did not offer and could not offer individually. Douglas A. Archbald, *School Choice and Changing Authority: An Analysis of the Controversy Over the Minnesota Postsecondary Enrollment Options Law*, 6 J. EDUC. POL. 1, 7 (1991).

106. Getting school districts to cooperate with each other and to share resources seems to be the rationale of the programs discussed *infra* notes 107-13 and accompanying text. The underlying assumption of those programs and of the indirect results of open enrollment and PEO is that once schools are working with each other

Minnesota has three laws directly encouraging schools to share programs or resources. They are the Cooperation and Combination,[107] Agreements for Secondary Education,[108] and Education Districts statutes.[109] The Cooperation and Combination law requires cooperating school boards to provide at least secondary education cooperatively for a minimum of two years and then to combine into one district.[110] The Agreements for Secondary Education law allows a school board to enter into an agreement to have its secondary pupils educated in another district.[111] The Education District law allows four or five districts to cooperate to provide increased educational opportunities.[112] To encourage schools to participate in the programs, two of them have accompanying

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the psychological barriers to consolidation are breached, i.e. districts may discover that the reality of combining with another district is not as dire as anticipated.

Additionally, districts are given time to get used to the idea prior to an actual consolidation. The value of this time should not be underestimated. A recent newspaper article describing the last year of the Jasper, Minnesota school noted that there was talk of consolidation five years previously. At that time, the opposition to consolidation was strong, but people are now reconciled to the idea. One citizen stated, "The [school] board and town weren't ready to deal with [consolidation]. The community needed more time." Howard Sinker, *Jasper's Last Hurrah*, STAR TRIB., Feb. 26, 1993, at 1A, 16A.

107. MINN. STAT. § 122.241 (1992).

108. MINN. STAT. § 122.535 (1992).

109. MINN. STAT. § 122.91 (1992).

110. MINN. STAT. § 122.241 (1992). The Cooperation and Combination law sets forth some requirements for the cooperation period and requirements stating which districts may combine. *Id.* at subds. 2 and 3. The combination requirements are interesting. The districts must be contiguous and meet one of four requirements: 1) at least two districts with at least 400 resident pupils in grades 7-12 and projections of enrollment at least at that level for the next five years, 2) at least two districts both of which qualify for sparsity revenues and have an average isolation index over 23 or the combined district qualifies for sparsity revenue, 3) at least three districts with fewer than 400 resident pupils in grades 7-12 in the combined district, or 4) at least two districts with fewer than 400 resident pupils enrolled in grades 7-12 in the combined district if either district is located at the border of the state. *Id.* at subd. 3.

111. Section 122.535 applies to districts with fewer than 375 pupils in grades 7-12. MINN. STAT. § 122.535, subd. 1 (1992). The agreement must set forth transportation obligations, tuition to be paid, and any other fees or charges to be paid to the providing district. *Id.* at subd. 2. In the meantime the sending district can count the grade 7-12 pupils as resident pupils for purposes of state aid, levy limitations, and any other purpose. *Id.* at subd. 5. These provisions allow a school district to maintain an elementary school while having its junior and senior high students educated elsewhere. This, in turn, allows a town to retain the distinction and pride inherent in having its own school. Of course, any agreement for secondary education must be submitted to the commissioner for a review and comment. *Id.* at subd. 4.

112. MINN. STAT. § 122.91 (1992). Section 122.94 details what must or can be included in an education district plan. Among the mandatory provisions are: 1) coordination of programs for disabled, gifted and talented pupils, secondary vocational education, improved learning, community education, early childhood family education, career education, and low incidence academic programs, 2) research, planning and development functions, 3) methods to meet pupil needs for health services, li-

provisions in the Education Code which provide loans and/or grants to aid schools as they enter the program.[113]

In addition to the above legislation, Minnesota provides several loans which might be used by school districts that need help bringing their buildings up to fire safety code requirements. These loans can be used to force consolidation by denying smaller school districts a loan. One of these loans is the Maximum Effort School Aid law.[114] Maximum Effort loans are available to school districts which have levied taxes to the limit imposed by state law[115] and still need money to meet financial obligations.[116] These loans are generally capital loans.[117] The legislature requires that capital loans be available only to districts which serve an average of 80 pupils per grade or are eligible for sparsity revenue.[118] In addition, the district must be projected to maintain or increase its average daily membership over the next five years or be eligible for sparsity revenue.[119] Health and Safety revenue is also available to schools, but a school must apply to the Commissioner of Education for such revenue.[120] The code does not provide guidelines for when the revenue will be made available.[121]

In the year following passage of the fire safety inspection law, Minnesota passed a law to provide aid to districts needing help to

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brary services and counseling services. Optional provisions are also outlined. MINN. STAT. § 122.94, subds. 2 and 3 (1992).

113. *See* MINN. STAT. §§ 124.2721 (Education District Revenue) and 124.2725 (Cooperation and Combination Revenue) (1992).

