

## Separate and Unequal: School District Financing

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*Every child in America needs an excellent education — because global competition demands a highly skilled and knowledgeable work force, because democracy in the modern era depends on a thoughtful and well-educated citizenry, and because knowledge and a love of learning are among the most precious gifts society can give to children. . . .*

*In recent decades, as work and daily life in the United States have become more complex and demanding, education has become a prerequisite for economic self-sufficiency, personal growth and development, and responsible citizenship. As a nation, we look to schools to teach not only basic skills and knowledge, but a more sophisticated way of thinking, communicating, and solving problems. We also expect schools to cultivate in students an understanding of the arts and humanities and to instill in young people an appreciation of the nation's heritage and democratic principles. Finally, we increasingly rely on schools to ensure that young people have the life skills and attitudes necessary for success in the workplace. These benefits can no longer be limited to a well-educated elite. They are absolute necessities for every American.*

— The National Commission on Children<sup>1</sup>

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1. NATIONAL COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 177-78 (1991) [hereinafter BEYOND RHETORIC]. Congress established the National Commission on Children. The President, the President pro tempore of the U.S. Senate, and the Speaker of the U.S. House of Representatives appointed the thirty-four members on the commission. *Id.* at i. The commission membership included representation from government, education, labor unions, the medical community and children's rights organizations. Senator John D. Rockefeller IV chaired this bipartisan commission. *Id.* at iii. Other prominent members of the commission included Bill Clinton, then Governor of Arkansas and currently President of the United States; Marian Wright Edelman, President of the Children's Defense Fund; and Bill Honig, Superintendent of Public Instruction for California. *Id.*

*Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.*

— United States Supreme Court<sup>2</sup>

## I. Introduction

The quality of education that America's children receive is essential to the continued viability of the United States as a world leader.<sup>3</sup> Unfortunately, many view the country's educational system as a system in decay.<sup>4</sup> One of the major problems with our educational system is the lack of equal educational opportunity across the country. A factor that directly influences the quality of educational opportunity is the level of financial support available to the nation's public schools.<sup>5</sup> This level varies greatly from one school district to the next. As more and more school districts face budget cuts, school programs are being slashed.<sup>6</sup> These cuts have

2. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

3. In comparison with other countries around the world, the United States' educational performance ranked 9th in physics, 10th in arithmetic, 11th in chemistry, 12th in algebra, 16th in geometry, and last in biology. *BEYOND RHETORIC*, *supra* note 1, at 179 (citing INTERNATIONAL ASS'N FOR THE EVALUATION OF EDUC. ACHIEVEMENT, *THE UNDERACHIEVING CURRICULUM: ASSESSING U.S. SCHOOL MATHEMATICS FROM AN INTERNATIONAL PERSPECTIVE* 14-29 (1987); INTERNATIONAL ASS'N FOR THE EVALUATION OF EDUC. ACHIEVEMENT, *SCIENCE ACHIEVEMENT IN SEVENTEEN COUNTRIES: A PRELIMINARY REPORT* 25-43 (1988)).

4. In the 1980's, the National Commission on Excellence in Education stated that the national educational system put the nation "at risk" and that the system "threatens our very future as a Nation and a people." NATIONAL COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK* 5 (1983). In one of the commission's more memorable passages it stated that "[i]f an unfriendly foreign power had attempted to impose on America the mediocre educational performance that existed today, we might well have viewed it as an act of war." *Id.*

5. See *infra* part II.A.; cf. *Dupree v. Alma Sch. Dist. No. 30 of Crawford County*, 651 S.W.2d 90, 95 (Ark. 1983) ("[Property] wealth is what primarily dictates the amount of revenue each district receives and the quality of education in that district."). In response to public pressure for higher educational standards, many states are changing their funding policies. For example, Kentucky now requires minimum per pupil expenditures in public schools. See *BEYOND RHETORIC*, *supra* note 1, at 206. Minnesota established minimum spending level requirements for all of its school districts in 1957. *Skeen v. Minnesota*, No. C7-88-1954, slip op. at 22 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992).

6. The media has reported deep budget cuts in school districts throughout the country. See, e.g., *St. Paul School Board: Mixing New, Familiar*, STAR TRIBUNE (Minneapolis), Oct. 20, 1991, at 26A; *Wichita: Real Numbers Bring \$6M for Schools*, Daily Report Card, Feb. 13, 1992, available in LEXIS, Nexis Library, Daily Report Card File; *Tentative Agreement Averts Chicago School Strike*, UPI, Nov. 17, 1991, available in LEXIS, Nexis Library, UPI File; *A Warranty for Graduates?*, LOS ANGELES TIMES, Nov. 8, 1991, at B6, col. 3; John Hildebrand, *Schools "Scared Silly": It's Budget Time, and the Spending is Far from Easy*, NEWSDAY (Long Island, NY), May 5, 1991, at 7 (Nassau and Suffolk ed.); Brian McGrory, *School Funds Sub-*

not been universal or uniform.<sup>7</sup> In many cases budget cutting has exacerbated traditional inequalities in school resources.<sup>8</sup>

America's system for financing public education fails to provide equal educational opportunity<sup>9</sup> for its children, even for children living in the same county. Large variations in school district property wealth<sup>10</sup> have created inequities in the ability of a poorer district to raise school funds and provide educational programs.<sup>11</sup> In an age of budget cutting, richer districts are better able to retain existing programs,<sup>12</sup> while poorer districts must cut back programs for their children. In many places around the country, the educa-

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*tracted; Woes Add Up*, THE BOSTON GLOBE, Mar. 2, 1991, at 25; Rene Sanchez, *D.C. Schools Upbraided for \$20,000 Meeting at Va. Resort*, THE WASHINGTON POST, June 7, 1990, at D5.

7. For example, in New Hampshire, budget cuts have forced 73 of the state's 162 school districts to eliminate kindergarten programs. William Celis, *Furor in New Hampshire on Vote to Cut Standards*, N.Y. TIMES, Aug. 26, 1992, at B7, col. 1. When the state eliminates the mandate of educational programs, the richer districts within the state can afford to maintain them, while poorer districts are more likely to drop them. See *id.*

8. When states make across-the-board cuts in educational funding, wealthy districts may be forced to cut off "extra fat." However, financially strapped districts facing similar curtailments must cut off the meat of educational programs. Cf. *id.*

9. Equal educational opportunity is impossible to define, because there is no consensus as to what it means. See John E. McDermott & Stephen P. Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference*, 38 LAW & CONTEMP. PROBS. 415, 416 (1974). This is because educational concepts are not static, rather they evolve and change over time. See *id.* at 416 n.6. Many standards have been used to measure educational opportunity including equal dollars per pupil; dollars adjusted for pupil needs; variations from the norm; inputs; and outputs. *Id.* at 416.

This article will simply define the term to mean that children in a given school district are given roughly the same conditions and possibility to learn as those same children would have if they were in a different school district. On a more practical level, this standard translates into equivalent school facilities, student-teacher ratios, curricula, extra-curricular activities, equipment and supplies, libraries, and levels of experienced faculty. This standard approaches the one suggested by Justice Marshall in his *Rodriguez* dissent: "the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 84 (1973) (Marshall, J., dissenting); see also *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 207 (Ky. 1989). This article suggests a standard of equal educational opportunity based on equivalence and not on absolute equality from district to district. To suggest such a standard based on absolute equality would ignore the real variations and needs of different districts. See McDermott & Klein, *supra* 9, at 417; see also JAMES COLEMAN, *EQUALITY AND ACHIEVEMENT IN EDUCATION* 138 (1990).

10. School district property wealth is normally measured by totalling the assessed value of the real property within the district.

11. See *infra* part II.C.2. Poorer small districts may also suffer forced consideration. See Susan R. Stockdale, *School Consideration and Minnesota's Fire Safety Inspection Law: A Step Too Far*, 11 LAW & INEQ. 117 (1992).

12. Richer districts also benefit from federal tax policy that subsidizes property tax payments. See JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 55 (1991).

tional opportunities a child receives are based solely on the neighborhood in which the child's parents choose to live.

Recognizing the great inequalities caused by budget cuts and by unequal funding of education, many parents and school districts are now in court challenging the constitutionality of their state's school funding schemes.<sup>13</sup> Because the 1973 United States Supreme Court decision *San Antonio Independent School District v. Rodriguez*<sup>14</sup> precludes a remedy based on the United States Constitution,<sup>15</sup> these challenges must succeed, if at all, on state grounds. These new challenges assert that under state law every child has a right to equality of educational opportunity. Plaintiffs seek school district funding equalization in order to assure equality of educational opportunity.

This article explores the law governing school funding. Part II shows that per pupil funding levels affect educational opportunities and resources. Part II then shows that the historical evolution of state and federal funding schemes have created inequalities of educational opportunity for children living in property-poor districts. Part II concludes that the U.S. Constitution does not provide a remedy for children disadvantaged by funding inequities. Part III shows that several states have interpreted their state constitutions to provide this needed remedy. In particular, these states often interpret the Education Clauses of their state constitutions which have no parallel in the U.S. Constitution. Part III then examines the pending case, *Skeen v. Minnesota*,<sup>16</sup> and concludes that the present Minnesota school funding scheme fails to meet the "general and uniform" and "thorough and efficient" requirements of the Minnesota Constitution's Education Clause. Part III also concludes that Minnesota's school funding scheme violates the Minnesota Equal Protection Clauses. Part III then concludes that concern for maintaining local control cannot support Minnesota's school finance scheme. Finally, Part IV proposes two solutions to remedy inequalities in school district financing.

## II. Financing Education

Much of the present debate in American public education revolves around money. To understand this debate, it is important to understand the evolution of the present educational system and

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13. See *infra* note 128 and accompanying text.

14. 411 U.S. 1, 35 (1973).

15. See *infra* part II.D.

16. *Skeen v. Minnesota*, No. C7-88-1954, slip op. (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992).

the financial system that supports it. While many Americans may assume that their children have a right to state-supported free public education, it is not a fundamental right protected by the United States Constitution,<sup>17</sup> nor has education always been a state-supported institution.<sup>18</sup> The present educational system and its support have evolved over the past two centuries.

### A. Does Money Matter?

The legal debate on school financing begins with the question: does money matter? Per-pupil education spending differs radically from school district to school district across the country. Differences arise not only between states, but even in school districts located in the same counties.<sup>19</sup> An important question is whether changes in per pupil spending would make any difference in students' opportunities to learn (inputs) or in their academic performance (outputs).

Education scholars disagree on the difference money makes in education. James Coleman argues that most school factors play a relatively minor role in determining student outputs.<sup>20</sup> Coleman notes that some teacher characteristics can have more than a minor effect;<sup>21</sup> teacher characteristics can vary with differences in funding. A recent Brookings Institute study found that differences in the economic resources of schools relate to average academic performance.<sup>22</sup> This study noted that while over half of all "high performance schools" had economic resources that were above average, only thirty percent of "low performance schools" did.<sup>23</sup>

There is a "conventional wisdom" that money makes a difference in education<sup>24</sup> and this notion is a fundamental premise driv-

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17. *Rodriguez*, 411 U.S. at 35.

