FISCAL EQUITY IN EDUCATION: DECONSTRUCTING THE REIGNING MYTHS AND FACING REALITY

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INTRODUCTION

More than two decades ago, the United States Supreme Court acknowledged gross inequities in the amount of resources made available to school children depending on the school district in which their parents reside. Nevertheless, the Court held in *San Antonio Indep. Sch. Dist. v. Rodriguez*,[1] that the plaintiffs had no federal constitutional claim on which to redress the inequalities and indicated that the apparent need for fiscal equity reform must be addressed at the state level. Since that time, there has been extensive fiscal equity reform litigation in the state courts. At last

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1. 411 U.S. 1 (1973). Plaintiffs, Mexican-American parents residing in the Edgewood Independent School District, sued on behalf of a statewide class of school children who were members of minority groups or who were poor and who resided in school districts with a low property tax base. Defendants were the State Board of Education, the Commissioner of Education, and other state officials.

count, thirty-one state courts have issued final rulings in these cases, fourteen of which favored plaintiffs,[2] seventeen of which were for the defendants,[3] and one of which was a mixed result.[4] Four other recent rulings constitute important victories for plaintiffs, two of which may presage a reversal of a prior ruling for defendants.[5] In addition, litigation is currently

2. Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Alabama Coalition for Equity v. Hunt, No. CIV.A.90-883-R 1993 WL 204083 (Ala. Cir. Ct. Apr. 1, 1993); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273 (N.J.), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Edgewood Indep. Sch. Dist. v. Kirby 777 S.W.2d 391 (Tex. 1989); Dupree v. Alma Sch. Dist. No. 30 of Crawford County, 651 S.W.2d 90 (Ark. 1983); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo. 1980); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Seattle Sch. Dist. No. One v. State, 585 P.2d 71 (Wash. 1978) (en banc); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Serrano v. Priest, 557 P.2d 929 (Cal.), *cert. denied sub nom.* Clowes v. Serrano 432 U.S. 907 (1977).

3. Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Coalition for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116 (Or. 1991); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 432, *aff'd mem.*, 361 S.E.2d 71 (N.C. 1987); Fair Sch. Finance Council of Okla., Inc. v. State, 746 P.2d 1135 (Okla. 1987); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (en banc); Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Board. of Educ. of City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Olsen v. State, 554 P.2d 139 (Or. 1976); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Milliken v. Green, 212 N.W.2d 711 (Mich. 1973).

4. In Bismark Public Sch. Dist. No. 1 v. North Dakota Legislative Assembly, 511 N.W.2d 247 (N.D. 1994), the court held the statutory funding scheme consitutional, although it did not provide equal educational opportunity; the state constitution requires a super-majority of four out of five justices to invalidate a statute. N.D. CONST. art. VI, § 4.

5. The New Hampshire Supreme Court, in Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1379 (N.H. 1993), held that the state constitution imposes a duty to provide a constitutionally adequate education to every public school child and to guarantee adequate funding. It remanded the case to the trial court to determine plaintiffs' claims that the present system violates this duty. *Id.* at 1382. In Committee for Educ. Equality v. State, 878 S.W.2d 446 (Mo. 1994), the Missouri Supreme Court dismissed an appeal of a judgment declaring the state educational finance statute unconstitutional, since the legislature had passed a new funding statute that had not been reviewed by the lower court. *Id.* at 455.

In Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995), the court distinguished its prior ruling in Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982), and held that allegations of a failure to provide a sound basic education to thousands of public school students in New York City constitutes a valid cause of action under the Education Article of the state constitution. In addition, plaintiffs' cause of action under the implementing regulations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), was upheld. The case was remanded for trial. Similarly, in Idaho Sch. for Equal Educ. v. Evans, 850 P.2d 724 (Idaho 1993), the Idaho Supreme Court distinguished its prior ruling in Thompson v. Engelking, 537 P.2d 635 (Idaho 1975) and rejected a motion to dismiss the claim that the current statute does not provide a thorough education. 850 P.2d at 736. The court remanded the case for trial. *Id.*

pending in at least thirteen states, including six cases where plaintiffs are seeking reconsiderations of decisions in which defendants had prevailed.[6]

The fiscal equity litigation of the past two decades involves a troublesome paradox: although the inequities that plaintiffs demonstrate are more stark and more difficult to dispute than in many other areas of civil rights reform, plaintiffs have had greater difficulty obtaining relief. Equally significant, few of the plaintiff victories have resulted in reforms that have demonstrably ameliorated the inequities. Although inter-district disparities have been reduced in some states, adverse results have followed many court interventions[7], and overall, the record is disappointing.[8] In some

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There is a decided trend toward judicial reform in this area. In the twelve states that have issued definitive final rulings in the past six years, plaintiffs prevailed in eight: Alabama, Arizona, Kentucky, Montana, Massachusetts, New Jersey, Tennessee, and Texas. Defendants prevailed in Minnesota, Nebraska, Oregon, and Virginia. *See supra* note 2 and accompanying text. If the recent New Hampshire, North Dakota, Missouri, New York and Idaho cases are included, plaintiffs can be deemed to have prevailed in 13 of the 17 most recent cases. Moreover, in three of the four states where defendants prevailed, Virginia, Minnesota, and Nebraska, the courts specifically noted that no allegation was made that any students were receiving less than an adequate education. Scott v. Commonwealth, 443 S.E.2d 138, 141 (Va. 1994); Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993); Skeen v. State, 505 N.W.2d 299, 302 (Minn. 1993).

6. In Idaho, Louisiana, New York, Ohio, Pennsylvania, and South Carolina, new cases have been initiated, although the highest courts in these states have ruled in favor of defendants in previous fiscal equity cases. Litigation is also pending in Alaska, Illinois, Kansas, Maine, Missouri, Rhode Island, and South Dakota. G. ALAN HICKROD & GREGORY ANTHONY, STATUS OF SCHOOL FINANCE LITIGATION (1994).

7. For example, following the California Supreme Court's decision in Serrano v. Priest, 557 P.2d 929 (Cal. 1977), the California state legislature passed legislation that provided for a uniform tax rate in every district, along with a recapture provision that transferred funds from wealthy school districts to poor ones. The California Ct. of Appeals found that for the 1982-83 school year, 93.2 percent of the students were in districts whose per capita spending varied by no more than $100, adjusted for inflation, compared to 56 percent in 1974. Serrano v. Priest, 226 Cal. Rptr. 584, 613 (Cal. App. 2d 1986). On the other hand, total spending for education, in relative terms, has plummeted. Ranked fifth in the nation in per-pupil expenditures in 1964-65, California fell to forty-second in 1992-93. Mark Schauer & Steve Durbin, *"Protecting" School Funding*, SACRAMENTO BEE, June 28, 1993, at B14.

In Connecticut, there was a noticeable reduction in disparities in tax effort among school districts following the state supreme court's decision in Horton v. Meskill, 376 A.2d 359 (Conn. 1977), but much of the increased state aid went towards tax relief rather than increased educational expenditures. George P. Richardson & Robert E. Lamitie, *Improving Connecticut School Aid: A Case Study with Model-Based Policy Analysis*, 15 J. EDUC. FIN. 169, 170-71 (1988).

In contrast to results in California and Connecticut, a 1991 study of the impact of fiscal equity reform in the state of Washington found that the share of financial resources available to the school districts with the highest percentage of students living in poverty had declined 4.9 percent since the state supreme court's 1978 ruling. Neil D. Theobald & Faith Hanna, *Ample Provision for Whom?: The Evolution of State Control Over School Finance in Washington*, 17 J. EDUC. FIN. 7, 23-24 (1991).