114. MINN. STAT. §§ 124.36 - 124.479 (1992).

115. A school district's net debt cannot exceed ten percent of the actual market value of all taxable property situated within its corporate limits. MINN. STAT. § 475.53, subd. 4 (1992).

116. MINN. STAT. § 124.37 (1992) (Policy and Purpose).

117. Maximum Effort School Aid provides two types of loans - Debt Service loans and Capital loans. MINN. STAT. §§ 124.42, 124.431 (1992). Capital loans are to be used to improve buildings. MINN. STAT. § 124.431, subd. 1 (1992). Debt Service loans are to be used to pay principal and interest on outstanding bonds. MINN. STAT. § 124.42 (1992).

118. MINN. STAT. § 124.431, subd. 2 (1992). This is just one of many criteria the Education Commissioner must consider when reviewing a district's application for a capital loan. *Id.* For a discussion of sparsity revenue, *see supra* note 16.

119. MINN. STAT. § 124.431, subd. 2 (1992).

120. MINN. STAT. § 124.83 (1992). Health and Safety aid is to be used to remove hazardous substances or for fire or life safety compliance. *Id.* at subd. 1.

121. The law requires that a fire safety plan describe the current fire code violation, the plan for its removal or repair, and a description of safety procedures to be followed until the hazard is corrected. MINN. STAT. § 124.83, subd. 2 (1992). The formula for determining how much money a school district receives is complicated but is tied to the district's tax capacity. *Id.* at subds. 3-5. The Commissioner of Education has no guidelines for providing approval of a plan or for denying it and that the commissioner has indicated he believes high schools in the state should serve an average of 100 students per grade.

correct violations following a fire safety inspection.[122] This money is available to schools with capital expenditure funds which are insufficient to make needed improvements.[123] However, the district must submit an application to the Commissioner of Education who is given almost no guidelines for approving an application other than his own whim.[124] Although this law seems to solve the problems of districts faced with great expense following a fire safety inspection, the discretion placed in the hands of a commissioner who supports consolidation of "small" schools takes away that solution.

There have been no constitutional challenges to any of these laws. The linkage between school consolidation and fire safety however, should be found unconstitutional.

As the preceding discussion shows, the school inspection law was not created in a vacuum. Prior to passage of the inspection law, school buildings were the largest type of public occupancy building in Minnesota not subject to fire inspections.[125] Consequently, most of the schools in Minnesota have never been inspected.[126] Although there have been no school-fire deaths since 1977, Minnesota averaged one hundred twenty school fires a year for several years before the school inspection bill was passed.[127] The time was ripe for a look at fire safety in the schools. The fact that fire safety became a concern at a time when the Commissioner of Education was urging schools to consolidate is significant.

Sometime in 1989 or 1990, members of the Facilities Subcommittee of the Education Committee of the House of Representatives visited schools in the state.[128] What they found were schools

122. MINN. STAT. § 124.84 (1992) (Handicapped Access and Fire Safety Improvements to School Buildings).

123. *Id.* at subd. 2.

124. *Id.* The law specifies that the commissioner shall establish the criteria for approval of an application. These criteria must include the cost effectiveness of making modifications to older buildings. *Id.*

125. The state of Minnesota previously required inspections of theaters, hotels, and other public buildings. *Hearing of the Education Finance Division and Facilities Subcommittes of the Educ. Comm. of the House of Representatives, State of Minnesota*, Mar. 5, 1990 (remarks of Tom Brace, State Fire Marshal) (audiotape available at State Office Building, St. Paul, Minn.).

126. A few school districts, such as St. Paul, had developed fire inspection programs for their schools, but this was rare. Interview with Jon Nisja, *supra* note 13.

127. James Walsh & Rob Hotakainen, *Many State Schools are Fire Disasters Awaiting Voters' Fix*, STAR TRIB., Sept. 2, 1991, at 1A. Most school fires each year are small, but according to Jon Nisja, deputy fire marshal, about once every three or four years one burns to the ground. *Id.*

128. Although several references were made to the school visits at a March 5, 1990, Education Facilities Subcommittee hearing, the actual dates of the visits were never mentioned. *Hearing, supra* note 125. The author is inferring that the visits

that appeared safe to the average person but which were, in fact, seriously deficient regarding fire safety.[129] This tour seems to have been a major impetus for the inspection law; the chair of the Facilities Subcommittee[130] was one of the sponsors of the bill.[131]

It is impossible to say with certainty whether the fire inspection bill was also intended to force schools to consolidate. It is, however, safe to conclude that, at the very least, the concern for safe schools was genuine.[132]

On the other hand, it is hard to believe that safety in the schools was the sole concern of the legislature which passed the bill. This conclusion is not based upon the wording of the bill or upon remarks made at two subcommittee hearings on the bill. In fact, that aspect of the bill's history might lead to the conclusion that legislators realized that the bill might force small schools to consolidate and were concerned that this not happen.[133]

Other changes made by the 1990 legislature to the Education

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were made shortly before the bill was introduced. This would place the visits in 1989 or early 1990.