18. See *infra* part II.C.1.

19. See KOZOL, *supra* note 12, at 236-37; Ben Yagoda, *What Makes a Great School Great*, PHILADELPHIA, Sept. 1992, at 92-93. New York City spent \$7,299 per pupil in the 1989-90 school year. KOZOL, *supra* note 12, at 236-37. By contrast in the same year some neighboring suburban school districts spent almost double that amount. *Id.* (Great Neck - \$15,594, Manhasset - \$15,084). In that same year, however, while Chicago spent \$5,265 per pupil, Camden, New Jersey spent only \$3,538 per student. *Id.* at 236.

20. COLEMAN, *supra* note 9, at 149-50.

21. *Id.*

22. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 102-04 (1990).

23. *Id.* The study found that money is the key difference in determining student-teacher ratios in schools. *Id.* The study found that high performance schools have about two fewer students per teacher, 13.8 to 1 as compared to 15.7 to 1. *Id.* at 103. The study deemed this difference "fairly substantial." *Id.*

24. *Abbott v. Burke*, 575 A.2d 359, 406 (N.J. 1990). Kozol quotes a doctor who works in the South Bronx as follows:

ing educational decision making.<sup>25</sup> Some courts have also assumed that the "amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student."<sup>26</sup> As two Minnesota courts conclude, if greater resources do not produce better results, high spending wealthy school districts have wasted a large amount of taxpayer money.<sup>27</sup>

While money will not solve all problems,<sup>28</sup> it can change the inputs and improve performance.<sup>29</sup> Specifically, increased financial allocations to school districts can provide more extensive curricula, better technological equipment, libraries and facilities, lower student-teacher ratios, and can attract and retain experienced faculty.<sup>30</sup> Finally, even assuming money does not make a difference in educational outputs, it does not follow that a state can, consistent with state constitutional provisions, allow a poorer school district to receive fewer dollars for education.<sup>31</sup>

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You could also argue, I suppose, that children at expensive high schools do not really profit from their access to so many books, so many foreign languages, so many high-paid teachers, and even suffer from exposure to so many guidance counselors. We have the right to raise our eyebrows, nonetheless, when 'overutilization' by the very rich has been permitted to continue at the very time that we are told to question whether it much matters. If it doesn't matter, cancel it for everybody. Don't give to them, deny it to us, then ask us to believe that it is not significant.

KOZOL, *supra* note 12, at 118.

25. *Abbott*, 575 A.2d at 406 ("the entire state aid program itself is based on the assumption that money makes a difference in the quality of education").

26. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989); *Dupree v. Alma Sch. Dist. No. 30 of Crawford County*, 651 S.W.2d 90, 95 (Ark. 1938) (the amount of money a district receives dictates the quality of education); *see also*, *Van Dusartz v. Hatfield*, 334 F. Supp. 870, 874 (D. Minn. 1971).

27. *Skeen v. Minnesota*, No. C7-88-1954, slip op. at 193 (Minn. Dist. Ct. Wright County Dec. 17 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992); *Van Dusartz*, 334 F. Supp. at 874.

28. *See Abbott*, 575 A.2d at 403 ("no amount of money may be able to erase the impact of socioeconomic factors"); *McDermott & Klein*, *supra* note 9, at 429 ("a high expenditure level may be a necessary, but not sufficient, condition for high levels of student performance").

29. For example, the government uses funds from Title I of the Elementary and Secondary Education Act of 1965 (ESEA) to decrease class size for poorer children. SOURCEBOOK OF EQUAL EDUCATIONAL OPPORTUNITY 335-44 (1979) (published by Marquis Academic Media). According to the National Institute of Education, Title I has succeeded in providing additional educational services to students whom the schools usually serve the least. *Id.*

30. *See Kirby*, 777 S.W.2d at 393; *Skeen*, No. C7-88-1954, slip op. at 144; *Abbott*, 575 A.2d at 395-97.

31. The Constitution does not tell [students in poorer districts] that since money will not help, we will give them less; that because their needs cannot be fully met, they will not be met at all. It does not tell them they will get the minimum because that is all they can benefit from. Like other states, we undoubtedly have some "uneducable" students, but in New Jersey there is no such thing as an uneducable district, not under our Constitution.

### B. *The Rise of Free Public Education*

Free public education has a long history in America. In 1779, Thomas Jefferson proposed a system of publicly controlled schools for Virginia.<sup>32</sup> Under this proposal children could attend school<sup>33</sup> free of charge for three years.<sup>34</sup> The most gifted of these students ultimately would be educated at William and Mary College for free.<sup>35</sup> Only a modified version of Jefferson's plan ever passed the Virginia legislature, in 1796.<sup>36</sup> Nevertheless, Jefferson's dream of free public education lived on with land grants to Northwest Territory states in support of the creation and maintenance of public schools.<sup>37</sup>

From the 1830's until after the Civil War, many states had early, abortive attempts to create free public education systems. For example, New York created its Board of Regents to supervise secondary and higher education in 1784,<sup>38</sup> but did not succeed in making all of its public schools free until 1867.<sup>39</sup> Despite early failures, by 1870 over half the children in America were enrolled in school.<sup>40</sup>

One education scholar summarized the state of American public education at the beginning of the 20th century as follows:

At the turn of the century America had reason to be proud of the educational progress it had made. The dream of equality of educational opportunity had been partly realized. Any white American with ability and a willingness to work could get a good education and even professional training. The schools were very far from perfect, of course: teachers were in-

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Abbott, 575 A.2d at 403.

32. HARRY G. GOOD & JAMES D. TELLER, A HISTORY OF AMERICAN EDUCATION 85 (1973).

33. Early American schools were not age-graded. It was not uncommon to find children age eight to twenty-five in the same school. See JAMES S. COLEMAN, YOUTH: TRANSITION TO ADULTHOOD 10-20 (1974); JOSEPH F. KENT, RITES OF PASSAGE 18 (1977). Age-grading was a by-product of Horace Mann and the common schools movement of 1830-50. COLEMAN, *supra* note 9, at 18.

34. GOOD & TELLER, *supra* note 32, at 86.

35. *Id.*

36. *Id.*

37. In 1803, Ohio was the first state to receive federal land grants for public schools. *Id.* at 158. Later, the admission of 16 states into the Union was conditioned upon their promise to constitutionally secure the right to education to their citizens. See *Pauley v. Kelly*, 255 S.E.2d 859, 863-64 n.5 (W. Va. 1979) (Alaska, Arizona, Colorado, Hawaii, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, Washington and Wyoming).

38. GOOD & TELLER, *supra* note 32, at 157.

39. *Id.* at 138.

40. ROSS FINNEY, A BRIEF HISTORY OF THE AMERICAN PUBLIC SCHOOL 190 (1925) (6,871,000 of the 12,000,000 children between the age of five and eighteen attended school).

adequately prepared, classrooms were overcrowded, school buildings and equipment were inadequate, and the education of [African-Americans] had been neglected. But the basic institutional framework for a noble conception of education had been created. Free public schools, from the kindergarten through the university, had been established.<sup>41</sup>

The rapid growth of immigration at the beginning of the century started to strain public schools.<sup>42</sup> After 1900, immigrants entered the United States at a rate of about one million a year.<sup>43</sup> As a result of child labor and compulsory school attendance laws, the children of these immigrants flooded the public schools of Eastern cities.<sup>44</sup> By the beginning of World War I, almost three-fourths of all American children attended school.<sup>45</sup> At the same time, as additional funds were needed to maintain minimal educational standards, the public had grown suspicious of all public institutions as "inefficient and wasteful."<sup>46</sup>

Between 1900 and 1920, financial pressures facing educators led to the rise of the "efficiency" movement within education.<sup>47</sup> This movement adopted the principles of "scientific management"<sup>48</sup> espoused by Fredrick Taylor.<sup>49</sup> Market concepts also took hold in educational theory.<sup>50</sup> Schools that could produce the most grade promotions for the lowest cost were seen as the most effi-

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41. RAYMOND E. CALLAHAN, *EDUCATION AND THE CULT OF EFFICIENCY* 1 (1962).

42. *Id.* at 14-15. Not only did the large influx of non-English-speaking children from diverse backgrounds and semiliterate families strain the physical facilities of schools, it created new pedagogical problems for an educational system accustomed to teaching a relatively homogeneous population of children. *Id.*

43. *Id.* at 14.

44. *Id.*

45. FINNEY, *supra* note 40, at 190. (By 1915, 19,707,000 of the 26,000,000 children between the ages of five and eighteen attended school.)

46. CALLAHAN, *supra* note 41, at 15.

47. *See id.* at 46-51. Many critics of the time, convinced that schools were wasting public tax dollars, called for schools to become more efficient or have their budgets cut. In the summer of 1911, the president of the National Council of Education responded by calling for the creation of a committee on "Tests and Standards of Efficiency of Schools and School Systems." *Id.* at 54. By the following year practically every department or division of the annual meeting of the National Education Association had at least one speaker or meeting devoted to "efficiency." *Id.* at 59.

48. Scientific Management is a system which attempts to get the greatest productivity out of human efforts. *Id.* at 25. According to the principles of scientific management, there is only "one best way" of doing anything, and through scientific study that method could be determined. *Id.* at 29. Through standardization and giving defined tasks to each worker each day, productivity could be maximized. *Id.* at 30. In the educational field, this strengthened the use of standardized tests as a way of measuring educational success. *Id.* at 67.

49. *Id.* at 19-34. Taylor is best remembered for his study of pig iron production. *Id.* at 34-41.

50. *See id.* at 244.



cient.<sup>51</sup> Schools were modeled after factories.<sup>52</sup> Under this system quantity, not quality, was the goal of schools.<sup>53</sup> Emphasis was on per pupil costs.<sup>54</sup> It was assumed that not every child could succeed. Educators considered students who had to repeat grades inefficient.<sup>55</sup>

During this same "efficiency" period, 1900-20, modern concepts of the public school were established.<sup>56</sup> The standardization drive of the efficiency movement resulted in relatively uniform basic school curricula. States passed laws mandating attendance.<sup>57</sup> The rapid growth of public schooling in this period institutionalized school as the dominant feature in the lives of children age five to eighteen. Finally, the efficiency movement emphasized the reg-

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51. *Id.* at 156 ("each system had to be brought in line with the most efficient — efficient, that is, in terms of costs").