8. The Campaign for Fiscal Equity, Inc. ("CFE") recently undertook an analysis of the implementation of remedies in the ten states whose highest courts had declared their state educational finance systems unconstitutional between 1973 and 1990. MICHAEL A. REBELL, ROBERT L. HUGHES & LISA F. GRUMET, FISCAL EQUITY IN EDUCATION: A PROPOSAL FOR A DIALOGIC REMEDY (1995). Most strikingly, it found that there is no single definition of equity against which success can be measured. For example, the Texas legislature's initial

states, court orders have been virtually ignored;[9] in others, the courts have felt compelled repeatedly to strike down legislative responses which were inadequate or unconstitutional or both.[10]

Virtually every fiscal equity case to date, whether won by plaintiffs or defendants, has revealed a deplorable pattern of fiscal inequity. The record in *Rodriguez*, for example, showed that Edgewood, the poorest of the San Antonio school districts, had an annual per capita expenditure that was only 60 percent of that of Alamo Heights, a nearby affluent district, even though Edgewood was taxing itself at a 24 percent higher tax rate.[11] Thus, almost twice as much money was available for each child in Alamo

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response to the supreme court's order would have equalized all school districts at the ninety-fifth percentile of per-student funding, exempting the 132 richest districts. In contrast, the New Jersey Supreme Court's latest order mandates strict equality among the state's most affluent districts and its 30 poorest districts in general education spending, but omits equalization for the large number of middle-tier districts. *Id.* at 16-18. Which was the greater "success"?

Assessing success in fiscal equity suits is difficult because factors promoting or undermining equity are varied and complex. For example, equity may be affected by economic trends which are totally unrelated to a court decision. The difficulties of deciding whether the desired outcome of a reform litigation is equalization of tax burdens or equalization of spending, and whether school reforms other than tax or spending equalization should be counted as a partial or complete success further emphasize the problem of success characterization. *See* Patricia R. Brown & Richard F. Elmore, *Analyzing the Impact of School Finance Reform, in* CHANGING POLITICS OF SCHOOL FINANCE 107 (Nelda H. Cambron-McCabe & Allan Olden eds., 1982); ROBERT BERNE & LEANNA STIEFEL, THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE (1984).

9. For example, the West Virginia Supreme Court's ambitious decisions in Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979) and Pauley v. Bailey, 324 S.E.2d 128 (W. Va. 1984), which called for fiscal equalization and system-wide restructuring, have had virtually no follow-up in fiscal equity reform, although there has been some progress in other areas such as facilities improvement. *See* Jack L. Flanigan, *West Virginia's Financial Dilemma: The Ideal School System in the Real World*, 15 J. EDUC. FIN. 229 (1989); Margaret D. Smith & Perry A. Zirkel, *Pauley v. Kelly: School Finances and Facilities in West Virginia*, 13 J. EDUC. FIN. 265 (1988).

10. *See, e.g.*, Robinson v. Cahill, 358 A. 2d 457 (N.J. 1976); Abbott v. Burke, 643 A.2d 575 (N.J. 1994); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991); Carrollton-Farmer's Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992). For a discussion of the intense political battles that followed the *Robinson* decision, *see* RICHARD LEHNE, THE QUEST FOR JUSTICE: THE POLITICS OF SCHOOL FINANCE REFORM (1978); Mark Jaffee & Kenneth Kersch, *Guaranteeing a State Right for Quality Education, the Judicial-Political Dialogue in New Jersey*, 20 J.L. & EDUC. 271 (1991). *See also* Note, *Unfulfilled Promises: School Finance Remedies and State Courts* 104 HARV. L. REV. 1072, 1072 (1991) (arguing that "legislative inertia and unwarranted judicial deference to the political branches hinder the school finance plaintiffs' prospects for securing a constitutional remedy").

CFE's analysis does indicate promising developments in states like Kentucky and Washington, which recently implemented extensive reforms intended to reduce funding disparities, improve the quality of education for all students, and hold districts accountable for positive results. REBELL, HUGHES & GRUMET, *supra* note 8, at A-29-41 and A-74-81. It is too early to judge the success (by any measure) of these ambitious endeavors.

11. In 1967-68 dollars, Edgewood spent $356 per pupil and had a tax rate of $1.05 per $100 of assessed property, while Alamo Heights spent $594 per pupil and had a $0.85 per $100 tax rate. *Rodriguez*, 411 U.S. at 12-13.

Heights, a district that was approximately 80 percent White-Anglo, compared to Edgewood, an inner city district that was 90 percent Mexican-American. Moreover, this pattern of inequity has persisted throughout the years. In another striking example, New York City's 1990-91 average per capita expenditure was $7,494, while the comparable expenditure in suburban Great Neck was $16,625.[12]

How can the inequities be so compelling, but the judicial responses so hard to obtain and remedial improvement so difficult to achieve? The answer to this paradox lies, at least partially, in the fact that legal doctrines in this area, influenced heavily by the Supreme Court's decision in *Rodriguez*, have been built on a number of myths which have led most courts and commentators to avoid facing the real issues and remedying the real problems. Part I of this article describes and attempts to debunk these myths. Part II then discusses the problematic underlying policy issues which the myths are calculated to avoid addressing and suggests new approaches to civic dialogue that can induce citizens to confront honestly the difficult dilemmas in this area and then to resolve them.

I
THE REIGNING MYTHS

Four major myths have stymied real solutions to the fiscal inequities that plague educational finance systems in most states. These myths are that: a) there is no substantial relationship between educational funding and the quality of education; b) education is *not* a "fundamental interest"; c) local control of education justifies the perpetuation of fiscal inequities; and d) the extra cost burden of social services in cities with large minority populations is insignificant.

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12. Roosevelt and Elmont, predominantly minority districts near Great Neck, had expenditures of $5,178 and $5,452 per student, respectively. Brief for Reform Educational Financing Inequities Today at 35, Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo, 655 N.E.2d 647 (N.Y. 1995). In 1990-91, the total median downstate suburban expenditure was $11,352, and the statewide average expenditure was $8,199, compared to New York City's $7,494 expenditure. Amended Complaint at ¶ 62, City of New York v. State, 655 N.E.2d 307, *aff'd sub. nom. as modified by* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995).

Although the New York Court of Appeals denied in substantial part the state's motion to dismiss in *Campaign for Fiscal Equity, Inc.*, it granted motions to dismiss in the parallel *R.E.F.I.T.* and *City of New York* cases. In the former case, the court held that the allegations of greater disparities in resources available to school districts in the State of New York since the 1982 decision in Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982), did not state a cause of action; in the latter case, it ruled that the municipal plaintiffs lacked capacity to sue.

In 1989, the Texas Supreme Court cited a range in spending from $2,112 to $19,113 per student. On average, "$2,000 more per year is spent on each of the 150,000 students in the wealthiest districts than is spent on each of the 150,000 students in the poorest districts." Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392-93 (Tex. 1989).

A. The Cost/Quality Dispute

The Supreme Court in *Rodriguez* questioned whether "there is a demonstrable correlation between educational expenditures and the quality of education."[13] Ever since, plaintiffs in fiscal equity cases have borne a heavy burden in establishing that correlation. In recent cases, plaintiffs have met that burden by expending extensive resources and years of effort to document the paucity of textbooks, the plethora of leaky roofs, the lack of science labs, the dearth of computers, and the inadequacy of courses offered in many poor school districts. They have retained teams of educational experts to visit school districts in order to testify that such resource inadequacies have a direct bearing on educational opportunity and educational achievement.

Thus, in *Helena Elementary Sch. Dist. No. 1 v. State*,[14] the plaintiffs commissioned a study team to compare the qualities of several pairs of school districts. The team found significant differences in the availability of enriched and expanded curricula and the quality of instructional equipment, textbooks, and physical plant. On the basis of these findings and other survey evidence, the Montana Supreme Court concluded that "spending differences among similarly sized school districts in the state result in unequal educational opportunities,"[15] and ruled that Montana's educational finance system was unconstitutional.[16]

The Supreme Court of Texas issued a decision in 1989 which involved the same educational finance system that the U.S. Supreme Court had reviewed and refused to invalidate sixteen years earlier in *Rodriguez*. Citing specific examples of school districts which were unable to offer pre-kindergarten programs, foreign language, chemistry, or physics classes, college

13. *Rodriguez*, 411 U.S. at 42. Justice Powell's opinion for the majority cited a number of early studies on both sides of this issue. Although the Court did not specifically rely on any of the early studies nor explicitly hold that there is no cost/quality correlation, its skeptical statement of the issue clearly influenced a number of state courts on this critical point. *See, e.g.*, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982) (rejecting a direct correlation between school financing and educational quality and opportunity); Thompson v. Engelking, 537 P.2d 635, 642 (Idaho 1975) (refusing "to venture into the realm of social policy" on the cost/quality issue).