129. *Hearing, supra* note 125 (remarks of Reps. Kelso and Johnson and Tom Brace, State Fire Marshal).

130. Representative Becky Kelso, DFL-Shakopee, was the chair of the Facilities Subcommittee at the time.

131. Hotakainen & Walsh, *supra* note 11, at 10A.

132. Jon Nisja, the deputy fire marshal in charge of school inspections stated that the State Fire Marshal's Office was not going into this to force consolidation; that office is genuinely concerned about fire safety in the schools. Interview with Jon Nisja, *supra* note 13. The Commissioner of Education felt that the legislature did not intend the fire inspection law to force consolidation; they were shocked by the state of school buildings. Interview with Gene Mammenga, Commissioner of Education, *supra* note 24. *See also*, Hotakainen & Walsh, *supra* note 11, at 10A (Rep. Kelso, sponsor of the bill, stating that the bill had a true, pure intent as a safety law); *Hearing, supra* note 125 (remarks by various legislators expressing concern about the unsafe condition of many schools).

133. At the March 5, 1990 hearing, Tom Brace, State Fire Marshal, testified that the inspections would establish a baseline describing the condition of the schools. He stated that a literal, by the book, line by line inspection of the schools was not a reality; it would take a degree of reasonableness. In response to questions about the process of inspection and what happens if a school is not in compliance with the fire code, Brace stated that the Fire Marshal's Office works with school administrators to bring the school into compliance and then looks for substantial compliance. When asked if the fire marshal could close a school, Brace responded that he could. If it reached the point of closing a school, that meant there had been a breakdown in communication. He noted that the Department of Education had closed only two schools in the last 20 years. *Hearing, supra* note 125.

At a March 9, 1990 hearing, members of the Minnesota School Board Association expressed concern about a clause in the inspection law allowing the Commissioner to condemn a building which had failed an inspection. The legislators present agreed that something should be done about this. It does not appear in the final version of the law. *Hearing of the Education Finance Division of the Education Comm. of the House of Rep., State of Minn.*, Mar. 9, 1990 (audiotape available at State Office Building, St. Paul, Minn.).

Code lead to the conclusion that Minnesota intentionally linked fire safety to school consolidation. One change specifically leads to this conclusion: the change in the criteria for approving a capital loan. Prior to 1990, the criteria used to grant approval for a loan were fairly general.[134] Although consolidation with an adjacent district was an alternative to granting a loan, it was considered the proper solution only if it did not substantially lower the fiscal capacity of the adjacent district or so increase its area that the adjacent district was no longer viable.[135] The present or projected size of the school districts was not considered. The changes made by the 1990 legislature, on the other hand, do consider the present and projected size of a school district. Specifically, a loan will not be approved[136] unless a district serves, on average, at least 80 pupils per grade or is eligible for sparsity revenue.[137] Additionally,

134. MINN. STAT. ANN. § 124.43 (West 1988) (repealed 1990).

135. The former law stated the following:

> [n]o application shall be approved unless the state board of education certifies that the loan is needed to replace facilities dangerous to the health and safety of pupils, or to provide for pupils for whom no adequate facilities exist; that such facilities could not be made available by consolidating the district with an adjacent district without substantially lowering the fiscal capacity of that district or so increasing its area that it would no longer be viable; and that existing institutions or facilities within the area could not be acquired or leased to provide the needed facilities safely and at a lowered cost.

Id.

136. Loans are approved by the state board of education. MINN. STAT. § 124.431, subd. 6 (1992). Before the state board considers loan applications, however, they must be submitted to the Commissioner of Education for review and comment. *Id.* at subd. 2. Only applications which receive a positive review and comment are sent to the state board. *Id.* at subd. 6. The guidelines discussed in the text are those used by the commissioner when deciding whether to give an application a positive or negative review or comment.

137. The criteria to be used by the commissioner when determining whether to make a positive review and comment are whether:

> (1) the facilities are needed for pupils for whom no adequate facilities exist or will exist;
> (2) the district will serve, on average, at least 80 pupils per grade or is eligible for sparsity revenue;
> (3) no form of cooperation with another district would provide the necessary facilities;
> (4) the facilities are comparable in size and quality to facilities recently constructed in other districts that have similar enrollments;
> (5) the facilities are comparable in size and quality to facilities recently constructed in other districts that are financed without a capital loan;
> (6) the district is projected to maintain or increase its average daily membership over the next five years or is eligible for sparsity revenue;
> (7) the current facility poses a threat to the life, health, and safety of pupils, and cannot reasonably be brought into compliance with fire, health, or life safety codes;
> (8) the district has made a good faith effort, as evidenced by its maintenance expenditures, to adequately maintain the existing facility during the previous ten years and to comply with fire, health, and life

the district must be projected to maintain or increase its average daily membership over the next five years or be eligible for sparsity revenue.[138] The district must also have made a good faith effort to adequately maintain the existing facility according to fire and safety regulations during the previous ten years.[139] These and the other criteria introduced by the 1990 legislature reinforce the conclusion that small school districts will find it difficult to obtain a capital loan and will be, therefore, forced to consolidate with nearby school districts.[140]