52. *Id.* at 126-47. Charles Eliot, the president of Harvard University complained that schools were only used six hours each day and for only half of the days in the year. He said, "It is obvious at a glance that so partial a use of an *industrial plant* would never be thought possible. No productive industry could be successfully carried on with so incomplete a use of an expensive plant." *Id.* at 127 (citing N.E.A. *Proceedings* 241 (1903)) (emphasis added). Even the shape of many older school buildings are modeled after factories of the period.

53. *Id.* at 156. Schools favored eliminating curriculum classes or increasing class size if this would reduce overall costs. Educators emphasized education at the lowest cost, not producing the best educated populace. *Id.* at 244.

54. *Id.* at 71. Frank Spaulding, a leading educator of the time and the superintendent of Newton, Massachusetts and later of the Minneapolis school districts (1914-17), emphasized the importance of cost in a speech to educators when he asked:

Why is a pupil recitation in English costing 7.2 cents in the vocational school while it costs only 5 cents in the technical school? Is the "vocational" English 44 per cent superior to the "technical" English or 44 per cent more difficult to secure? Why are we paying 80% more in the vocational than in the technical school for the same unit of instruction in mathematics? Why does a pupil-recitation in science cost from 55 per cent to 67 per cent more in the Newton High than in either of the other schools?

*Id.* at 74.

55. *See id.* at 165-69. Teacher efficiency was measured by the rate of student promotion. *Id.* at 168. Nevertheless, with the wide range of educational opportunities open to unskilled workers before World War II, the lack of educational proficiency possessed by students leaving or dropping out of public schools did not pose a problem to the U.S. economy. In 1900, only 6.4 percent of 17 year olds had graduated high school. COLEMAN, *supra* note 33, at 26. By 1940, this number reached 50.8%. *Id.* As for college education, just over 4% of the eighteen to twenty-one year olds were in college in 1900, and by 1940 this figure had reached 15.68%. *Id.* In contrast, it is predicted that by the year 2000, a college education will be a prerequisite for between one-third and two-thirds of all new jobs. BEYOND RHETORIC, *supra* note 1, at 181 (citations omitted).

56. *See KENT, supra* note 33, at 235. Beginning in the early 1900's, the marketplace looked to a school diploma as the device to certify young people as skilled for work. COLEMAN, *supra* note 33, at 25.

57. By 1917, 38 states required compulsory school attendance beyond age 14. COLEMAN, *supra* note 33, at 24.

ular use of standardized tests as a measure of the quality of education.<sup>58</sup>

### C. Funding Public School Education

To educate the large number of children attending public schools, districts looked to three major sources for funding: state governments, local governments, and the federal government.

#### 1. State Funding

State education funding has become increasingly important in this century. Traditionally, funding for public schools was derived principally from local sources.<sup>59</sup> In 1915, seven states provided no state tax dollars to public schools,<sup>60</sup> six states provided over forty percent of school funding,<sup>61</sup> and one state provided over fifty percent.<sup>62</sup> The remaining states fell in between.<sup>63</sup> After World War I,

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58. Many comparisons of schooling in the United States are normatively based (i.e., graded in comparison to average). See McDermott & Klein, *supra* note 9, at 427 ("test scores of children or school districts are compared with the scores of a national or state sample of normative or typical student population"). One of the problems with most achievement tests is that they do not aim to measure the overall effectiveness of a school's educational program, but rather seek to measure particular skill areas. See *id.* at 425-26. School districts which choose not to emphasize the subject matter tested on standardized tests have a distinct disadvantage in norm-based achievement. See *id.*

Normative comparisons lead to the conclusion that for every good school there must be a bad school. Not all school systems can be like Lake Wobegone's, where "all the children are above average." Though Minnesota has the "best" graduation rate in the nation, there is some state with the "worst" graduation rate. See Skeen v. Minnesota, No. C7-88-1954, slip op. at 25 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992) (90.9% graduation rate for Minnesota compared to a national average of 75%). This comparison fails to address the issue of what is an acceptable rate of graduation, or whether a state like Minnesota falls within a range of acceptable rates. Only by adopting an approach to educational performance which measures success against a baseline set of goals would it be possible for all American schools to be "good schools."

59. See NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPT' OF EDUC., DIGEST OF EDUCATION STATISTICS 1990, at 147 (1991) [hereinafter DIGEST OF EDUCATION STATISTICS 1990]. Through the beginning of the Depression, local funds accounted for more than 80% of all funds spent on public school education. Through World War II, local funds still represented two-thirds of all funds spent. *Id.*

60. FINNEY, *supra*, note 40, at 214 (citing U.S. Bureau of Education Report, 1917, p. 79). The seven states that provided no state tax funds were all located west of the Mississippi. They were Colorado, Idaho, Kansas, Nebraska, Oregon, South Dakota, and Wyoming. *Id.* However, it also should be noted that Massachusetts provided only one percent of its local schools budgets. *Id.*

61. *Id.* These six states were Alabama, Georgia, Kentucky, Maine, Mississippi, and New Jersey.

62. *Id.* Montana provided 50.85%.

63. Minnesota's mix was 82.23% from county and local taxes, and 10.79% from

83.2 percent of all school funds came from local sources;<sup>64</sup> remaining funds came almost exclusively from the states.<sup>65</sup> By 1961, before the Great Society program, 56.9 percent of all school funds were local.<sup>66</sup> State funds represented 38.7 percent of all school funds and federal funds represented 4.3 percent.<sup>67</sup> Significant regional and state variations still existed. While states like Nebraska were almost wholly dependent on local funds,<sup>68</sup> others, like Delaware, had less than twenty percent of education funds come from local sources.<sup>69</sup>

Throughout this century, the funding mix has slowly moved from total dependence on local funding toward greater reliance on state funds. Only by the mid-1970's did non-local sources provide more than half of all school funds.<sup>70</sup> In the last twenty years, however, there has been relatively little change in education funding mixes. State sources represent 49.5% of funds today, and local sources provide 44.1%.<sup>71</sup>

Dependence on local as opposed to state funds still varies greatly from state to state.<sup>72</sup> For example, the state of New Hampshire provides only 7.6 percent of its school funds and local sources account for 89.1 percent;<sup>73</sup> in Hawaii, almost all non-federal dollars spent on education come from the state.<sup>74</sup> Minnesota is in the middle, with the state providing 55.8 percent of school funds<sup>75</sup> and local sources provide 39.9%.<sup>76</sup>

## 2. Local Funding

Nationally, almost 90% of all local funding comes from prop-

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state taxes. The remaining funds came from other sources such as permanent funds. *Id.*

64. DIGEST OF EDUCATION STATISTICS 1990, *supra* note 59, at 147.

65. *Id.* State funds amounted to 16.5 percent of school district budgets. Federal funds amounted to only 0.3 percent of revenues.

66. *Id.*

67. *Id.*

68. G. CRESSMAN & H. BENDA, PUBLIC EDUCATION IN AMERICA 88-89 (1966). 86.9% of Nebraska school funds derived from local sources and only 5.9% of funds came from the state.

69. *Id.*

70. DIGEST OF EDUCATION STATISTICS 1990, *supra* note 59, at 147. The first year local funds represented less than 50 percent of all school funds was 1974-75. In 1987-88, local funds still comprised 44.1% of all funds spent.

71. *Id.* at 147.

72. *See id.*

73. *Id.* at 148.

74. *Id.* In Hawaii, 86.7% of all education funds come from the state, and 13.2% come from the federal government. The remaining 0.1% come from local or other sources.

75. *Id.*

76. *Id.*

erty taxes.<sup>77</sup> Two-thirds of all local funds are raised through direct taxation;<sup>78</sup> the rest is raised through indirect taxation by local governments.<sup>79</sup> However, through regulation of local boards — in particular the taxing authority of these boards — state governments maintain ultimate control over their available local funding.<sup>80</sup>

Large variations in property wealth<sup>81</sup> can create income disparities between districts.<sup>82</sup> For example, in 1989, the poorest district in Texas had \$20,000 of property wealth per student and the richest district had over \$14,000,000 of property wealth.<sup>83</sup> This reflects a difference of 700 to 1,<sup>84</sup> resulting in spending ranging from \$2,112 to \$19,333 per student.<sup>85</sup> Another consequence of property wealth differences is that property owners in wealthier districts often pay taxes at a lower rate than in poorer districts though they raise more per pupil.<sup>86</sup> Finally, property owners in rich districts derive a greater benefit from federal tax policies which make property taxes a deduction; this benefit further eases the fund-raising ability of wealthier districts.<sup>87</sup>

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77. NATIONAL CTR. FOR EDUC. STATISTICS, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION, 1977-78, at 13 (1981) (nationally, 89.4% of all local revenues come from local property taxes). This is the last year for which records are available.

78. CENSUS OF GOVERNMENT (1987), 4 GOVERNMENT FINANCES, 1 FINANCES OF PUBLIC SCHOOL SYSTEMS 16 (1990) (30.2% of all funds spent on education are raised through direct local taxation). In many states, however, the funds are not raised directly by local school boards (ex. Massachusetts and Virginia). Instead, in these states the local municipality is responsible for raising funds through its general taxation power. *See id.*

79. This is accomplished through a number of different methods throughout the country including allocations from general local government taxation and sales taxes.

80. *See* Abbott v. Burke, 575 A.2d 359, 403 (N.J. 1990); *see also*, Melby v. Hellie, 80 N.W.2d 849, 852 (Minn. 1957) ("Our Constitution has vested in the legislature plenary power as to the manner of establishing a system of schools."). By authorizing local governments to raise revenues, the state governments control the sources, amounts, and uses to which these funds may be put.

81. School district property wealth is normally measured by totalling the assessed value of the real property within the district.

82. *See* KOZOL, *supra* note 12, at 55.

83. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989).

84. *Id.*

85. *Id.*

86. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 12-13 (1973).

87. Because the property tax is counted as a tax deduction by the federal government, home-owners in a wealthy suburb get back a substantial portion of the money that they spend to fund their children's schools — effectively a federal subsidy for an unequal education. Home owners in poor districts get this subsidy as well, but, because their total tax is less, the subsidy is less.

KOZOL, *supra* note 12, at 55. The overall value of this subsidy is substantial. In 1984, for example, the federal government granted \$9 billion in property tax deduc-

Minnesota has large differences in per pupil property wealth. Adjusted tax capacity<sup>88</sup> per pupil ranges from \$1,226 in the Bertha-Hewitt district to \$30,639 per pupil in Becker.<sup>89</sup> This difference between districts has been increasing over time.<sup>90</sup>

### 3. Federal Funding

The federal contribution to educational budgets varies widely by state. For example, federal funds provide only 3.3 percent of New Hampshire's public school revenues, but they represent 13.2 percent of Hawaiian school funds.<sup>91</sup> The federal government provides 4.2 percent of Minnesota school funds.<sup>92</sup> Minnesota is 45th in the rank of federal funds to states.<sup>93</sup>

There are many reasons for the disparities in federal funding as a function of the percentage of the total funds spent in a state. First, the more funds that state and local governments provide for education, the smaller the federal percentage share will be. Second, federal programs allocate funds to states differently. The federal government has a large variety of programs to assist education. Some of these programs give aid directly to the states.<sup>94</sup> These programs may require that each state receive a minimum dollar allocation.<sup>95</sup> Other aid can be applied for by individual school districts.<sup>96</sup> The allocation of funds in these programs may

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tions and an additional \$23 billion in mortgage-interest deductions to homeowners. *Id.* (citing OFFICE OF MANAGEMENT AND BUDGET, FEDERAL PROPERTY-TAX AND MORTGAGE-INTEREST DEDUCTIONS AND FEDERAL GRANTS TO LOCAL SCHOOLS (1986)). In contrast, the federal government granted local school districts only \$7 billion in aid. KOZOL, *supra*, note 12, at 55.