Justice Marshall's dissenting opinion dismissed the significance of the debate in the social science literature on this point. To deny that disparities in educational funding had constitutional consequences was, to Marshall, an "absurdity": "Authorities concerned with educational quality no doubt disagree as to the significance of variations in per pupil spending. . . . We sit, however, not to resolve disputes over educational theory but to enforce the Constitution. It is an inescapable fact that if one district has more funds available per pupil than another district, the former will have greater choice in educational planning than will the latter." *Rodriguez*, 411 U.S. at 83 (Marshall, J., dissenting).

14. 769 P.2d 684 (Mont. 1989), *modified*, 784 P.2d 412 (Mont. 1990).

15. *Id.* at 688.

16. The decision in *Helena Elementary Sch. Dist.* reversed the Montana Supreme Court's previous decision in Woodahl v. Straub, 520 P.2d 776 (Mont. 1974), which had upheld the constitutionality of Montana's educational finance system.

preparation programs, and many extra-curricular programs, the Court concluded:

> The amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student. High-wealth districts are able to provide for their students broader educational experiences including more extensive curricula, more up-to-date technological equipment, better libraries and library personnel, teacher aides, counseling services, lower student-teacher ratios, better facilities, parental involvement programs, and drop-out prevention programs. They are also better able to attract and retain experienced teachers and administrators.[17]

Is such extensive empirical research really necessary? Clearly, plaintiffs in these cases are required to expend substantial resources—and potential plaintiffs without such resources are dissuaded from bringing cases—in order to prove the obvious. From a commonsense point of view, there can be no doubt that money affects educational opportunity and educational achievement. If money makes no difference, why do the affluent districts fight so hard in the state legislatures and in the courts to keep from sharing their funding with the poorer districts? As the chief justice of the Arizona Supreme Court recently stated:

> [L]ogic and experience also tell us that children have a better opportunity to learn biology or chemistry, and are more likely to do so, if provided with laboratory equipment for experiments and demonstrations; that children have a better opportunity to learn English literature if given access to books; that children have a better opportunity to learn computer science if they can use computers, and so on through the entire state-prescribed curriculum. . . . It seems apparent to me, however, that these are inarguable principles. If they are not, then we are wasting an abundance of our taxpayers' money in school districts that maintain libraries and buy textbooks, laboratory equipment and computers.[18]

Probably the most exciting experiment in urban education today is the "Comer model," which is currently being implemented in about fifty inner-city schools. Based on his pilot project in the New Haven public schools, James Comer and his colleagues at the Yale Child Study Center have shown that mental health teams, working together with parents, teachers, and school administrators, can overcome serious learning and motivational

17. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989), *mandamus proceeding*, 804 S.W.2d 491 (Tex. 1991).

18. Roosevelt Elementary Dist. No. 66 v. Bishop, 877 P.2d 806, 822 (Ariz. 1994)(en banc)(Feldman, C.J., specially concurring).

problems, many of which lie outside the schools' traditional schooling domain.[19] Although this approach appears highly effective, it is also resource-intensive and quite expensive. The Comer model, therefore, illustrates the obvious fact that infusions of large sums of money, if used well, can make dramatic differences in the education of poor children.[20]

Admittedly, in some instances, school officials in poor school districts may waste or misappropriate money. The same is true, however, in rich districts. Perhaps such abuses are not noticed as often in affluent areas because these districts have more resources to squander. Even if it were true that proportionately more money is wasted in poorer areas, waste or mismanagement should be the real concern, rather than the misleading implication that money cannot make a difference to those starved for basic educational resources. In short, the legislatures, executive branches, and courts have an obligation to the students in the poorer districts to appropriate a fair share of educational resources—and to see that these resources are well-spent and well-managed—because the quality of children's education depends on such funding.[21]

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19. *See* JAMES P. COMER, SCHOOL POWER: IMPLICATIONS OF AN INTERVENTION PROJECT (1980); James P. Comer, *Educating Poor Minority Children*, 259 SCI. AM. 42 (1988). *See also* Ronald Edmunds, *Effective Schools for the Urban Poor*, 37 EDUC. LEADERSHIP 15 (1979) (explaining that effective leadership and devotion to fundamental objectives can substantially raise achievement in inner-city schools); Robert E. Slavin, Nancy A. Madden, Laurance J. Dolan, Barbara A. Wasik, Steven M. Ross & Lana J. Smith, *Whenever and Wherever We Choose: The Replication of 'Success for All'*, PHI DELTA KAPPAN, Apr. 1994, 639 (reporting progress based on prevention and immediate intervention with one-to-one reading tutoring that achieved demonstrable success in fifteen schools in seven school districts).

20. For recent analyses of the cost/quality link, see Richard J. Murname, *Interpreting the Evidence, or Does Money Matter?*, 28 HARV. J. ON LEGIS. 457 (1991) (concluding that adequate funding is a necessary but not sufficient condition for high quality programs); Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991) (reporting detailed study of 900 school districts in Texas, which correlates student achievement to teacher quality and teacher quality to teacher salaries).

The most influential recent writings that question the cost/quality link are those of Eric A. Hanushek. *See, e.g.*, Eric A. Hanushek, *The Impact of Differential Expenditures on School Performance*, 18 EDUC. RESEARCHER 45 (1989); Eric A. Hanushek, *When School Finance 'Reform' May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991). Hanushek's methodology and conclusions were recently challenged by Larry V. Hedges, in Richard D. Lane, and Rob Greenwald, in *Does Money Matter? A Meta-Analysis of the Effects of Differential School Inputs on Student Outcomes*, 23 EDUC. RESEARCHER 5 (1994).

21. Noting that "effective education requires effective process and management as well as resources," Professor William Clune proposes a three-part remedy, involving a base program of substantial spending equality, compensatory add-ons reflecting a realistic needs assessment, and performance-oriented policies designed to increase the effectiveness of educational spending. William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap between Wrong and Remedy*, 24 CONN. L. REV. 721, 726 (1992). The Kentucky Educational Reform Act, discussed *infra* at note 45, includes school report cards and other specific accountability measures.

B. Fundamental Interest

The second major myth in fiscal equity parlance is that the right to education is not "fundamental." Under equal protection analysis whether or not a right or interest is fundamental determines the level of protection it commands. Since its beginnings in the New Deal era, the equal protection doctrine has resulted in two general approaches to laws or regulations that impact groups of citizens unequally. Some equal protection claims are given minimal scrutiny by the Supreme Court, while others are deemed worthy of a higher level "strict scrutiny." Historically, the latter category—in which plaintiffs obviously are much more likely to prevail[22]—has included cases involving suspect racial classification. Most important for cases challenging the equity of state educational funding, the strict scrutiny category includes any state action involving "fundamental rights" such as the right to vote,[23] access to criminal procedure,[24] and the right to change residency from one state to another.[25]

Based on the theory that the right to education is fundamental, the *Rodriguez*[26] plaintiffs sought strict scrutiny review for their claim. The Supreme Court declined to apply that level of scrutiny, however, and held that "the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education . . . [but] in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution . . . ."[27] The Court concluded that education was not among the rights explicitly protected by the federal Constitution, and it rejected the notion that fiscal equity in education implicitly required such protection.[28]

Consistent with the fact that education historically has been the province of state governments in the American federal system, most state constitutions do explicitly refer to education.[29] Most of the justification for denying fundamental interest status to education as a matter of federal equal protection law does not apply to state equal protection claims. Nevertheless, most state supreme courts that have considered the issue have

22. Between 1937 and 1970, with a single exception in both categories, every plaintiff whose case was relegated to minimal scrutiny status lost in the U.S. Supreme Court, and every one whose allegations received strict scrutiny review won. *See* Long Island Lighting Co. v. Cuomo, 666 F.Supp. 370, 411-12 (N.D.N.Y. 1987), *vacated in part*, 888 F.2d 230 (2d Cir. 1989).

23. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); Dunn v. Blumstein, 405 U.S. 330 (1972).

24. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).

25. Shapiro v. Thompson, 394 U.S. 618 (1969).

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

27. *Id.* at 33.

28. *Id.* at 35.

29. *See* Allen W. Hubsch, *Education and Self-Government: The Rights to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 134-40 (1989).

rigidly followed the federal equal protection doctrine and denied fundamental-interest status to plaintiffs in fiscal equity cases.[30] As a result, only the minimum level of scrutiny applies to these and other educational claims. Under this level of review, the courts uphold any state action that is rationally related to a legitimate state purpose.[31]

In light of the centrality of education in our technological, information-driven society, and of the critical role that educational opportunity plays in America's liberal political ideology, the notion that the right to education does not merit enhanced legal consideration is counterintuitive and implausible.[32] The Supreme Court eventually recognized this idea and

30. *See, e.g.*, McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo, 655 N.E.2d 647 (N.Y. 1995); Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27, 43 (N.Y. 1982); Board of Educ. of City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979); Fair Sch. Finance Council of Okla., Inc. v. State, 746 P.2d 1135 (Okla. 1987).

State courts in California, Connecticut, and Wyoming have bucked this trend, declaring education a fundamental interest under the equal protection clauses of their state constitutions. Serrano v. Priest, 557 P.2d 929 (Cal. 1977); Horton v. Meskill, 376 A.2d 359 (Conn. 1977)(Horton I); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980). *See also* Pauley v. Kelly, 255 S.E.2d 859, 879 (W. Va. 1979) (holding that education is a fundamental right through a combination of state equal protection and "thorough and efficient" education clauses). In a later case, the Connecticut Supreme Court refused to apply strict scrutiny to the new legislation that had been adopted in response to its 1977 ruling. Horton v. Meskill, 486 A.2d 1099, 1107 (Conn. 1985).

See generally William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639 (1989).

31. Under the traditional rational relationship standard, "state legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 425 (1961).

Although minimum scrutiny generally results in a victory for the defendant, *see e.g.*, *Levittown*, *Hornbeck*, *McDaniel*, and *Fair Sch. Council of Okla.*, two state supreme courts have invalidated finance schemes under the rational basis standard. Dupree v. Alma Sch. Dist. No. 30 of Crawford County, 651 S.W.2d 90 (Ark. 1983); Tennessee Small Sch. Sys., Inc. v. McWherter, 851 S.W.2d 139 (Tenn. 1993). For discussions of these cases, see Susan J. Speaker, *Dupree v. Alma School District Number 30: Mandate for an Equitable State Aid Formula*, 37 ARK. L. REV. 1019 (1984), and William E. Thro, *The Significance of the Tennessee School Finance Decision*, 85 EDUC. L. REP. 11 (1993).

32. Indeed, the Supreme Court's landmark desegregation decision, Brown v. Board of Education, 347 U.S. 483 (1954), which preceded *Rodriguez*, was based on the proposition that:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. 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.

Brown, 347 U.S. at 493.

modified *Rodriguez*'s stark holding that education was not a fundamental interest. In the course of upholding the right of children of illegal immigrants to public education in *Plyler v. Doe*,[33] the Court stated that education is a "matter[ ] of supreme importance,"[34] which, Justice Blackmun noted, "must be accorded a special place in equal protection analysis."[35] That special place turned out to be the middle tier of review.[36]

Ironically, over a decade after *Plyer*'s modification of *Rodriguez*, most state courts continue woodenly to apply the lower standard of review. Few state supreme courts have considered the relevance of intermediate scrutiny to fiscal equity cases, and none have invalidated a state funding scheme on this basis.[37] However, the recent decision in *Tennessee Small Sch. System v. McWherter*,[38] which invalidated the state's fiscal equity scheme by applying not intermediate scrutiny but a stricter rational relationship test, could be a harbinger of future analyses.[39]

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33. 457 U.S. 202 (1982).

34. *Id.* at 221 (quoting Meyer v. Nebraska, 262 U.S. 390, 400 (1923)).

35. *Id.* at 233 (Blackmun, J., concurring). *See also id.* at 248 (Burger, C.J., dissenting) (observing that the majority applied a heightened scrutiny standard to "legislation affecting access to public education"); Mary Jean Moltenbrey *Alternative Models of Equal Protection Analysis: Plyler v. Doe*, 24 B.C. L. REV. 1363, 1366 (1983) (observing that *Plyler* "indicates a strong shift away from a strict two-tiered equal protection analysis and toward the use of a balancing approach").

36. *Id.*

37. The Supreme Court of North Dakota explicitly held in Bismark Public Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994), that intermediate scrutiny was the appropriate equal protection standard to apply to fiscal equity in education cases because of the importance of the rights affected and the individual interests involved. A majority of that court thought that the state's educational funding scheme did not pass muster under such analysis. *Id.* at 258-59. The court lacked the required super-majority required to invalidate the statute. *See supra* note 4 and accompanying text. The Wisconsin Supreme Court considered *Plyler*, but declined to apply a heightened scrutiny standard because a "complete denial" of education had not occurred. Kukor v. Grover, 436 N.W.2d 468, 580 (Wis. 1989). The Oklahoma Supreme Court also declined to apply an intermediate scrutiny approach, because "the plaintiffs here have not alleged that they have been absolutely denied a free public education, nor that they are not receiving an adequate one." Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135, 1145-46 (Okla. 1987). The New York Court of Appeals, in *Campaign for Fiscal Equity, Inc. v. State*, rejected plaintiffs' argument for intermediate scrutiny of their equal protection claim, based both on *Plyler* and on state constitutional considerations. 655 N.E.2d 661, 668-69 (N.Y. 1995).

38. 851 S.W.2d 139 (Tenn. 1993).

39. Tennessee's revitalization of the rational relationship test is consistent with a line of U.S. Supreme Court cases that have applied the traditional rational basis test in a manner that "is not a toothless one." Mathews v. Lucas, 427 U.S. 495, 510 (1976). *See also*, Williams v. Vermont, 472 U.S. 14 (1985) (holding that vehicle use tax scheme based on residence at time of purchase was not rationally related to any legitimate state purpose); Zobel v. Williams, 457 U.S. 55 (1982) (holding that statutory scheme by which Alaska distributed income from its natural resources to state residents based on the year in which their residency was established was irrational).

This revitalized rational basis test was most clearly applied in City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985), which invalidated a zoning ordinance that restricted group housing for the mentally retarded. After expressly denying middle-tier status to the mentally retarded, the Court examined in detail and rejected each purported

Although persuading courts to apply more than minimum scrutiny review to fiscal equity claims under the equal protection doctrine has been largely unsuccessful, a second approach has been more fruitful. In recent years, most plaintiff successes in fiscal equity cases have been based on "minimum adequate education"[40] theories built on state constitutional education clauses which guarantee, for example, "a thorough and efficient education" or a "sound basic education."[41] In order to find that members of the plaintiff class are receiving less than an adequate education, a court

justification for the ban on group housing, such as community attitudes, proximity to a school, and size of the home. Justice Marshall, in a separate opinion, concluded that the form of "heightened scrutiny" that was actually taking place in *Cleburne* was one which he called a "second order" rational basis review. *Id.* at 456, 458 (Marshall, J., concurring).

Numerous lower federal courts have applied *Cleburne*'s second order rational basis approach. *See, e.g.*, Phan v. Commonwealth of Va., 806 F.2d 516, 521 n.6 (4th Cir. 1986); Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991); Burstyn v. City of Miami Beach, 663 F. Supp. 528 (S.D. Fla. 1987). *See also* Eisenbud v. Suffolk County, 841 F.2d 42, 45 (2d Cir. 1988) (viewing *Cleburne* as a variation of intermediate scrutiny).