It should be noted that failure to pass a school fire safety inspection will not necessarily result in consolidation. Following an inspection, the school district receives a set of written orders describing what is wrong, what needs to be done, and the time frame for correction.[141] School districts are usually given three months to correct problems but can apply for a twelve to eighteen month extension.[142] Although a school district may be given an extension to allow it to raise money to pay for the more expensive corrections,[143] the district is expected to correct the less costly,

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safety codes and state and federal requirements for handicapped accessibility; and
(9) evaluations by school boards of adjacent districts have been received.

MINN. STAT. § 124.431, subd. 2(a) (1992).

The commissioner may also grant a negative review. The criteria for the negative review are:

(1) the state demographer has examined the population of the communities to be served by the facility and determined that the communities have not grown during the previous five years;
(2) the state demographer determines that the economic and population bases of the communities to be served by the facility are not likely to grow or to remain at a level sufficient, during the next ten years, to ensure use of the entire facility;
(3) the need for facilities could be met within the district or adjacent districts at a comparable cost by leasing, repairing, remodeling, or sharing existing facilities or by using temporary facilities;
(4) the district plans do not include cooperation and collaboration with health and human services agencies and other political subdivisions; or
(5) if the application is for new construction, an existing facility that would meet the district's needs could be purchased at a comparable cost from any other source within the area.

Id. at subd. 2(b).

138. *Id.*

139. Because schools have never been inspected for fire safety, it is doubtful that many schools, especially small schools, meet this criteria.

140. MINN. STAT. § 124.431 (1992). This combination of criteria will eliminate small school districts that have not maintained their buildings because the state has never inspected them and that are losing or maintaining their student population. If a district cannot repair its building, it will have no option but consolidation.

141. Interview with Jon Nisja, *supra* note 13.

142. *Id.*

143. More expensive corrections include installation of a sprinkler system, fireproofing hallways, or enclosing stairwells open to more than two floors. *Id.* Fire

human problems[144] as soon as possible.

Options are available to a district unable or unwilling to comply with an order. The district may appeal the order or appeal for more time to comply.[145] It is possible in extreme cases to find creative solutions such as closing floors, instituting a fire watch, or connecting the school's fire alarms to the local fire department.[146] A school district may also apply for a variance because of unreasonable financial hardship.[147]

If all options have been explored and rejected, the fire marshal's office has the authority to condemn a building, but that has been a rare occurrence.[148] The State Commissioner of Education also has the power to condemn a building that is unsafe[149] and can thereby force a school to consolidate.[150]

Minnesota's fire safety inspection law is constitutional in that it is well within the state's police power[151] to inspect public places for safety purposes. A constitutional challenge to the inspection

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sprinklers cost an average of $1.25 per sq. ft.; building sizes vary from 20,000 sq. ft. to 400,000 sq. ft. *Id.* The cost of enclosing a stairwell also varies. Estimates run about $5000 per floor per stair. *Id.* The cost of fire-rating a hallway is difficult to estimate. Doors may need to be replaced or may just need closer installation. *Id.* Additionally, major alterations to the ventilation system may be needed. *Id.*

Of the first 181 schools inspected, 51 percent had problems with open stairwells and about 80 percent lack fire-rated hallways. *Id.* A common problem in schools where extensions have been added to the original building is too few exits for the number of children in the school. *Id.* Correcting this problem may be expensive, if not impossible.

144. The less expensive, easily corrected problems include: blocked exits, improper storage of combustible materials, flammable decorations in hallways, too few fire drills, or an insufficient number of fire extinguishers or fire extinguisher inspections. *Id.*

145. *Hearing, supra* note 125 (remarks of Tom Brace, State Fire Marshal). Brace indicated that districts which appeal an order seldom appeal the whole order. It is more typical for a district to have problems with just a few of the deficiencies described in an order. *Id.*

146. *Hearing, supra* note 133 (remarks of Tom Brace, State Fire Marshal).

147. *Id.* Brace indicated that the fire marshal's office would consider financial hardship and "work with that party." *Id.*

148. *Id.*

149. MINN. STAT. § 121.15 (1992). The commissioner can exercise this power when asked to approve plans for school district construction of or on a school building.