88. Property tax levels are determined by state law and levied by local units of government. An assessor decides the market value of property and applies the appropriate tax capacity percentage to determine the "tax capacity." Tax capacity was formerly referred to as "assessed value." *Skeen v. Minnesota*, No. C7-88-1954, slip op. at 13 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992).

89. *Id.* at 30.

90. *Id.* at 31 (between the 1983-84 school year and the 1988-89 school year there was a 28% increase in the variation of tax bases between richer and poorer districts in the state).

91. DIGEST OF EDUCATION STATISTICS 1990, *supra* note 59, at 148.

92. *Id.*

93. *Id.* Data for Virginia is not reported.

94. See BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1993 app. one 425-31 (1992) [hereinafter BUDGET FISCAL YEAR 1993]. The type of state aid programs are varied (for example: general state block grants; grants to support state education agencies; and grants to states to combat drug abuse).

95. *Id.* at app. one 425.

96. See *id.* at app. one 425-31. Examples of programs that local school boards can apply for include assistance for establishing magnet schools, for capital expenses, and programs aimed at certain groups like immigrants or Native American children.

depend on the character of the school district's population,<sup>97</sup> or on the type of program the school district hopes to implement.<sup>98</sup> Even when examining a single federal program, no two states receive identical allocation per student.

Today, federal funding is diminishing after peaking in the Carter years at almost ten percent of all revenues spent on public education.<sup>99</sup> Since that time it has declined to a point less than two-thirds of its highest level.<sup>100</sup> The present funding level is the lowest since before the Great Society Program in the mid-Sixties.<sup>101</sup> This retreat in funding by the federal government comes at a time of increasing demands to provide more student services.<sup>102</sup> Increased demand coupled with decreasing federal support exacerbates local districts' financial problems.

#### D. Education as a Fundamental Right Under the Federal Constitution

Inequities in property taxes and the distribution of state funds for public education in Texas prompted one parent, Demetrio Rodriguez, to file a class action suit in the summer of 1968.<sup>103</sup> This case eventually reached the United States Supreme Court.<sup>104</sup> In *San Antonio Independent School District v. Rodriguez*,<sup>105</sup> the Court held that variations in school district resources due to differing property values did not rate constitutional protection.<sup>106</sup> This

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97. See, e.g., *id.* at app. one 428 (funding based on school age-population); How a State or Local Education Agency Obtains Funds, 34 C.F.R. § 298.7 (1991) (funding allocations based on the concentration of low-income families).

98. E.g., BUDGET FISCAL YEAR 1993, *supra* note 94, at app. one 428 (programs to create magnet schools or prevent dropouts).

99. DIGEST OF EDUCATION STATISTICS 1990, *supra* note 59, at 147 (9.8% was the exact figure in both the 1978-79 and 1979-80 school years).

100. The present level of federal funding was 6.3% in 1987-88. This is the last year for which statistics are available. *Id.*

101. *Id.* In terms of overall Gross National Product, public school revenues represented between 4.0 and 4.6 percent in the years 1970 through 1977. See U.S. DEPT OF EDUC., 1 THE CONDITION OF EDUCATION 1990, at 168 (1990). However, from the years 1979 through 1987 (the last year for which figures are available), only 3.5 to 3.6 percent of total GNP was spent on schooling. *Id.*

102. Besides the additional revenues that schools must spend to educate and assimilate disabled students into the school community, increased costs are also associated with problems of society as a whole. For example, the public schools are faced with educating a growing number of children born to drug-addicted mothers, schools must create new educational programs to deal with AIDS education, and, finally, schools must deal with educating homeless children. All of these special needs require increased expenditures.

103. PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 283 (1988).

104. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 (1973).

105. 411 U.S. 1 (1973).

106. *Rodriguez* was a 5-4 decision. The majority summarized its findings as follows:

ruling forced future plaintiffs alleging unequal educational opportunity into state court.<sup>107</sup>

Three of Demetrio Rodriguez' four sons attended the Edgewood Elementary School.<sup>108</sup> The school building was deteriorating, its classrooms lacked basic supplies, and almost half of its teachers were uncertified and teaching with emergency permits.<sup>109</sup> Ninety percent of the school district population was Mexican-American; the majority of the remainder was African-American.<sup>110</sup> In contrast, the nearby Alamo Heights District's school population was only 18 percent Mexican-American and less than one percent African-American.<sup>111</sup>

The Edgewood School District had the highest property tax assessment rate in the San Antonio metropolitan area — \$1.05 per \$100 of assessed property.<sup>112</sup> Despite this high rate of taxation, it could raise only \$26 per pupil.<sup>113</sup> In contrast, Alamo Heights raised \$333 per pupil with a property tax rate of only \$.85 per \$100 of assessed property value.<sup>114</sup> In addition, the state's educational assistance program, designed to equalize school district expenditure levels,<sup>115</sup> actually contributed more money to Alamo Heights than to Edgewood.<sup>116</sup>

The Court held that differences based on wealth did not raise a significant constitutional question.<sup>117</sup> First it concluded that

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[T]o the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. . . . The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies this standard.

*Rodriguez*, 411 U.S. at 54-55 (citation omitted). Justice Stewart joined the majority opinion and judgment despite believing that the Texas system created an educational system that was "chaotic and unjust." *Id.* at 59 (Stewart, J., concurring).

107. Despite the ruling in *Rodriguez*, the battle over the constitutionality of educational funding in Texas continued in state courts. Eventually, the Texas Supreme Court ruled that the state's finance scheme violated the Texas State Constitution. *See Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

108. IRONS, *supra* note 103, at 283.

109. *Id.*

110. *Rodriguez*, 411 U.S. at 12.

111. *Id.* at 12-13.

112. *Id.* at 12.

113. *Id.* The average assessed property value per pupil was only \$5,960.

114. *Id.* at 13. The average assessed property value exceeded \$49,000 per pupil.

115. *Id.* at 10.

116. *Id.* at 12-13. The state contributed \$222 per pupil in Edgewood, but \$225 per pupil in Alamo Heights. *Id.* Federal funding assistance in contrast supplied \$108 per pupil in Edgewood, but contributed only \$36 per pupil to Alamo Heights. *Id.*

117. *Id.* at 23-24 ("at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages"). The Court went

wealth is not a suspect class and therefore the Texas educational financing system did not operate to the disadvantage of a suspect class.<sup>118</sup> Next, the Court held that education was not a fundamental right.<sup>119</sup> Because it is not a fundamental right,<sup>120</sup> "strict scrutiny" did not apply.<sup>121</sup> Finally, the Court concluded that the Texas financing system passed "rational basis" review because it furthered legitimate, articulated state purposes and therefore it did not constitute invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>122</sup>

### III. State Approaches to School Financing

Because *Rodriguez* precludes a federal constitutional remedy, unequal school funding has become a state concern. In contrast to the Federal Constitution every state constitution mentions education in some way.<sup>123</sup> Many states define education as a fundamen-

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on to state that no system can assure "equal quality of education except in the most relative sense." *Id.* at 24.

118. *See id.* at 18-29.

119. *Id.* at 35.

120. *See id.* at 35-37. The Court explained its holding as follows:

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.

*Id.* at 35.

121. *See id.* at 37-44. Strict scrutiny is the standard of review for fundamental rights. *See* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW § 11.7 (1986). The "strict scrutiny" standard requires the government to prove that it has a compelling government interest to uphold the challenged law. *Id.* at § 11.4. In the absence of a compelling government interest, either a rational basis test or an intermediate test applies to challenged government action. *Id.*

122. *See Rodriguez*, 411 U.S. at 47-55. The Court summarized its holding by stating that "to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory." *Id.* at 54-55.

123. *Pauley v. Kelly*, 255 S.E.2d 859, 865 & n.10 (W.Va. 1979). Some state constitutions say that public schools may or shall be established, while others require the legislature to provide for public school systems of a particular quality. *Id.* at 865. For example, the Michigan Constitution provides that "[r]eligion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." MICH. CONST. art. VIII, § 1 (emphasis added). The Wisconsin Constitution provides that "[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable." WIS. CONST. article X, § 3 (emphasis added). In contrast, the Minnesota Constitution provides that "it is the duty of the legislature to establish a general and uniform system of public schools." MINN. CONST. art. XIII, § 1 (emphasis added). It also requires that the system be "thorough and efficient." *Id.*



tal right.<sup>124</sup> These rulings depend on an analysis of the provision's language and history of state constitutional conventions.<sup>125</sup>

The majority of states are grappling with the constitutionality of their school financing schemes. Fifteen state appellate courts have upheld the constitutionality of their school financing systems,<sup>126</sup> and eleven have declared their state's systems unconstitutional.<sup>127</sup> Law suits are pending in nineteen other

124. See *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1976) ("in Connecticut, elementary and secondary education is a fundamental right"); *Rose v. Council For Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) ("A child's right to an adequate education is a fundamental one under our Constitution."); *Skeen v. Minnesota*, No. C7-88-1954, slip op. at 145 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992) ("Education is a fundamental right under the Minnesota Constitution."); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W.Va. 1979) ("education is a fundamental constitutional right in this State"); *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wis. 1989) ("equal opportunity for education" is a fundamental right").

Montana found that its constitution "guaranteed equality of educational opportunity" and ruled that its finance system violated the state constitution without reaching the question of whether education is a fundamental right. *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 689-91 (Mont. 1989).

But see, *East Jackson Schools v. State*, 348 N.W.2d 303, 305 (Mich. Ct. App. 1984) ("Education is not a fundamental right under Michigan's Constitution.").

125. See, e.g., *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393-98 (Tex. 1989); *Skeen v. Minnesota*, No. C7-88-1954, slip op. at 161-68 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992); *Kukor v. Grover*, 436 N.W.2d 568, 574-78 (Wis. 1989).

126. Arizona, see *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973).

Colorado, see *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1011 (Colo. 1982).

Georgia, see *McDaniel v. Thomas*, 285 S.E.2d 156, 168 (Ga. 1981).