In 1993, the U.S. Supreme Court, by a 5-to-4 margin, issued a decision which appeared to reinstate the traditional, pre-*Cleburne* approach to rational basis review. Heller v. Doe, 113 S. Ct. 2637 (1993). *See also* Federal Communications Comm'n v. Beach Communications, Inc., 113 S. Ct. 2096 (1993). However, Justice Souter, dissenting, noted that the *Heller* majority did not purport to overrule *Cleburne*, "and at the end of the day, *Cleburne*'s status is left uncertain." Heller v. Doe, 113 S. Ct. at 2652. The federal court decisions issued since *Heller* indicate a propensity to continue to apply *Cleburne*'s revitalized rational relationship test, at least in the context of the rights of gay men and women in the military. *See* Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993) (invalidating Department of Defense regulations prohibiting gay men and women from serving in the Navy); Dahl v. Secretary of U.S. Navy, 830 F.Supp. 1319 (E.D. Cal. 1993) (same).

40. In *Rodriguez*, the Supreme Court indicated that it might have ruled differently if there had been a showing that children in the plaintiff districts had received less than an "adequate education." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973). *See also* Papasan v. Allain, 478 U.S. 265, 287 (1986) (stating that "*Rodriguez* did not, however, purport to validate all funding variations that might result from a state's public school funding decision").

41. An education clause rationale was the constitutional justification for seven of the eight recent plaintiff victories cited, *supra* note 5. The New York Court of Appeals 1995 decision in Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 664 (N.Y. 1995), also upheld the validity of plaintiffs' cause of action alleging a denial of a minimum adequate education based on the entitlement of each child in New York state to a "sound basic education." *See also* Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27, 48 (N.Y. 1982) (interpreting the Education Article of the State Constitution. N.Y. CONST. art. XI, § 1).

must articulate or adopt specific minimum education standards[42] and/or determine what constitutes an adequate education.[43]

The remedial implications of relying on an educational adequacy approach can be formidable. In Kentucky, for example, the court held that in light of the educational inadequacies demonstrated by plaintiffs, the Kentucky constitution "places an absolute duty on the General Assembly to recreate, re-establish a new system of common schools."[44] In response, the General Assembly revamped the entire educational system.[45]

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42. For example, the Idaho Supreme Court recently held that a prima facie case of unconstitutionality would be established "[s]hould the plaintiffs be able [to] prove that they cannot meet the standards established by the State Board of Education . . . with the money provided under the current funding system." Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 735 (Idaho 1993). *Cf.* Helena Elementary Sch. Dist. v. State, 769 P.2d 684, 692 (Mont. 1989) (concluding that "the Montana School Accreditation Standards are minimum standards upon which quality education must be built"); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 102-03 (Wash. 1978) (assessing adequacy of funding by calculating the cost of meeting Washington's regulatory standards for minimum education).

43. The supreme court of Kentucky has formulated a highly detailed definition of adequate education under state constitutional standards:

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

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

In Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995), the court held that a "sound basic education . . . should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." *Id.* at *3. The court further stated that the state must assure the provision of essentials such as "minimally adequate physical facilities . . . reasonably current text books [and] minimally adequate teaching of reasonable up-to-date basic curricula . . . by sufficient personnel adequately trained to teach those subject areas." *Id.* at *4.

The New Jersey Supreme Court adopted a relative definition: "[I]n order to achieve the constitutional standard for the students from these poorer urban districts . . . the totality of the districts' educational offering must contain elements over and above those found in the affluent suburban district." Abbott v. Burke, 575 A.2d 359, 402 (N.J. 1990).

44. *Rose*, 790 S.W.2d at 215.

45. The Kentucky Education Reform Act of 1990 ("KERA") completely restructured education in Kentucky. 1990 Ky. Acts ch. 476 (1994). In addition to funding equalization and other new mandates, KERA requires new programs for "at-risk" youth, school-based decision making, accountability measures requiring statewide testing and school "report cards" and state intervention when student performance continually declines, adoption of new education standards and development of a model curriculum, and rewards for successful schools. KY. REV. STAT. ANN. §§ 157.360(1), 160.345(2), 158.6453(1), 158.6455(4),

The emphasis on deprivation of a minimally adequate education in state litigation appropriately enforces state constitutional guarantees of educational entitlement. Indeed, *Rose* dramatically demonstrates the importance of fiscal equity in education and the far-reaching effect of plaintiff victories. Nevertheless, a court holding based only on minimum adequacy does not accurately describe the full dimensions of the issue. Without an accompanying finding based on an egalitarian perspective, stemming from either an equal protection or Title VI holding, these cases may encounter problems in the remedial stage.

First, an exclusive reliance on minimum adequacy unfairly and unnecessarily stigmatizes school children who perform at substandard levels. Not surprisingly, the students who are not receiving a minimally adequate education are, by and large, those who reside in underfunded school districts.[46] Their low achievement levels stem from a deprivation in the educational opportunities afforded them. An egalitarian holding would properly place the responsibility for low achievement level on these schools' lack of educational opportunities, rather than the children themselves.

Second, to a significant extent, our changing and competitive society views minimally adequate educational standards in relative terms. An eighth-grade education no longer adequately prepares an individual for competitive employment, as it did two generations ago. Relative deprivation, therefore, is inherent in any concept of a denial of a minimally adequate education.[47] To be effective, complex remedies in institutional reform litigation—especially those that require cooperation or sacrifice from a large segment of the population—must rest on a significant degree of broad public acceptance.[48] In a society that prides itself on offering equal opportunities, equity-based remedies are likely to gain greater public acceptance and support than remedies based strictly on substantive entitlements—especially for those children who are most disadvantaged. As

158.6455(2), 158.6455(1) (Michie/Bobbs-Merrill 1987 & Supp. 1990). The Act is summarized in Charles S. Benson, *Definitions of Equality in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401, 418-20 (1991).

46. "It will be unfair and ultimately impossible to hold schools and students accountable for common learning goals if there are inadequate and inequitable opportunities to learn among schools and districts, and if the state cannot be held accountable for the equitable distribution of resources." NEW YORK STATE CURRICULUM AND ASSESSMENT COUNCIL, COMM'R OF EDUC. AND THE BD. OF REGENTS, LEARNING-CENTERED CURRICULUM AND ASSESSMENT IN NEW YORK STATE 50 (Mar. 1994). *See also* discussion *supra* part I.A.

47. *See* Frank I. Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 49-57 (1969).

48. *See* HOWARD I. KALODNER & JAMES J. FISHMAN, LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION (1978) (discussing problems in implementing remedies in desegregation cases where broad public acceptance is lacking); MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM 212-14 (1982) (arguing that judicial remedies are implemented successfully in cases of "moral flux" where public attitudes have not become confrontational).

See also discussion *infra* at part II.B.

Congressman Hawkins expressed it, "The concept of equal opportunity is deeply embedded in our national ethos. We Americans love to be seen as good sports who guarantee a fair chance for all."[49]

Remedies that are based at least in part on equal protection and/or Title VI holdings will provide greater flexibility. The concept of a minimum adequate education is subject to constant change in our fast-moving society.[50] A remedy based solely on adequacy standards runs risks of emphasizing adherence to outdated precepts or involving courts in continuing modifications of remedial decrees to respond to changing educational realities.[51]

Ideally, a remedy for a fiscal equity case would be based on both minimum adequacy and egalitarian concepts. Minimum adequacy standards provide concrete criteria for designing a solution and for assuring accountability at the early stages of the remedial process. Once significant reforms have been initiated, the decree should emphasize self-adjusting concepts of equitable distribution of resources to provide a stable, enduring remedial plan, while permitting the court to disengage from continuing active oversight.[52]

C. *Local Control*

Although it acknowledged extensive inter-district disparities, the Supreme Court in *Rodriguez*, after applying the minimum scrutiny equal

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49. Augustus F. Hawkins, *Equity in Education*, 28 HARV. J. ON LEGIS. 565, 565 (1991).