150. Without a safe building or the funds to build one, the district has no choice but to consolidate.

151. Although the term "police power" is generally understood and universally used, its meaning is vague and ambiguous. 16A AM. JUR. 2D *Constitutional Law* § 362 (1979). Among the definitions various courts have used are the following:

> 1) The power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.
>
> 2) The power inherent in the state to prescribe, within the limits of

law, therefore, will not succeed and would not be wise.[152] However, the requirements for a capital loan are not constitutional under the Minnesota Constitution. These requirements deny small schools access to funds used to bring school buildings into compliance with the fire code.[153] This denial violates the Equal Protection[154] and Special Legislation[155] Clauses of the Minnesota Constitution.

Equal protection requires that similarly situated entities be treated similarly.[156] Minnesota's capital loan requirements treat school districts differently based upon their size. Because small schools are not a protected group[157] and because access to capital

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the state and federal constitution, reasonable regulations necessary to preserve the public order, health, safety, and morals.

16A AM. JUR. 2D *Constitutional Law* § 363 (1979).

152. Anyone arguing that schools should not be inspected for fire safety is quite likely to be perceived as a "scrooge" and lose credibility.

153. *See supra* notes 137-40 and accompanying text.

154. MINN. CONST. art. I, § 2. This section states:

> No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his [or her] peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted.

Id. Although this section does not specifically guarantee equal protection of the laws, that concept has been read into it.

155. MINN. CONST. art. XII, § 1.

> Prohibition of special legislation; particular subjects. In all cases when a general law can be made applicable, a special law shall not be enacted except as provided in section 2. Whether a general law could have been made applicable in any case shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law authorizing the laying out, opening, altering, vacating or maintaining of roads, highways, streets or alleys; remitting fines, penalties, or forfeitures; changing the names of persons, places, lakes or rivers; authorizing the adoption or legitimation of children; changing the law of descent or succession; conferring rights on minors; declaring any named person of age; giving effect to informal or invalid wills or deeds, or affecting the estates of minors, or persons under disability; granting divorces; exempting property from taxation or regulating the rate of interest on money; creating private corporations, or amending, renewing, or extending the charters thereof; granting to any private corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever or authorizing public taxation for a private purpose. The inhibitions of local or special laws in this section shall not prevent the passage of general laws on any of the subjects enumerated.

Id.

156. State v. Russell, 477 N.W.2d 886, 893 (Minn. 1991) (Simonett, J., concurring specially) (stating persons similarly situated are to be treated alike unless a sufficient basis exists for distinguishing between them).

157. Under equal protection analysis, protected groups are entitled to a higher level of scrutiny. Georgia ex rel. Brooks v. Braswell, 460 N.W.2d 344, 347 (Minn. Ct. App. 1990). When determining whether a group is protected, courts consider, among other factors, whether the group is "saddled with disabilities," has a history

loans is not a fundamental right,[158] a rational basis test would be applied to determine whether this disparate treatment is constitutional.

The rational basis test[159] most recently enumerated by the Minnesota Supreme Court is a three-prong test:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.[160]

This test differs from the rational basis test used by federal courts in that the Minnesota Supreme Court has indicated it will not hypothesize a rational basis for a law.[161] Instead, the court requires a reasonable connection between the actual, not theoretical, effect of the classification and the goal of the law.[162] The basis upon which the classification is drawn must be based upon factual, not anecdotal, information.[163]

Application of this test to the capital loan requirement that schools serve an average of eighty pupils per grade leads to the

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of discrimination, or is politically powerless. 16 AM. JUR. 2D *Constitutional Law* § 750 (1979). Courts have held groups based on the following characteristics to be protected: race or national origin, religion, alienage (at least resident aliens), sex, nonresidency (in some instances), and wealth (in some situations). *Id.*

158. Laws affecting fundamental rights are also subject to a higher level of scrutiny. *Braswell*, 460 N.W.2d at 347. The definition of *fundamental right* is amorphous. It has been defined as those rights guaranteed by a constitution. 16 AM. JUR. 2D *Constitutional Law* § 750 (1979). It may be easier to define by identifying that which courts have held to be a fundamental right including the right of procreation; the right to marry; the right to exercise First Amendment freedoms such as free speech, press, and assembly; the right to interstate travel, the right to vote; and, a juvenile's right of statutory appeal. *Id.*

Education has been held not to be a fundamental right under the Federal Constitution. *Id.* Minnesota courts have not yet decided whether education is a fundamental right under the Minnnesota Constitution. Minnesota Civil Liberties Union v. Minnesota, 224 N.W.2d 344, 354 (Minn. 1974) (stating that the court would pass on the question of whether education is a fundamental right under the Minnesota Constitution). The Minnesota Supreme Court has not yet answered this question. There are strong arguments to be made that education is a fundamental right in Minnesota, but that is another article.

159. *See supra* note 75.

160. *Russell*, 477 N.W.2d at 888 (quoting Wegan v. Village of Lexington, 309 N.W.2d 273, 280 (Minn. 1981)).

161. *Id.* at 889.