Idaho, see *Thompson v. Engelking*, 537 P.2d 635, 636 (Idaho 1975).

Illinois, see *People of Ill. ex rel. Jones v. Adams*, 350 N.E.2d 767 (Ill. App. Ct. 1976).

Maryland, see *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 780 (Md. 1983).

Michigan, see *Milliken v. Green*, 212 N.W.2d 711, 721 (Mich. 1973).

New York, see *Board of Educ. Levittown Union Free School Dist. v. Nyquist*, 439 N.E.2d 359, 361 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1139 (1983).

Ohio, see *Board of Educ. of City Sch. Dist. of City of Cincinnati v. Walter*, 390 N.E.2d 813, 822 (Ohio 1979).

Oklahoma, see *Fair Sch. Finance Council of Okla., Inc. v. Oklahoma*, 746 P.2d 1135, 1137 (Okla. 1987).

Oregon, see *Olsen v. State*, 554 P.2d 139, 149 (Or. 1976).

Pennsylvania, see *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979).

South Carolina, see *Richland County v. Campbell*, 364 S.E.2d 470, 472 (S.C. 1988).

Tennessee, see *Tennessee Small Sch. Systems v. McWhorter*, 1992 WL 119824 (Tenn. App. June 5, 1992) (reversing a district court partial final declaratory judgment finding the Tennessee system unconstitutional).

Wisconsin, see *Kukor v. Grover*, 436 N.W.2d 568, 570-85, (Wis. 1989), *reh'g denied*, 443 N.W.2d 314 (1989).

127. In addition to the district court decision in Minnesota, *Skeen v. Minnesota*, No. C7-88-1954, slip op. at 147-48 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *cer-*

states,<sup>128</sup> including several which are hearing constitutional challenges for a second time.

The Minnesota school finance scheme provides a good example of the battle over school financing.<sup>129</sup> *Skeen v. Minne-*

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*tification and request granted*, No. C5-92-677 (Minn. May 1, 1992), the following state appellate courts have ruled that their funding schemes are unconstitutional:

Arkansas, *see* Dupree v. Alma Sch. Dist. No. 30 of Crawford County, 651 S.W.2d 90, 91 (Ark. 1983) (affirming trial court's finding that the state's financing system violated that state's constitutional provisions requiring equal protection and those requiring the establishment of "a general, suitable and efficient system of education.").

California, *see* Serrano v. Priest, 557 P.2d 929, 958 (Cal. 1977), *cert. denied and opinion supplemented by* 569 P.2d 1303 (1977).

Connecticut, *see* Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1976) ("the state system of financing public elementary and secondary education as it presently exists and operates cannot pass the test of 'strict judicial scrutiny' as to its constitutionality").

Kentucky, *see* Rose v. Council for Better Educ., 790 S.W.2d 186, 215 (Ky. 1989).

Montana, *see* Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989) ("spending disparities among the State's school districts translate into a denial of equality of educational opportunity" in violation of the Montana Constitution).

New Jersey, *see* Abbott v. Burke, 575 A.2d 359, 563 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273, 297-98 (N.J. 1973).

Texas, *see* Edgewood Indep. Sch. Dist. v. Kirby (*Kirby I*), 777 S.W.2d, 391, 398 (Tex. 1989) ("the school financing system violates the Texas Constitution's 'efficiency' provision"). *See also* Edgewood Indep. Sch. Dist. v. Kirby (*Kirby II*), 804 S.W.2d 491, 492-93 (Tex. 1991) (holding that the Texas school financing system still violates the state constitution despite legislative modification following *Kirby I*).

Washington, *see* Seattle Sch. Dist. No. 7 of King County v. State, 585 P.2d 71, 85-104 (Wash. 1978).

West Virginia, *see* Pauley v. Kelly, 255 S.E.2d 859, 878 (W.Va. 1979) ("Because education is a fundamental constitutional right in this State, then, under our equal protection guarantees any discriminatory classification found in the educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification.") (citations omitted).

Wyoming, *see* Washakie Sch. Dist. v. Herschler, 606 P.2d 310, 315 (Wyo. 1980), *cert. denied*, Hot Springs County Sch. Dist. No. One v. Washakie County Sch. Dist. No. One, 449 U.S. 824 (1980).

128. The states with pending law suits are: Alabama, Alaska, California, Idaho, Illinois, Indiana, Kansas, Massachusetts, Michigan, Missouri, Nebraska, New York, North Dakota, Ohio, Oklahoma, Oregon and Pennsylvania. *Skeen v. Minnesota*, No. C7-88-1954, slip op. at 152 (Minn. Dist. Ct. Wright County Dec. 17, 1991) *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992). In addition, suits are also pending presently in New Hampshire, Fox Butterfield, *In New Hampshire, Needy Schools Test a Tradition: Little State Aid*, N.Y. TIMES, Jan. 2, 1992, at A1, col. 1, and New Jersey, Joseph F. Sullivan, *Fight on Trenton Aid to Poor School Districts Goes to Court, Again*, N.Y. TIMES, July 9, 1992, at B8, col. 1. The New Jersey Supreme Court had previously declared the state system unconstitutional, *see supra* note 127 and accompanying text.

129. One fact that distinguishes the Minnesota suit from similar suits in other states is the fact that the largest inner-city metropolitan school districts, Minneapolis, St. Paul and Duluth, did not enter the suit on either side. *Skeen*, No. C7-88-1954, slip op. at 8-9. In addition, almost no small rural school districts entered the suit on either side. *Id.* at 9. The plaintiffs in this case represented 52 school districts generally located in the outer-ring suburbs and/or rural areas. These districts

*sota*<sup>130</sup> is a case of first impression in Minnesota.<sup>131</sup> In December, 1991, after a lengthy trial, a district court judge declared the Minnesota scheme unconstitutional.<sup>132</sup> Specifically, the court found that the "referendum levy,<sup>133</sup> supplemental revenue<sup>134</sup> and debt service levy<sup>135</sup> components of the Minnesota school finance system" violate the equal protection guarantees<sup>136</sup> and the Education Clause of the Minnesota Constitution.<sup>137</sup>

comprise approximately one-quarter of all kindergarten through twelfth grade students in the state. *Id.* at 5-6. Twenty-four school districts entered the case as intervenor defendants. These districts are generally located in the "inner-ring and second tier suburbs," and represent approximately 17% of kindergarten through twelfth grade enrollment. *Id.*

While suits in other states tend to have racial overtones as a background concern (generally minority inner-city districts versus white suburban districts), in *Skeen*, the absence of the more racially and ethnically diverse city school districts as litigants removes this backdrop. The Minnesota litigation is one purely of local property wealth and the legal consequences that such differences make.

130. No. C7-88-1954, slip op. (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992).

131. In 1971, the Minnesota system of financing public elementary and secondary education was found to violate the equal protection guarantees of the Fourteenth Amendment of the U.S. Constitution. *See Van Dusartz v. Hatfield*, 334 F. Supp. 870, 877 (D. Minn. 1971). The court found that:

The level of spending for publicly financed education in Minnesota is profoundly affected by the wealth of each school district. Children living in districts poorer than the richest are proportionately disadvantaged.

*Id.* at 873. The court made its holding based on a finding that the state's system of financing was a form of wealth discrimination under the Fourteenth Amendment. *See id.* at 874-86. While *Van Dusartz* has never been explicitly overruled or reversed, the United States Supreme Court in its *Rodriguez* decision would seem to control and implicitly overrule the decision. *See discussion supra* part II.D.

132. *Skeen*, No. C7-88-1954, slip op. at 145. The trial before Judge Gary J. Meyer lasted 67 days, and involved the testimony of 35 witnesses and over 450 exhibits. *Id.* at 1. Judge Meyer's opinion itself spans 211 pages.

133. A referendum levy supplements a district's general operating fund. *Id.* at 19. In 1957, the Minnesota legislature established minimum spending levels for all school districts in the state. *Id.* at 22. This "foundation level" of support was based on both state and local taxes. *Id.* Later in 1971, the legislature ended a school board's authority to raise operating funds in excess of the state formula without voter approval (a referendum levy). *Id.* at 23.

134. Supplemental revenue is designed to insure that no district receives a reduction in general education revenues from one year to the next due to changes in the state legislature's allocation formulas. *Id.* at 18.

135. The debt service levy is used to repay bond indebtedness incurred in connection with the construction of buildings and other facilities. *Id.* at 19.

136. *Id.* at 147-48. The *Skeen* court found violations of the equal protection guarantees of Article I, section 2 and Article XIII, section 1. Article I, section 2 of the Minnesota Constitution states that:

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 peers.

MINN. CONST. art. I, § 2.

137. Article XIII, section 1 reads:

The stability of a republican form of government depending mainly

As in other states the district court's decision in *Skeen* was not the end of the battle, but marked the first shot in a long war. The case is currently on appeal to the Minnesota Supreme Court. If the court upholds the district court's decision, the battle will shift to the state legislature. After the legislature acts, the litigants will likely return to the courts to test the constitutionality of the new financing system.<sup>138</sup>

### 1. The Facts in *Skeen*

This article will assume the facts as found by the district judge.<sup>139</sup> The court's first major finding was that, compared to other schools nationwide, Minnesota schools "on balance are very good."<sup>140</sup> The court also found that the poorer school districts "meet or exceed all educational requirements established by the state."<sup>141</sup> The court found, however, that "[c]hildren in very small school districts have an educational disadvantage over children in larger school districts."<sup>142</sup>

The court also found that property wealth differences between districts created disparities in the quality of education Min-

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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.

138. See, e.g., *Edgewood Indep. Sch. Dist. v. Kirby (Kirby I)*, 777 S.W.2d 391 (Tex. 1989); *Edgewood Indep. Sch. Dist. v. Kirby (Kirby II)*, 804 S.W.2d 491 (Tex. 1991). *Kirby* is the continuation of *Rodriguez* in the Texas state court system. In New Jersey the battle has long raged in the court system: see *Abbott v. Burke (Abbott II)*, 575 A.2d 359 (N.J. 1990); *Abbott v. Burke (Abbott I)*, 495 A.2d 376 (N.J. 1985), and *Robinson v. Cahill (Robinson VI)*, 358 A.2d 457 (N.J. 1976); *Robinson v. Cahill (Robinson V)*, 355 A.2d 129 (N.J. 1976); *Robinson v. Cahill (Robinson IV)*, 351 A.2d 713 (N.J. 1975); *Robinson v. Cahill (Robinson I)*, 303 A.2d 273 (N.J. 1973) *cert. denied sub nom. Dickey v. Robinson*, 414 U.S. 976 (1973). A third suit continuing the earlier litigation (*Abbott v. Burke*) was recently filed in New Jersey. Sullivan, *supra* note 128, at B8, col. 1.