50. As the Massachusetts Supreme Judicial Court has stated,

> The content of the duty to educate which the Constitution places on the Commonwealth necessarily will evolve together with our society. Our Constitution, and its education clause, must be interpreted "in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning."

McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993) (quoting Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978)).

51. Exclusive reliance on adequacy standards may also, in certain situations, require extraordinary expenditures to obtain a modicum of educational achievement. *See* Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1475 (1986) (noting that the educational benefits standard in Board of Educ. v. Rowley, 458 U.S. 176 (1982), may require virtually unlimited expenditures to teach severely handicapped children certain minimum self-help skills). Such expenditures can raise resentments and cause political backlashes that detract from the spirit of public acceptance necessary for a successful remedy.

52. As one commentator has noted,

> Neither [the egalitarian nor the minimum adequate education] model by itself is quite satisfactory. In times of budget cuts and general economic hardship, funding equality may guarantee only that all districts will be equally deprived. But given the politically charged nature of education, any minimum standard will likely be subject to fatal compromises. Without the touchstone of equality, the floor for the poorest students may remain far below the education opportunities afforded the most wealthy.

Alexander Natapuff, *1993: The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 EDUC. L. REP. 755, 755 (1994).

protection test, upheld Texas' educational funding system. The Court concluded that the flawed funding scheme was rationally related to the legitmate government interest of achieving a "large measure of participation in and control of each district's schools at the local level."[53]

Local control of education is a unique and long-standing feature of the American education system. Its origins hark back to New England town school houses, midwestern land grant educational set-asides, and the nineteenth-century common school movement's broad-based participatory ideals. The traditional image of "participation and control of each district's schools at the local level" does not, however, describe the realities of present-day school governance.

In virtually every state, there has been a marked trend toward greater state control of education. In the 1960s and 1970s, pressures to assure increased educational opportunity for ethnic and racial minorities led to greater state level oversight and more regulations. In the 1980s, a slew of commission reports warned of a "rising tide of mediocrity"[54] in American education which was undermining the nation's ability to compete in the global economy. This concern generated a dramatic surge of state-level reform initiatives which substantially increased state control over local school boards.

> During the years 1982 to 1986, eleven states passed omnibus reform laws. Most of these acts imposed more rigorous academic standards for students and higher standards for teachers. Between 1980 and 1986, forty-five states altered their requirements for earning a standard high school diploma. These alterations have almost invariably entailed increases in required courses.[55]

These state requirements, which were accompanied by little or no extra funding, generally included specific, costly mandates to purchase computers, remove asbestos, and limit class sizes for special education students.

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53. 411 U.S. at 49.

54. NATIONAL COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM 5 (1983). *See also* TASK FORCE ON FEDERAL ELEMENTARY AND SECONDARY EDUC. POLICY, THE TWENTIETH CENTURY FUND, MAKING THE GRADE (1983); TASK FORCE ON TEACHING AS A PROFESSION, CARNEGIE FORUM ON EDUC. AND THE ECONOMY, A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY (May 1986); THEODORE R. SIZER, HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL (1984).

55. Charles F. Faber, *Is Local Control of the Schools Still a Viable Option?*, 14 HARV. J.L. & PUB. POL'Y 447, 450 (1991) (footnotes omitted). Faber also discusses stricter teacher certification requirements, pointing out that between 1975 and 1986, 33 states passed legislation mandating written competency examinations for teachers.

State and federal control of education will likely accelerate in the next few years as the Goals 2000: Educate America Act is implemented. States receiving funds under this Act will be required to adopt a state improvement plan which includes content and student performance standards certified as consistent with national goals. Local school boards will be held accountable for student performance outputs under these state standards. Pub. L. No. 103-227, § 306, 108 Stat. 125, 160-65 (1994).

Local districts are increasingly being held accountable for student performance as reflected on statewide standardized testing measures, and in some states, those school districts that are deemed substandard are subject to supersession by the state.[56] In New Jersey, for example, the State Education Department has the authority to take control of a substandard district and dismiss school board members and top administrators, which recently occurred in Jersey City.[57]

In addition to greatly increased control by state regulators, local school boards are also being forced to cede authority to a variety of other actors. Dissatisfaction with the present system of local governance of education has led, for example, to an accelerating trend toward school-based management ("SBM"). Under SBM, significant decisions regarding principal and teacher selection, curriculum programs, and budgets are made by parent/teacher councils, rather than by local school boards.[58] In addition, there are widespread calls for voucher plans that would allow parents to obtain public funding to enroll their children in private schools[59] or public "charter schools" that operate independently of many state regulations, reporting directly to state authorities instead.[60] Demand also has developed

56. N.J. STAT. ANN. §§ 18A:7A-15, 7A-34, 7A-35, 7A-38, 7A-39, 7A-40, 7A-42, 7A-44, 7A-45 (West 1989). *See also* KY. REV. STAT. ANN. §§ 158.650-158.750 (Baldwin 1990) (authorizing state board of education to declare a local district "educationally deficient" if it fails to meet minimum student, program, service, or operational performance standards).

57. For a background discussion of the Jersey City takeover, see Sally B. Pancrazio, *State Takeovers and Other Last Resorts*, *in* SCHOOL BOARDS: CHANGING LOCAL CONTROL 71 (Patricia First & Herbert Walberg eds., 1992). For a discussion of the results of the takeover five years later, see Kimberly J. McLarin, *Jersey City Schools Audit Complicates State Control*, N.Y. TIMES, July 10, 1994, at A26 (discussing lack of agreement regarding indicators of higher student performance, uncovering of fiscal irregularities, and absence of any plan for phasing out state control).

58. *See, e.g.*, MASS. GEN. LAWS ANN., ch. 71, § 59C (West 1993); KY REV. STAT. ANN. § 160.345 (Michie 1987 & Supp. 1990). In Chicago, dissatisfaction with the performance of the city's board of education led to legislative enactment of an extensive decentralization scheme that vests basic responsibility for choosing a principal, teachers, and many curriculum and budget functions in a parent-dominated, school-based council. ILL. REV. STAT. ch. 122, para. 34 (1989).

59. *See, e.g.*, JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS 1 (1991).

60. Massachusetts recently announced that 15 new schools will be designed, run by 13 different organizations, under its charter school statute. MASS GEN. LAWS ANN. ch. 71, § 89 (West 1994). Seven other states operate such charter schools and ten others have considered or are considering establishing them. William Celis, *15 Massachusetts Public Schools are Entrusted to Private Managers*, N.Y. TIMES, Mar. 19, 1994, at A1.

for the right to enter into privatization contracts, which turn over the operation of local public schools to management consultant firms,[61] and for the elimination of local school boards entirely.[62]

For all the buffeting that local school boards have suffered in recent years, however, local control of education remains a worthy ideal.[63] Local control encourages diversity, innovation, and experimentation in education. Moreover, it promotes efficiency and direct accountability to those most affected by schooling practices—the parents and citizens who live in that particular community. Perhaps most significantly, local control invites a high level of direct citizen involvement at the grass-roots level. Despite its many shortcomings, the local school district remains the most broad-based and effective vehicle for meaningful participatory democracy in American society. This involvement is particularly essential in the educational realm, because it encourages substantive parental influence on sensitive values issues.[64]

The issue, therefore, is not whether local control of education is important, but how we can best promote meaningful local control. Recent proposals to refocus the functions of local school boards to emphasize core policy-making activities[65] or to promote community dialogues to create working consensus on controversial values issues[66] promise to strengthen local control. Perpetuation of highly inequitable state fiscal equity schemes clearly does not.

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61. In recent years, both the Minneapolis and Baltimore school boards have signed agreements that have turned over the management of some or all of their schools to private management consulting firms. Six more school systems, including those in Milwaukee, San Diego, and Washington, D.C., are reportedly investigating this scheme. *More Districts Explore Privatizing Schools*, SCHOOL BOARD NEWS, Feb. 1, 1994, at 1; *Private Firm to Manage Nine Baltimore Public Schools*, SCHOOL BOARD NEWS, June 23, 1992, at 1.