162. *Id.*

163. *Id.*

conclusion that the requirement is unconstitutional. The capital loan requirement fails the second prong of Minnesota's rational basis test, that the classification be relevant to the purpose of the law. Capital loans may be used to acquire, better, furnish, or equip educational facilities.[164] This provision allows the loans to be used to bring buildings into compliance with the fire code, i.e. to "better" the facility. There is no connection between the size of a school and the need for a safe facility. Students in any school, regardless of size, have a right to a safe school. Failure to pass this prong of the test makes the loan requirement unconstitutional.

The requirements for a capital loan also violate Minnesota's special legislation provision.[165] Although this provision does not prevent the legislature from creating classes, it does require those classes to be based upon substantial distinctions so that classes differ from each other in a "real sense."[166] A law is constitutional if "the class to which it applies justifies a statute peculiar to the class in the matters addressed in the law."[167] A three point, rational basis test is applied to determine if there is a proper basis for the classification: (1) whether the classification applies to all who are similarly situated with respect to the condition justifying the legislation, (2) whether the distinctions between classes are genuine and substantial rather than arbitrary or fanciful; and (3) whether there is an evident connection between the distinctive needs peculiar to the class and the remedy or regulations provided by the law.[168]

The class created by the requirements for a capital loan is quite select. To qualify, schools must be part of a district that meets the following characteristics: (1) serves at least eighty students per grade, on average, or qualifies for sparsity revenue, (2) will maintain or increase its average daily attendance for the next five years, (3) has made a good faith effort over the past ten years to comply with fire, health, and life safety codes; and (4) cannot cooperate with another district to provide the necessary facilities.[169]

It is probable that only a small number of districts actually

164. MINN. STAT. § 124.431, subd. 1 (1992).

165. *See supra* note 155.

166. *In re* Tveten, 402 N.W.2d 551, 558 (Minn. 1987).

167. *Id.*

168. *Id.* at 558-59. The discerning reader will have noticed this three prong test is virtually the same as the rational basis test applied to equal protection challenges under the Minnesota Constitution. *See supra* text accompanying note 160.

169. *See supra* note 137.

meet these requirements.[170] If the basis of a classification is valid, it does not matter how many or how few entities fall within the class created.[171] A court, however, will scrutinize a law more closely if it creates a class with few members.[172]

The small class created by the capital loan requirements is not sufficiently different from those excluded to justify special treatment for the purpose of distributing capital loans. Capital loans can be used to better existing facilties or to build new ones.[173] It is logical to believe that large districts which will maintain or increase their pupil population will have a greater need to build new facilities than will smaller districts that are not projected to grow. It is not logical, however, to believe that larger, growing districts will have a greater need to improve their facilties, especially to meet code regulations.

The only justification for creating this special class is that the legislature wants to force small districts to consolidate. That justification, however, is not a rational basis for differentiating between financially distressed districts needing to improve their facilities[174] and the capital loan requirements are, therefore, unconstitutional.

The legislature has the power to force districts to consolidate; it should be forced to face the issue of consolidation directly rather than hiding behind the capital loan provisions.

Part III. Summary and Recommendations

Consolidation of schools has a long tradition.[175] Its proponents see consolidation as a way to save money and improve academic programs.[176] Opponents point out that consolidation destroys the advantages of smaller schools, such as more contact between students and teachers, more parental support and involvement, and increased extracurricular opportunities for students.[177]

Until recently, research on the effects of consolidation was

170. Each criterion is quite specific. It seems unlikely that many school districts outside the Twin Cities area will meet all of the criteria.

171. Williams v. Rolfe, 114 N.W.2d 671, 676 (Minn. 1962).

172. *Id.*

173. *See supra* note 117.

174. In *Tveten*, the Minnesota Supreme Court held a law exempting annuities issued by fraternal benefit societies from the claims of creditors, but not those issued by for-profit companies, to be special legislation. *Tveten*, 402 N.W.2d at 551. The court reasoned that the only justification for this classification was that the legislature was indirectly subsidizing fraternal societies. *Id.* at 559. The court believed this was a justification but not a rational basis for the law. *Id.*

175. *See supra* note 3.

176. *See supra* notes 21-25, 34-45, and accompanying text.

177. *See supra* notes 27-45 and accompanying text.

lacking. Two recent studies, however, show that consolidation generally results in savings on only the salaries of a few administrators and that the academic results are mixed.[178] In fact, the most recent trend among state education officials nationwide has been to abandon or consider abandoning consolidation programs.[179] Also, some large schools are now experimenting with techniques to create the feeling or reality of a small school within their large school.[180]

In Minnesota, the state constitution gives the legislature the power to force districts to consolidate.[181] To date, Minnesota has passed a series of laws encouraging, but not forcing, districts to consolidate.[182]

In 1990, the Minnesota legislature considered forcing consolidation but declined.[183] Or did it? That same legislature passed a fire safety inspection law requiring some districts to make expensive repairs and changes to their buildings[184] and changed the requirements for capital loans.[185] Capital loans are intended to help financially distressed districts build new facilities or improve existing ones.[186] These new requirements will deny a capital loan to distressed, small school districts faced with great expense following a fire safety inspection.[187] These small districts will then have no choice but to consolidate.