139. This assumption is consistent with the appellate standard of review in Minnesota. See *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990) ("The scope of review in a case tried by the court without a jury is limited to determining whether the court's findings are clearly erroneous and whether it erred in its conclusions of law.").

The *Skeen* court made 409 separate findings of facts. These findings stretched over 140 pages, and are summarized in four and a half pages. *Skeen v. Minnesota*, No. C7-88-1954, slip op. at 1-145 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992).

140. *Id.* at 141. In fact, Minnesota's high school graduation rate is the highest in the nation (90.9%). *Id.* at 25. Minnesota's rate compares to a national average of only 75%. *Id.*

141. *Id.* at 141.

142. *Id.* at 142.

nesota children received.<sup>143</sup> Greater revenues allowed wealthier districts to provide greater educational resources, and these greater resources "produced greater educational effectiveness and educational opportunity."<sup>144</sup> Specifically, the court found that these wealth disparities created significant differences in pupil-staff ratios<sup>145</sup> and that these ratios "contribute significantly to the education received by Minnesota children."<sup>146</sup> The differences were so great that certain poorer school districts would require over 100 additional staff members to have the same pupil-staff ratios as the wealthier school districts.<sup>147</sup> The court also found significant differences in the staffs' experience, development, and salaries.<sup>148</sup> Finally the court found wealthier districts had advantages in curricula, summer schools, advanced placement programs, gifted and talented programs, access to computers, and extracurricular activities.<sup>149</sup> These advantages furnished students in wealthier districts with a "superior education."<sup>150</sup> The court concluded that property wealth disparities "placed children in low wealth districts at an unequal footing with children in high wealth districts."<sup>151</sup>

The court found wide variations in property wealth per pupil between school districts.<sup>152</sup> For example, Elk River and Edina, two school districts of approximately equal size in the greater Twin Cities metropolitan area,<sup>153</sup> have tax capaci-

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143. *See id.* at 144.

144. *Id.* at 193 (citing a study by Dr. Van E. Mueller, a professor in the Department of Education Policy and Administration at the University of Minnesota).

145. *Id.* at 144. Pupil to professional staff ratios vary from 13.8:1 in St. Anthony-New Brighton to 17.2:1 in Rosemount. *Id.* at 103-05.

146. *Id.* at 144.

147. *Id.* at 103-05. In fact, Rosemount (17.2:1) would need 108 new staff members to bring its pupil/staff ratio equal to that of Bloomington (15.6:1).

148. *Id.* at 144.

149. *Id.* Other states have reached similar conclusions. *See, e.g.,* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393-94 (Tex. 1989); Abbott v. Burke, 575 A.2d 359, 395-97 (N.J. 1990).

150. *Skeen*, No. C7-88-1954, slip op. at 93 (increased input variables "contribute to the high wealth districts' furnishing a superior education to Minnesota students than low wealth districts."). The *Skeen* court did realize that greater resources "do not always and invariably produce superior opportunity for children, since resources must be wisely employed to produce effective results." *Id.* at 95. Based on a study by Dr. Van E. Mueller, a professor in the Department of Education Policy and Administration at the University of Minnesota, however, the court found that high wealth districts provide "greater educational opportunity" than low wealth districts. *Id.* at 96.

151. *Id.* at 144.

152. *Id.* at 141. The Minnesota data of school district wealth disparity is comparable with that from other states. *See, e.g.,* Abbott, 575 A.2d at 388.

153. *Skeen*, No. C7-88-1954, slip op. at 113 (in 1990-91 Elk River had 6,973 students and Edina had 6,436).

ties<sup>154</sup> per pupil of \$2,395 and \$10,879, respectively.<sup>155</sup> These differences resulted in operating expenses of \$3,066 per pupil in Elk River compared with \$4,448 per pupil in Edina,<sup>156</sup> a difference of \$1,382, or 45%.<sup>157</sup> This translated into differences in staff ratios, programs for the gifted, summer schools, libraries, counseling services, building cleanliness and even school accreditation.<sup>158</sup>

The *Skeen* court concluded that property-wealth variations created significant inequalities between districts which were not the result of "tax effort" by the districts, but were a "function of wealth."<sup>159</sup> Specifically, court found that the referendum levy<sup>160</sup> was "an inefficient and non-uniform use of revenue" as it related to students in very small districts.<sup>161</sup> The court concluded that "Minnesota's school finance system has created an unconstitutional wealth-based classification in its effect on certain school districts."<sup>162</sup>

## 2. The Issues

The Minnesota Constitution has a section dedicated specifically to education. This provides:

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.<sup>163</sup>

Interpreting the state constitution, the Minnesota Supreme Court has held that the state legislature possesses "almost unlimited

154. See *supra* note 88 and accompanying text (defining tax capacity).

155. *Skeen*, No. C7-88-1954, slip op. at 66-67.

156. *Id.* at 118. In addition, while Elk River had debt service of \$370 per pupil, Edina had no debt service. *Id.*

157. *Id.*

158. See *id.* at 113-16. Two of Elk River's schools lost their North Central Association accreditation, at least in part due to the consequences of insufficient funding. *Id.* at 115. Specific faults related to money included oversized kindergarten classes, insufficient library hours, and a lack of adequate administrators given the schools' sizes. *Id.*

159. *Id.* at 141. In Minnesota, this wealth based difference has affected schooling for at least the past 20 years. See *Van Dusartz v. Hatfield*, 334 F. Supp. 870, 873 (D. Minn. 1971) ("The level of spending for publicly financed education in Minnesota is profoundly affected by the wealth of each school district. Children living in districts poorer than the richest district are proportionately disadvantaged.").

160. School districts use the referendum levy to supplement their general operating funds. *Skeen*, No. C7-88-1954, slip op. at 19.

161. *Id.* at 142.

162. *Id.*

163. MINN. CONST. art. XIII, § 1 (emphasis added).

power over all matters relating to public schools."<sup>164</sup> Therefore, in Minnesota the maintenance of public schools is a matter of state, not local, concern.<sup>165</sup>

The two key phrases in the Education Clause require establishment of both a "general and uniform system of public schools" and a system that is "thorough and efficient."<sup>166</sup> To find the meaning of these phrases, other state appellate courts have turned to dictionaries, constitutional conventions and each other for guidance.<sup>167</sup>

### 3. The Court's Analysis

After dealing with preliminary questions of standing,<sup>168</sup> the court constructed the meaning of the Education Clause.<sup>169</sup> The court first examined the "general and uniform" clause. Looking at the original constitutional debates, the court concluded that the clause "was to assure that both the rural, city and township areas were to receive equal benefits."<sup>170</sup> The court found that Minnesota courts have not interpreted this clause to require absolute uniformity.<sup>171</sup> It defined the state's duty to create uniform schools to include a "duty to assure equal access to resources for similarly situated school districts."<sup>172</sup> The court held that the school financing system violated the Education Clause of the Minnesota

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164. See *Board of Educ. v. Houghton*, 233 N.W. 834, 835 (Minn. 1930).

165. *Id.*

166. See MINN. CONST. art. XIII, § 1.

167. See, e.g., *Skeen v. Minnesota*, No. C7-88-1954, slip op. at 159-72 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992); *Pauley v. Kelly*, 255 S.E.2d 859, 874-77 (W. Va. 1979).

168. See *Skeen*, No. C7-88-1954, slip op. at 158-161. The court addressed both the validity of the standing of the plaintiff and also whether or not the issue in contention constituted a political question.

169. *Id.* at 161-72.

170. *Id.* at 164. The *Skeen* court cited an interesting statement from the Republican debate over the state constitution which addressed the very issue now being debated again.

In one town say the school section is worth \$100 per acre. That would be a great fund for that town. In another town adjoining, it may so happen that the school section is worth but the government price - \$1.25 per acre. Now those towns may be just as populous, and everyone admits that education is not a local, but a general benefit. It is the benefit of our county that the children of another county should be educated. Now I submit if that would be just? One county might have a revenue of \$50,000, while another would have a small revenue of \$2,000. I ask if that is just and equitable.

*Id.* at 163 (quoting DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE TERRITORY OF MINNESOTA 242 (T. Andrews ed. 1858)).

171. *Id.* at 160 (citing *Curryer v. Merrill*, 25 Minn. 1, 6 (1878)).

172. *Id.* at 146.

Constitution.<sup>173</sup>

The court then conducted an equal protection analysis.<sup>174</sup> The court first held that education was a fundamental right<sup>175</sup> under the Minnesota Constitution.<sup>176</sup> The court then examined the relationship between wealth and equal protection.<sup>177</sup> The court found that the Minnesota Constitution's provision for "uniform" schools supported a finding that wealth is a suspect class. The court found that Minnesota's finance system is not uniform and discriminates among school districts based on wealth. Finally, it concluded that the Minnesota Constitution does not recognize local control of schools and that the maintenance of public schools is a state concern.<sup>178</sup>

The court rejected a constitutional standard that would mean "minimal adequacy for some children and exceptional instruction for others."<sup>179</sup> Rather, the state was required to establish a system that was "equally effective for all children."<sup>180a</sup> Finally, it held that constitutional uniformity must be measured by inputs or resources<sup>181</sup> available and not by outcomes achieved.<sup>182</sup>

#### 4. Analyzing the *Skeen* opinion with reference to other states

Because *Skeen* is a case of first impression it is useful to analyze the issue with reference to the other states as well as preexisting Minnesota state law.

##### a. *General and Uniform*

The Minnesota Constitution's "general and uniform" clause

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173. *Id.* at 172.

174. *Id.* at 172-88.

175. *Id.* at 175-83.

176. *Id.* at 172-73 ("This Court holds that the Minnesota Constitution, Equal Protection Clause, Article I, Section 2, and the Education Clause, Article XIII, Section 1, guarantee its citizens a fundamental right to an education, and that the Minnesota Constitution thereby provides for broader guarantees than the federal constitution in the area of education.").

177. *Id.* at 183-85.

178. *Id.* at 185-86.

179. *Id.* at 192.

180. *Id.* at 192.

181. *Id.* at 192. By inputs or resources, the court meant teachers, textbooks, facilities and curricula.