62. *See, e.g.*, Myron Lieberman, THE FUTURE OF PUBLIC EDUCATION 34 (1960); Richard Finn, *Re-Inventing Local Control, in* SCHOOL BOARDS: CHANGING LOCAL CONTROL (Patricia First & Herbert Walberg eds., 1992).

63. For an insightful analysis of the value of local control in education, see Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773 (1992).

64. In this sense, effective parental involvement in public education avoids many of the problems associated with the constitutional "opt-out" remedy for those whose values cannot be accommodated in the public schools. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (establishing a parental right to educate children in private, not public, schools); Michael A. Rebell, *Values Inculcation and the Schools: The Need for a New Pierce Compromise, in* PUBLIC VALUES, PRIVATE SCHOOLS 37 (Neal Devins ed., 1989).

65. *See, e.g.*, TASK FORCE ON FEDERAL ELEMENTARY AND SECONDARY EDUC. POLICY, THE TWENTIETH CENTURY FUND, FACING THE CHALLENGE (1992); Jacqueline P. Danzberger, *Governing the Nation's Schools: The Case for Restructuring Local School Boards*, 75 PHI DELTA KAPPAN 367 (1994).

66. *See* Michael A. Rebell, *Schools, Values and the Courts*, 7 YALE L. & POL'Y REV. 215 (1989); Harold Patterson, *Don't Exclude the Stakeholders*, SCH. ADMIN., at 13, Feb. 1993.

To tout local control and then deprive poor districts of sufficient resources to exercise any meaningful local policy discretion is "a cruel illusion for the poor districts due to limitations placed upon them by the system itself."[67] The New York Court of Appeals upheld the state's inequitable education funding formula in 1982 on the basis of a local control theory:

> It is the willingness of the taxpayers of many districts to pay for and to provide enriched educational services and facilities beyond what the basic pupil expenditure figures will permit that creates differentials in services and facilities.[68]

This assumption is based on a suburban model that equates local control with protection of family interests and parental control.[69] It is belied, however, by the obvious fact that even though poor districts often tax themselves at a higher rate, they are incapable of raising sufficient sums to meet their minimum needs, let alone to engage in creative local policymaking initiatives.

Moreover, the argument for local control is strongly "undercut and limited by the legislature's enactment of requirements for statewide uniformity [in education mandates]."[70] The increase in state mandates in recent years has had a "disproportionately harsh impact on the property-poor districts."[71] The need to devote scarce resources to state-mandated requirements severely limits a district's ability to establish priorities and control educational policy. The impact of these mandates is especially severe in cities like New York, Newark, and Baltimore, which must disproportionately provide additional services to limited English-proficient, disabled, and educationally disadvantaged students.[72]

Behind much of the local control rhetoric is an assumption that fiscal equity reform will necessarily be accompanied by increased state control

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67. Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983)(quoting Serrano v. Priest, 557 P.2d 929, 948 (Cal. 1977)).

68. Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 367 (N.Y. 1982). *See also* Board of Educ. v. Walter, 390 N.E.2d 813, 820 (Ohio 1979) (concluding that local control means "not only the freedom to devote more money to the education of one's children but also control over and participation in the decision-making process as to how these local tax dollars are to be spent").

69. *See* Richard Briffault, *Our Localism: Part II: Localism and Legal Theory*, 90 COLUM. L. REV. 316 (1990); *see also* Kern Alexander, *Equitable Financing, Local Control and Self-Interest*, *in* THE IMPACTS OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE 293, 306 (Julie K. Underwood & Deborah A. Verstegen eds., 1990) (explaining that local control doctrine "represents an elaborate justification for the self-interest of maintaining social and economic advantage").

70. Bismark Public Sch. Dist. No. 1. v. State, 511 N.W.2d 247, 260 (N.D. 1994).

71. Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo, 578 N.Y.S.2d 969, 972-73 (Sup. Ct. Nassau County 1991), *modified on other grounds*, 606 N.Y.S.2d 44 (App. Div. 1992), *aff'd*, 655 N.E.2d 647 (N.Y. 1995).

72. *See infra* part I.D.

and rigid centralization, because "those who pay the piper call the tune."[73] But a state financing system can promote local control or any other public policy goals that it is designed to pursue. A financing system could, for example, provide equal per-capita allotments to each district, or appropriate need-based weightings, without additional strings attached—or no more strings than those which presently tie up local districts. In fact, a well-devised state financing system could specifically promote family interests, parental involvement, and meaningful local control by providing financial incentives for the creation of local policy boards, community values dialogues, or other initiatives that might address the true problems of local governance.[74]

In any event, there has never been an empirical showing "that a discriminatory funding scheme is necessary to local control."[75] On the contrary, an efficient and equitable state financing scheme "will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives that are not now available to them,"[76] without undermining the traditional policymaking capacity of more affluent districts.

D. Municipal Overburden

In the 1970s, advocates of fiscal equity for large cities developed the concept of "municipal overburden." Many state fiscal allocation schemes were said to be discriminatory because, when applied to the large city districts, they overestimated the cities' ability to finance public education by failing to account for the enormous burdens they face in providing services in other areas, such as welfare, public health, public housing, services to the elderly, crime prevention, correctional facilities, mass transit, and maintenance of infrastructure. Plaintiffs pressed this argument most forcefully in

73. Alexander, *supra* note 69, at 303. *See also* Olsen v. State, 554 P.2d 139, 146 (Or. 1976) ("[T]he governmental body supplying the funds, despite initial protestations to the contrary, ultimately directs how the funds shall be spent"); James G. Ward, *Implementation and Monitoring of Judicial Mandates with Interpretive Analysis, in* IMPACTS OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE 225, 246 (Julie K. Underwood & Deborah A. Verstegen eds., 1990) (arguing that in California and New Jersey "the net effect of the school finance reform cases was increased centralization and bureaucratic decision-making").

Rodriguez assumed that a plaintiff victory would likely result in statewide assumptions of all educational funding. *Rodriguez*, 411 U.S. 1, 41 n.85. That expectation has not in fact proven accurate. Only two (California and Washington) of the fourteen states that have invalidated their state education financing systems have witnessed significant trends toward statewide centralization of education finance. In California, the centralizing trend was due more to Proposition 13 than to the *Serrano* decision. WARD, *supra* note 73, at 248.

74. A well-devised accountability system can also utilize performance standards that promote effective management and resource utilization at the local level. Although statewide performance standards may be applied rigidly, they also can be combined with a charter school philosophy that exempts school districts which meet defined performance standards from existing state regulations. *See supra* notes 53-58 and accompanying text.

75. Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993).

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

Levittown v. Nyquist.[77] While the lower courts in *Levittown* accepted the municipal overburden argument,[78] the New York Court of Appeals did not:

> While unquestionably education faces competition in the contest for municipal dollars from other forms of public service for which non-municipal school districts bear no responsibility, municipal dollars flow into the cities' treasuries from sources other than simply real property taxes—sources similarly not available to non-municipal school districts.[79]

In the wake of this resounding rejection by New York's highest court, the concept of municipal overburden has largely been abandoned in fiscal equity litigation, partially because of the influence of certain economists who argue that the complexity of analyzing comparative tax burdens and benefits makes municipal overburden an elusive concept.[80] The only court in recent years to set aside technical economic arguments has been the New Jersey Supreme Court, which remarked about the constitutional consequences of municipal overburden:

> The underlying causes of municipal overburden are many and complex. Its consequences in this case are clear and simple. The poorer urban school districts, sharing the same tax base with the municipality, suffer from severe municipal overburden; they are extremely reluctant to increase taxes for school purposes. Not only is their local tax levy well above average, so is their school tax rate. The oppressiveness of the tax burden on their citizens by itself would be sufficient to give them pause before raising taxes. Additionally, the rates in some cases are so high that further taxation may actually decrease tax revenues . . . .[81]

Municipal overburden is indisputable as a political reality. While economists often debate whether large cities with heavy expenditures also

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77. 439 N.E.2d 359 (N.Y. 1982).