The new loan requirements violate the equal protection and special legislation clauses of the Minnesota Constitution.[188] Capital loans are part of the Maximum Effort School Aid law, which is designed to aid financially distressed schools, i.e. those schools whose citizens have been taxed and levied to the limit allowed.[189] Capital loans are to be spent on school buildings.[190] There is no rational relationship between the size of financially distressed schools and their need for safe buildings.

Capital loans should be made available to all schools that need them. Safety in the schools is important. Because schools in Minnesota have never been inspected, many districts have not

178. *See supra* notes 53-59 and accompanying text.
179. *See supra* notes 63-69 and accompanying text.
180. *See supra* notes 70 and 71, and accompanying text.
181. *See supra* notes 78-90 and accompanying text.
182. *See supra* notes 91-121 and accompanying text.
183. *See supra* note 11 and accompanying text.
184. *See supra* notes 12, 143, and 144.
185. *See supra* notes 134-40 and accompanying text.
186. *See supra* note 117.
187. *See supra* notes 134-40 and accompanying text.
188. *See supra* notes 154-74 and accompanying text.
189. *See supra* note 117.
190. *Id.*

spent the money to put in sprinklers and fire-safe walls.[191] Installing these items will be expensive.[192] Many districts will be able to afford this expense, but some will not. If the state decides to help districts, it should help all districts and not a select few. If the legislature does not change the requirements for a capital loan to make these funds available to all, the present requirements should be challenged and a court should find the requirements to be unconstitutional.

Regardless of whether the capital loan requirements are challenged, Minnesota must more thoroughly consider the need for further legislation forcing school consolidation. Old assumptions about the necessity for consolidation may no longer be valid. One assumption has been that consolidation leads to an improved curriculum,[193] but the conditions which lead to this assumption have changed.

Past rounds of consolidation took place in less technologically advanced times.[194] This meant that students in small, isolated schools were at a disadvantage with regard to access to information about the world[195] in comparison to their counterparts in larger school systems. Under those circumstances, claims that consolidation would expose students to a variety of courses and people were credible. In the modern world, they are less so. The pervasiveness of modern media and transportation systems provides access to the outside world to almost all children.[196] In addition to bringing the world into one's home, modern technology now provides a means of beaming a teacher via satellite into a classroom miles away.[197]

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191. *See supra* note 125.

192. *See supra* note 143.

193. *See supra* note 48 and text accompanying note 22.

194. *See supra* note 48.

195. *See* Beckner & O'Neal, *supra* note 8, at 5 (stating small secondary schools tend to include less variety in student social, economic, and ethnic status, thus limiting the opportunity for contact with others from a different background). Beckner & O'Neal believed this meant students in rural areas experiece "cultural impoverishment and lack of opportunity for the personal development that comes from contact with different kinds of people." *Id.*

196. For a discussion of current misperceptions of rural life, see Martin Burlingame, *Declining Enrollments and Small Rural Cities and Districts*, 11 ED. AND URBAN SOC. 313, 317 (1979). Burlingame points out that present cultural influences on small towns are predominantly urban. *Id.* (citing Richard Dewey, *The Rural-Urban Continuum: Real but Relatively Unimportant*, 66 AM. J. SOC. 60 (1960)). What was true in 1960 and 1979 must be even truer in the 1990s.

197. According to a report by the U.S. Office of Technology Assessment, distance learning, i.e. the use of computers, interactive video, satellites and other media to link distant classrooms, has increased dramatically in recent years. *See Long Distance Teaching: Distance Learning is Revolutionizing the Teaching Profession*, 24 THE FUTURIST, 48 (1990).

It is no longer true that consolidation is necessary to expose students to a variety of people and courses.

A financial assumption underlying the push for consolidation, and hence, the change in the capital loan requirements, is the notion that Minnesota cannot afford to keep all of its small districts operating, or to repair all of the unsafe buildings.[198] This way of looking at the issue is short-sighted in that it fails to recognize the role these buildings could play in changing communities.

For example, school buildings could be used as community service centers. In many districts, school enrollments are declining, and fewer classroooms are being used in the school buildings. This phenomenon has been the impetus for cries of school consolidation.[199] But these unused classrooms could be used to meet the needs of everyone in the community.

People are living longer than they did in the past.[200] As a result, the population of many small towns is older than it has been. This has meant that small school districts find it hard to pass bond referendums to improve their school buildings because older citizens do not want to pay higher property taxes. They see no benefit to themselves. As a consequence, districts that cannot raise money to improve their buildings are forced to consolidate.