182. See *id.* at 192-95. An outcome-based system would measure equal opportunity by measuring student performance in terms of standardized tests. *Id.* at 194. The court stated that "[r]educing the sum of outputs to the accomplishment of a few achievement tests would also be grossly unfair to educators and pupils, for education must extend far beyond the limits of verbal facility and mathematical proficiency." *Id.* at 195 (citing *Miliken v. Green*, 212 N.W. 711, 716 (Mich. 1973)).



requires that the legislature establish schools and that there be some parity between these schools.<sup>183</sup> As interpreted, this parity does not rise to the level of cloned replication. For example, the Minnesota Supreme Court has ruled that school districts need not have identical text books.<sup>184</sup> Still, the legislature could require this type of uniformity by using its plenary power over schools.<sup>185</sup>

Several other state courts have defined the requirements of a system of uniform education.<sup>186</sup> Five other states have clauses in their constitutions requiring the establishment of a "general and uniform" system of public schools.<sup>187</sup> Of these, only the North Carolina Constitution's "general and uniform" provision specifically requires that "equal opportunities" be provided to all students.<sup>188</sup> The Kentucky Supreme Court defined uniformity in terms of inputs, when it required that every district have a "substantially uniform system and equal facilities."<sup>189</sup>

#### *b. Thorough and Efficient*

Minnesota's educational system should be examined against the goals of the state constitution's authors to determine whether it is constitutionally "thorough and efficient".<sup>190</sup> The creators of the Minnesota Constitution thought the stability of a "republican form of government"<sup>191</sup> was dependent "upon the intelligence of the people,"<sup>192</sup> which was to be maintained by "a general and uniform system of public schools."<sup>193</sup>

Seven other states also have "thorough and efficient" clauses in their state constitutions.<sup>194</sup> West Virginia defines a "thorough

183. MINN. CONST. art. XIII, § 1 ("it is the *duty* of the legislature to establish a general and uniform system of public schools") (emphasis added).

184. *Cf. Curryer v. Merrill*, 25 Minn. 1, 4 (1878).

185. *See Melby v. Hellie*, 80 N.W.2d 849, 852 (Minn. 1957) ("Our Constitution has vested the legislature with plenary power as to the manner of establishing a system of schools.") (citing *Board of Educ. v. Erickson*, 295 N.W. 302 (Minn. 1940)).

186. *See, e.g., Kukor v. Grover*, 436 N.W.2d 568, 574-78 (Wis. 1989); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 207 (Ky. 1989).

187. *See, ARIZ. CONST. art. XI, § 1; IND. CONST. art. VIII, § 1; N.C. CONST. art. IX, § 2; S.D. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2.*

188. N.C. CONST. art. IX, § 2.

189. *See Rose v. Council For Better Educ., Inc.*, 790 S.W.2d 186, 207 (Ky. 1989) (quoting *Wooley v. Spalding*, 293 S.W.2d 563, 565 (Ky. 1956)).

190. *See Skeen v. Minnesota*, No. C7-88-1954, slip op. at 165-66 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992).

191. MINN. CONST. art. XIII, § 1.

192. *Id.*

193. *Id.*

194. *See MD. CONST. art. VIII, § 1; N.J. CONST. art. VIII, § 4, para. 1; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; S.D. CONST. art. VIII, § 15; W. VA. CONST. art. XII, § 1; WYO. CONST. art. VII, § 9.*

and efficient" system as one that develops "the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."<sup>195</sup> New Jersey also defines "thorough and efficient" in terms of citizenship qualifications and the ability to obtain gainful employment,<sup>196</sup> noting that this required that "something more" be added to the education in poorer districts.<sup>197</sup> The New Jersey Supreme Court defined the word "thorough" to include "completeness and attention to detail."<sup>198</sup> The court held that a thorough education must provide more than an adequate or minimal education.<sup>199</sup>

Some states define the term efficient in terms of equality. The Kentucky Constitution requires that the legislature "provide for an efficient system of common schools."<sup>200</sup> The Kentucky Supreme court interpreted this provision to require that schools be "efficient, equal and substantially uniform."<sup>201</sup> The Texas Supreme Court held that an efficient system has to distribute education funds "equitably and evenly."<sup>202</sup>

### c. *Equal Protection*

The Equal Protection Clause of a state's constitution may require an educational system of equivalent funding per pupil. Equal protection requires that a state distribute government benefits rationally and fairly.<sup>203</sup> Interpreting its own Equal Protection Clause, the Arkansas Supreme Court stated:

For some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution. Bare and minimal sufficiency does not translate into equal educational opportunity. 'Equal protection is not addressed to minimal sufficiency but rather to the unjustifiable inequalities of state action.'<sup>204</sup>

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195. See *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979).

196. See *Abbott v. Burke*, 575 A.2d 359, 403 (N.J. 1990).

197. *Id.*

198. *Pauley*, 255 S.E.2d at 875.

199. *Id.*

200. See KY. CONST. § 183.

201. See *Rose v. Council For Better Educ., Inc.*, 790 S.W.2d 186, 208 (Ky. 1989).

202. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989).

203. See *McDermott & Klein, supra* note 9, at 432 ("Under the equal protection clause, the concern is whether government treats people equally, not with making people equal and not with equality of results emanating from a distributed benefit, for the latter may be beyond the capacity and power of governments and schools to control.").

204. *Dupree v. Alma Sch. Dist. No. 30 of Crawford County*, 651 S.W.2d 90, 93 (Ark. 1983) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting)).

In *Serrano v. Priest*<sup>205</sup>, the California Supreme Court determined that a funding scheme that "makes the quality of a child's education a function of the wealth of his parents and neighbors" is a form of invidious discrimination in violation of the Equal Protection Clause of the California Constitution.<sup>206</sup> Other courts have echoed the sentiment in *Serrano*. The Arkansas Supreme Court stated that "the educational opportunity of the children in this state should not be controlled by the fortuitous circumstances of residence. . . . Such a system only promotes greater opportunity for the advantaged while diminishing the opportunities for the disadvantaged."<sup>207</sup> The Kentucky Supreme Court held that schools must afford "*equal opportunity for all*,"<sup>208</sup> and explained that "although by accident of birth and residence, a student lives in a poor, financially deprived area, he or she is still entitled to the same educational opportunities that those children in the wealthier districts obtain."<sup>209</sup> Finally, the Kentucky Supreme Court held that

Each child, *every child*, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education. This obligation cannot be shifted to local counties and local school districts.<sup>210</sup>

An equal protection analysis raises the issue of how to define "equality" with respect to education.<sup>211</sup> A system requiring absolute per pupil dollar allocations ignores differences in costs and needs between districts.<sup>212</sup> Furthermore, equal dollar allocations for each school district does not translate to equal educational opportunity for the children in those districts.<sup>213</sup> Therefore, an

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205. *Serrano v. Priest (Serrano I)*, 487 P.2d 1241 (Cal. 1971).

206. *Id.* at 1241.

207. *Dupree*, 651 S.W.2d at 93.

208. *Rose v. Council For Better Educ., Inc.*, 790 S.W.2d 186, 207 (Ky. 1989) (emphasis in the original).

209. *Id.*

210. *Id.* at 211 (emphasis in the original). The *Rose* court then went on to define seven goals that an efficient system of education must provide to each child. *Id.* at 212.

211. "Equity, after all, does not mean simply equal funding. Equal funding for unequal needs is not equality." KOZOL, *supra* note 12, at 54.

212. McDermott & Klein, *supra* note 9, at 417.

213. James Coleman concluded that equal dollar inputs into schools does not mean that the inputs received by the children in those schools are equal. COLEMAN, *supra* note 9, at 138. Coleman illustrated his point:

[A] school board can spend identical amounts on textbooks in two different schools (or two school boards can spend identical amounts in

"equal" funding system must address differences in needs due to varying school populations and conditions.<sup>214</sup>

*d. What About Local Control*

The loss of local control is one of the most frequently noted concerns regarding modification in the use of property taxes as a base for funding local education. For example, though it saw education as a fundamental right, the Wisconsin Supreme Court in *Kukor v. Grover*<sup>215</sup> focused on the importance of local control of education under the Wisconsin Constitution<sup>216</sup> and adopted the *Rodriguez* rational basis approach for its analysis.<sup>217</sup> The court did not believe that defining equality of educational opportunity as a fundamental right "mandates absolute equality in districts' per-pupil expenditures."<sup>218</sup> It concluded that the Wisconsin Constitution prohibited such equalization "to the extent that it would necessar-

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two different systems), so that the inputs as disbursed by school boards are identical. But if the texts depreciate more rapidly, through loss and lack of care, in one school or one system than the other, then the text as received by a given child (say the second year after a new text is issued) constitutes a *lesser* input of educational resources to him than if he were in the other school or other system. . . . As another example, if the expenditures on window glass in a city school in a lower-class neighborhood and a suburban school were equal, the child in the city school would spend much of his time in classrooms with broken windows, while the child in the suburban school would not.

*Id.* (emphasis in the original).

214. See *Skeen v. Minnesota*, No. C7-88-1954, slip op. at 197 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992) ("School districts have special needs and different costs, thus it is very likely that district spending will vary.").

The New Jersey Supreme Court, in crafting a remedy for its state funding scheme required that funding must "be adequate to provide for the special educational needs of these poorer urban districts and address their extreme disadvantages." *Abbott v. Burke*, 575 A.2d 359, 408 (N.J. 1990). Equivalent spending per se would not meet the New Jersey standard as additional aid may be required "for the special educational needs of [poorer] districts in order to *redress their disadvantages*." *Id.* (emphasis added).

The Texas Supreme Court also concluded that in equalizing funding the state may recognize differences in the cost of living in given areas or the cost of providing educational opportunity for disadvantaged students. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989).

215. 436 N.W.2d 568 (Wis. 1989).

216. *Id.* at 580-81 ("The principle of local control in Wisconsin, therefore, is not merely a theoretical notion, but rather is a constitutionally based and protected precept as to which the framers of our constitution were firmly committed."). A comparison to the Wisconsin Constitution enacted in 1848 is important, as the Minnesota Constitution closely resembles it. *Skeen*, No. C7-88-1954, slip op. at 162 (citing WILLIAM ANDERSON & ALBERT J. LOBB, A HISTORY OF THE CONSTITUTION OF MINNESOTA 131 n.46 (1921)).

217. See *Kukor v. Grover*, 436 N.W.2d 568, 580 (Wis. 1989).

218. *Id.* at 579.

ily inhibit local control."<sup>219</sup>

Critics argue that the loss of the ability to raise funds from property taxes would eliminate local school boards' ability to supervise and control the educational systems in their communities.<sup>220</sup> Nevertheless, local control over schools is not necessarily sacrificed by creating equality in state school financing systems.<sup>221</sup>

Local control over schools in poor districts has been called a "cruel illusion" due to the inability of those districts to raise money for their schools.<sup>222</sup> The state ultimately controls the boards' abilities to raise money.<sup>223</sup> Because of limited tax rolls, many boards simply cannot tax themselves at the levels necessary to achieve educational excellence. The California Supreme Court pointed out that property tax funding rather than promoting fiscal choice, actually deprived less wealthy districts of options.<sup>224</sup> The Texas Supreme Court elaborated on that principle:

An efficient system does not preclude the ability of communities to exercise local control over the education of their children. It requires only that the funds available for education be distributed equitably and evenly. An efficient system will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives that are not

219. *Id.*

220. See, e.g., *Skeen*, No. C7-88-1954 slip op. at 185.

Jonathan Kozol argues that the elements under "local control" are far less than might be expected:

The local board does not control the manufacture of the textbooks that its students use. It does not govern teacher preparation or certification. It does not govern political allegiance. It does not govern the exams that measure math and reading. It does not govern the exams that will determine or prohibit university admission. It does not even really govern architecture. . . .