The older population has also resulted in higher health care costs,[201] and the children of these older citizens are increasingly faced with the problem of caring for their parents.[202] For some adults, caring for their parents has become a full-time job. At the same time, working parents of young children worry about finding adequate, safe day care for their children.[203]

One commentator has proposed "community/schools."[204] A "community/school" is a building which has been adapted for use

198. Saving money is an often used justification for school consolidation. *See supra* notes 34-38 and accompanying text. It is generally anticipated that part of the financial savings will result from the closing of schools. *Id.* Given the fact that most Minnesota schools have never been inspected, *see supra* note 125, and therefore, have not been kept fire-safe, it will require great cost to bring all of Minnesota's school buildings into compliance with the fire code, *see supra* note 143.

199. *See supra* note 7.

200. *See* Barbara Vobejda, *Elderly Population Growth Will Lead to 4-Generation Families*, WASH. POST, Nov. 10, 1992, at A3 (the number of Americans 65 and older "grew by 22 percent during the 1980s, more than double the growth of the nation as a whole").

201. Robert J. Samuelson, *Health Care: How Much Waste?*, WASH. POST, Mar. 31, 1993, at A19.

202. *Odd Jobs*, WASH. POST, Apr. 11, 1993, at H2 (a survey showed that people with aging parents were among those experiencing the most stress).

203. *See* Judy Mann, *The Raw Nerve of Child Care*, WASH. POST, Jan. 27, 1993, at D26.

204. Susan F. Gilbert, *Adaptive Re-Use of Public School Buildings: The "Commu-*

by the school and its surrounding community.[205] The "community/school" concept could be adopted so that school buildings serve as a community service center by serving the needs of a community from the cradle to the grave. Empty space in the building could be used to provide daycare for small children and older adults. If enough space is available, medical services for the community might also be located in the same building.

From the community perspective, an advantage of turning schools into community service centers is that all citizens of a town will have access to services they need. All citizens of a town, therefore, will have a stake in maintaining the quality of the school building and ensuring it is a safe place. This should make it easier to pass referendums to improve school buildings.

From the state's perspective, the state will have a place in each community from which it can provide needed services. Minnesota has recently discussed establishing one state agency to coordinate services to children.[206] Such an agency could establish an office in community service buildings. If schools are used as community service centers, any money that must be contributed by the state to supplement the funds a community can raise could come from the human services budget as well as the education budget.

Conclusion

Although consolidation may be the solution to the problems of individual school districts,[207] it has not been shown to be a

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nity/School" Concept, 11 J. LAW & EDUC. 361 (1982). Gilbert considers the legal aspects of adapting school buildings to multiple uses.

205. *Id.* at 380-83.

206. Governor Arne Carlson proposed a Department of Children and Education Services in his State of the State address. Dennis J. McGrath, *Reinventing Government*, STAR TRIB., Jan. 18, 1993, at 1B.

207. Prior to the recent studies of school consolidation discussed earlier, *see supra* notes 53-59 and accompanying text, reports of the effects of consolidation focused on individual consolidations, *see supra* note 47. The problem with some of these reports is the reporters found only what they wanted to find. For example, a 1967 study of the consolidation of schools in Garrard County, Kentucky found that following consolidation there was an improvement in the facilities and instructional materials available to high school students. Norman Deeb, *School Consolidation: A Case Study*, 40 BULL. BUREAU SCH. SERVICE, C. EDUC., U. KY. (1967). This was the result of a special tax passed by the citizens of the consolidating districts to provide funds to finance the consolidation. These funds were used to build a new high school and to buy instructional materials and equipment. The study failed to examine the effects of the consolidation upon elementary students, whether per pupil costs had increased or decreased, whether teachers and pupils had more or less contact with each other, or whether pupil achievement increased or decreased following consolidation.

It is dangerous to use the possibly biased reports of the results of a few consolidations as justification for consolidating all "small" schools within a state. It would

large-scale solution to education's problems.[208] Prior to 1990, Minnesota had a set of "consolidation" laws which encouraged schools to consolidate but did not force consolidation.[209] With the linkage of fire safety, changed capital loan requirements, and consolidation,[210] Minnesota has taken the step from encouraging consolidation to forcing it. Given that this step was taken without full public discussion of the issue,[211] and that consolidation is not a large-scale solution, Minnesota should retreat a step and consider alternative solutions to shrinking enrollments and tight budgets.

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be more prudent to carefully consider proposed consolidations on an individual basis. One educator suggests that a school system considering consolidation study the nature, extent, and strength of other community institutions and social services in the community. Nelson, *supra* note 3, at 4. The school system should, of course, also consider the possible financial and educational effects of a proposed consolidation. *See id.*

There are undoubtedly small school systems that will benefit from consolidation. That does not mean all small schools will benefit.

208. *See supra* notes 53-71 and accompanying text.

209. *See supra* notes 91-113 and accompanying text.

210. *See supra* notes 125-40 and accompanying text.

211. *See supra* notes 11-12 and accompanying text.