What the local board *does* determine is how clean those floors will be; how well the principal and teachers will be paid; whether the classroom will be adequately heated; whether a class of 18 children will have 18 textbooks or whether . . . a class of 30 children will be asked to share the use of 15 books, whether the library is stocked with up-to-date encyclopedias, computers, novels, poetry, and dictionaries or whether it's used instead for makeshift classrooms, as in New York City, whether the auditorium is well equipped for real theatrical productions or whether, as in [a nearby suburb], it must be used instead to house 11 classes, whether the gymnasium is suitable for indoor games or whether it is used for reading rooms, whether the playground is equipped with jungle gyms and has green grass for soccer games and baseball or whether it is a bleak expanse of asphalt studded with cracked glass.

KOZOL, *supra* note 12, at 212-13.

221. *Dupree v. Alma Sch. Dist. No. 30 of Crawford County*, 651 S.W.2d 90, 93 (Ark. 1983).

222. See *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 948 (Cal. 1976).

223. *Abbott v. Burke*, 575 A.2d 359, 403 (N.J. 1990). Many states cap the amount of property tax rate that can be imposed by local authorities.

224. See *Serrano II*, 557 P.2d at 948.

now available to them. Only if alternatives are indeed available can a community exercise the control of making choices.<sup>225</sup>

#### IV. Solutions

##### A. National Solutions

The *Rodriguez* decision prevents the federal judiciary from setting minimum national education standards.<sup>226</sup> Therefore, any attempt to find a national solution to the educational inequalities must focus on the Congress.

If education is truly a national priority, and not just a subject for rhetorical argument, then the need for a national educational policy is clear.<sup>227</sup> The nation cannot remain competitive if some states maintain a system of equal opportunity for the next generation while other states allow gross inequalities. To maintain the nation's competitive edge, Congress could choose to extend the right to equality of educational opportunity to all by statute.<sup>228</sup>

If Congress chooses this method, it should avoid a solution based on per-pupil expenditure levels. Because of the vast differences in costs and needs from district to district such an approach is doomed to fail to resolve the problems of educational inequality.<sup>229</sup> Instead, Congress should seek a solution based on input factors other than money.<sup>230</sup> An input oriented policy would undoubtedly require greater expenditures in some districts, and greater state and federal support for those districts.<sup>231</sup>

Congress should mandate a national policy which maintains local autonomy, yet provides a safety net for children abandoned by state and local governments. One way to achieve these two goals would be to mandate maximum student-teacher ratios at different grade levels.<sup>232</sup> Congress could also guarantee every child

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225. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989).

226. See *supra* part II.D.

227. See BEYOND RHETORIC, *supra* note 1, at 177-79.

228. NOWAK, ROTUNDA, YOUNG, *supra* note 121, at § 14.45. Such Congressional action may raise a federalism concern. However, even if such a statute were to pass, there remains great room for both local control and innovation in schooling. The proposal set forth below, while arguing for congressionally set input variables, allows local school boards total freedom choosing both the methodology and substance of education within schools.

229. See *supra* notes 215-19 and accompanying text.

230. Imposing an input standard would be in line with the earlier cases that struck down separate-but-equal schools. In those cases, courts used inputs as the standard of equality in comparing separate schools for African-Americans with facilities available to whites. See *McDermott & Klein*, *supra* note 9, at 420.

231. See *supra* notes 222-24 and accompanying text.

232. In Chapter I programs aimed at helping disadvantaged students, Congress

the right to a textbook and minimum sanitary conditions in his or her school.<sup>233</sup> Finally, Congress might mandate the availability of in-school libraries,<sup>234</sup> computer instruction, foreign languages, the arts, music, and sports, and a variety of classes and activities such as are available at most of the "better" school districts in the country.<sup>235</sup> Such changes could insure that every child in the country would have the opportunity to receive a quality education regardless of his or her parents' residences.

### B. State Solutions

Until Congress enacts a national policy, state legislatures should assume the duties of financing local schools.<sup>236</sup> As the Arkansas Supreme Court stated:

When a district falls short of the constitutional requirements whatever the reason for the violation, the obligation is the state's to rectify it. If local government fails, the state government must compel it to act, and if the local government cannot carry the burden, the state must itself meet its continuing obligation.<sup>237</sup>

While a complete shift from local funding from property taxes to state funding may seem radical, it merely accelerates the historical trend.<sup>238</sup> The state already controls local school districts' ability to raise funds for education.<sup>239</sup>

The Minnesota Supreme Court should affirm the district court's decision in *Skeen*. The Minnesota Constitution's Education Clause grants an unusually broad guarantee of the right to educa-

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has mandated a 25 to 1 ratio. Congress may also seek to mandate a maximum student-guidance counselor ratio. The New Jersey Supreme Court has observed that adequate guidance counseling could provide children in poorer districts with special assistance and individual attention. *Abbott v. Burke*, 575 A.2d 359, 402 (N.J. 1990). The Court thought that such counseling services in the schools could help solve problems associated with teen pregnancies, drug abuse and crime. *Id.*

233. See generally KOZOL, *supra* note 12, at 86-87 for examples of where even these basics are not provided today to every child in public schools.

234. Cf. *Abbott v. Burke*, 575 A.2d 359, 402 (N.J. 1990) ("Many students in poorer urban districts do not have books at home. These students need adequate libraries and media centers.").

235. See, e.g., KOZOL, *supra* note 12, at 63-66, 163-65.

236. "[T]he state, by requiring attendance but refusing to require equity, effectively requires inequality. Compulsory inequality, perpetuated by state law, too frequently condemns our children to unequal lives." *Id.* at 56.

237. *Dupree v. Alma Sch. Dist. No. 30 of Crawford County*, 651 S.W.2d 90, 95 (Ark. 1983) (quoting *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973)).

238. See *supra* part II.C.1.

239. See *Leroy v. Special Indep. Sch. Dist. No. 1 of Minneapolis*, 172 N.W.2d 764, 768 (Minn. 1969). Over the years, states have moved towards greater regulatory control of schooling. *Skeen v. Minnesota*, No. C7-88-1954 slip op. at 21 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992).

tion.<sup>240</sup> It provides for a system that is both "general and uniform" and "thorough and efficient."<sup>241</sup> The Minnesota Constitution makes it the state's duty to provide education to children. The district court found that Minnesota children receive unequal educational opportunities based upon their parents' residence.<sup>242</sup> This inequality can be changed only by modifying the present financing system.

The Minnesota Equal Protection Clauses also provide grounds for affirming *Skeen*. Because education is a state concern and the Minnesota Constitution confers a *duty* on the legislature to provide an education to the state's citizens,<sup>243</sup> there must be a clear and compelling reason for legislation which provides unequal educational opportunities.<sup>244</sup> No clear or compelling reason is apparent. The present system cannot be justified as rationally related to student needs. The inequities in Minnesota education caused by the variation in property wealth are therefore unconstitutional and cannot remain.

New social and economic circumstances require that the Minnesota legislature reexamine school financing. In earlier days commerce was more locally dependent and employees lived in relatively close proximity to their places of employment.<sup>245</sup> The level of education in one town was not likely to have a large impact on the economic health of another town. But the health of a state in a global economy is dependent on the quality of education in local regions.<sup>246</sup> Employers can locate their businesses anywhere in the world. Employers seeking an educated work force will move to regions where the labor pool is educated. For example, employers who are deciding to locate a new business in Edina, Minnesota are likely to base that decision on the educational qualifications of

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240. South Dakota is the only other state whose constitution has both "general and uniform" and "thorough and efficient" education clauses. See S.D. CONST. art. VIII, §§ 1 & 5.

241. See *supra* note 163 and accompanying text.

242. See *supra* part II.C.2.

243. MINN. CONST. art. XIII, § 1. See *supra* note 163-65 and accompanying text.

244. Because education is a fundamental right in Minnesota, see *supra* note 175 and accompanying text, strict scrutiny is the standard to be applied in determining the constitutionality of a statute which impinges that right. See *supra* note 121 and accompanying text.

245. *Skeen v. Minnesota*, No. C7-88-1954 slip op. at 166 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *certification and request granted*, No. C5-92-677 (Minn. May 1, 1992). ("In the early days of statehood the economy was primarily agricultural. The children who attended the one room school houses often never left their communities.").

246. *Id.* at 166 ("In the 1990's Minnesota must compete on a global level. Extensive education is needed for those who design, manage and sell Minnesota products abroad, as well as the workers who assemble the product.").



workers in the Twin Cities area, and not simply on the quality of Edina's school system. The state's education system should reflect this change.<sup>247</sup>

The Minnesota legislature should increase the financial resources available to poorer school districts.<sup>248</sup> An increase in state taxes may be offset by a decrease in local property tax rates. This would also decrease the state's annual costs for property tax refunds. As the New Jersey Supreme Court noted

We realize our remedy here may fail to achieve the constitutional object, that no amount of money may be able to erase the impact of the socioeconomic factors that define and cause these pupils' disadvantage. We realize that perhaps nothing short of substantial social and economic change affecting housing, employment, child care, taxation, welfare will make the difference for these students; and that this kind of change is far beyond the power or responsibility of school districts. We have concluded, however, that even if not a cure, money will help, and that these students are constitutionally entitled to that help.<sup>249</sup>

Some districts may be hurt by any redistribution in funding, but they will be no worse off than they would be had a fair system of funding always been in place. Against the constitutional mandates of "general and uniform," "thorough and efficient" and equal protection, it is an unacceptable argument that unconstitutionally advantaged districts will now lose unfair advantages. Activists must lobby the state legislature for increased funding for all schools to solve the problems of redistribution. This would allow all schools to have the funds to do what, until now, only a few, privileged districts could do.

No school system can make children equal. A good school system can provide a child with all the resources that child needs to achieve his or her full potential. While state-provided financing of education is not the whole answer, equalized funding would ensure that all children within a given state have the same opportunity to reach their potential. In a land that boasts of providing equal opportunity for all, the tragedy of the school financing system is not just that children growing up in poorer district will be

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247. *Cf. id.* (as opposed to earlier times, it is uncertain whether children who grow up in the small towns of Minnesota will stay in that community when they grow up).

248. *Cf. Abbott v. Burke*, 575 A.2d 359, 403 (N.J. 1990) ("If the claim is that additional funding will not enable poorer urban districts to satisfy the thorough and efficient test, the constitutional answer is that they are entitled to pass or fail with at least the same amount of money as their competitors.").

249. *Id.*

less likely to succeed, but that the state failed to provide equal opportunities to children in the wealthy and poor districts.

As the United States Supreme Court held in *Brown v. Board of Education*,

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>250</sup>

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250. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).