78. 443 N.Y.S.2d 843, 851-53, 862 (App. Div. 1981); 408 N.Y.S.2d 606, 640 (Sup. Ct. 1978). The trial court in Hornbeck v. Somerset County Bd. of Educ. (Cir. Ct. Baltimore 1979) (unpublished, on file with author) also upheld the municipal overburden argument. The Maryland Supreme Court's reversal of the case claimed that municipal overburden was irrelevant, as long as the funding in city schools was adequate. Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 780 (Md. 1983). The New Jersey Supreme Court explicitly acknowledged municipal overburden in Robinson v. Cahill, 303 A.2d 273, 297 (1973).

79. 439 N.E.2d at 365.

80. *See, e.g.*, Dick Netzer, *State Education Aid and School Tax Efforts in Large Cities, in* SELECTED PAPERS IN EDUCATION 135 (Edith Tron ed., 1974); Harvey E. Brazer & Therese A. McCarty, *Interaction between Demand for Education and for Municipal Services*, 40 NAT'L TAX J. 555 (1987). Other economists, however, argue that big cities face special needs that should be recognized in school aid formulas. *See, e.g.*, HELEN F. LADD & JOHN YINGER, AMERICA'S AILING CITIES: FISCAL HEALTH AND THE DESIGN OF URBAN POLICY (1989); James R. Knickman & Andrew J. Reschovsky, *Municipal Overburden: Its Measurement and Role in School Finance Reform in* PAPERS IN SCHOOL FINANCE 445 (Edith Tron ed., 1981).

81. Abbott v. Burke, 575 A.2d 359, 393 (N.J. 1990).

have compensating tax resources, legislatures usually ignore this issue. The equity of the cities' tax burdens is not fairly assessed in the political process because cities also carry a political overburden; city governments must simultaneously address crime, welfare, education, and other pressing issues.

> While legislators from mostly white, middle-income districts can focus their energy on passing school funding measures that benefit children and teachers within their legislative districts, legislators from predominantly urban areas have greater difficulty organizing themselves around a single issue . . . . To garner sufficient legislative support for the non-educational programs that are of great importance to urban voters, large city legislators in these two states in the last 15 years have been under pressure to accept school funding packages that place large city districts at a disadvantage.[82]

Furthermore, education is often at a political disadvantage in cities like New York, where the local school boards have no independent taxing authority. Unlike school boards in most suburban districts, these boards cannot present their budgets and tax rates directly to the voters for approval. Instead, they must compete with other municipal services in the complex, politicized city budgeting process to obtain their allocations.[83]

In addition to the burden imposed on large cities by inordinate welfare, police, hospital, and other costs, they face extraordinary demands for educational services. The New York City schools, for example, enroll approximately 70 percent of the students in New York State who live in concentrated poverty, over 60 percent of the public school children in the state who participate in remedial programs to compensate for deficiencies in their academic performance, 51 percent of the state's students with severe disabilities, and 81 percent of the state's pupils with limited English proficiency.[84] Urban decay demands that the City also expend enormous sums

82. Neil F. Theobold & Lawrence O. Picus, *Living with Equal Amounts of Less: Experiences of States with Primarily State-Funded School Systems*, 17 J. EDUC. FIN. 4, 5 (1991).

83. In 1964, the New York state legislature, responding to the fact that New York City often redirects funds voted by the legislature as school aid, required the city to devote to education the same proportion of its award budget that it had allocated for the average of the prior three years. N.Y. EDUC. LAW § 2576(5) (McKinney 1988). By 1994, the effect of that legislation had dissipated, and the legislature failed to enact a new fixed proportion mandate. Ian Fisher, *Albany Falters in Effort to Earmark School Aid*, N.Y. TIMES, June 20, 1994, at B3.

84. Amended Complaint at ¶ 36, Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995) (hereinafter Amended Complaint of CFE). Similar statistics apply to other big cities. Thus, in Baltimore, 61.6 percent of the students were from impoverished backgrounds, a rate half again as high as that in poor rural areas; 17.1 percent of its students were in special education, a rate that is 41 percent above the state-wide average. ROBERT SLAVIN, CENTER FOR RESEARCH ON EFFECTIVE SCHOOLING FOR DISADVANTAGED STUDENTS, FUNDING INEQUITIES AMONG MARYLAND SCHOOL DISTRICTS: WHAT DO THEY MEAN IN PRACTICE 5, 6 (1991). In New Jersey in 1984-85, 71 percent of all minorities in the state were educated in poor urban districts. In 1986-87, minority enrollment was 99 percent

on school security. Almost incomprehensibly in the face of these overwhelming special needs, the current state aid allocation actually averages *less* per-capita funding for students in New York City.[85]

The major political reality of *de facto* race segregation underlies the municipal overburden issue. Almost invariably, affluent whites leave large cities that are plagued with rising demands for municipal services and declining tax bases. In New York City, 60 percent of the overall population[86] and 81 percent of the public school population is African-American, Latino, or other minority.[87] Indeed, approximately 74 percent of the minority students in New York State attend schools in New York City.[88]

Another reason for most courts' rejection of the legal doctrine of municipal overburden is skepticism—some might say reflecting conscious or unconscious racism[89]—about whether these enormous problems can, in fact, be overcome. The rejection of municipal overburden in fiscal equity cases abandons African-Americans, Latinos, and other minorities who populate the nation's large urban centers. It continues a trend of backtracking on *Brown v. Board of Education*'s[90] promise of truly equal educational opportunity which began with *Milliken v. Bradley*.[91] *Milliken* precluded meaningful racial integration for most northern and western urban areas by exempting the outlying predominately white suburban school districts from responsibility for urban desegregation. Denial of municipal overburden remedies in fiscal equity suits exacerbates the detrimental impact of *Milliken* by depriving cities of the funding needed to provide quality education in the segregated schools that remain in the inner city neighborhoods.[92]

The problems of American cities are formidable, and easy solutions are not in sight. Nevertheless, for moral, political, and legal reasons, we

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in East Orange, 95 percent in Camden, and 91 percent in Newark. Abbott v. Burke, 575 A.2d at 387.

85. In 1992-93, on average, each student in New York City received approximately $400, or 12 percent, less education aid than her peers in the rest of the state. Amended Complaint of CFE, *supra* note 84, at ¶ 34.

86. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, COUNTY AND CITY DATA BOOK 782-83 (12th ed. 1994).

87. Amended Complaint of CFE, *supra* note 84, at ¶ 72.

88. *Id.*

89. *See* Charles R. Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (proposing equal protection test that evaluates governmental conduct to determine whether it conveys a symbolic message to which our culture attaches racial significance).

90. In *Brown*, 347 U.S. at 495, the Supreme Court boldly and unanimously declared that "in the field of public education the doctrine of 'separate but equal' has no place. Separated educational facilities are inherently unequal." (quoting Plessy v. Ferguson, 163 U.S. 537, 552 (1896)).

91. 418 U.S. 717 (1974).

92. Lawrence's equal protection approach, cited *supra* note 89, would have applied heightened scrutiny to *Milliken* and fiscal equity cases, rejecting municipal overburden arguments in which unconscious racial attitudes undoubtedly affected the outcomes.

cannot continue to neglect these urban areas and the largely minority populations who inhabit them. The New Jersey Supreme Court bluntly stated:

> Obviously, we are no more able to identify what these disadvantaged students need in concrete educational terms than are the experts. What they don't need is more disadvantage . . . . If the claim is that these students simply cannot make it, the Constitutional answer is, give them a chance. The Constitution does not tell them that since more money will not help, we will give them less; that because their needs cannot be fully met, they will not be met at all.[93]

Thus, the denial of the validity of municipal overburden reflects serious doctrinal defects, like the red herring of unproven cost/quality correlations, the implausible rejection of fundamental interest status for education, and the mystique of local control. Clearly, judicial deliberations regarding fiscal equity tend to obfuscate rather than clarify the real issues. The next section explores the reasons courts and policymakers endeavor to avoid facing the real issues and proposes promoting civic dialogue as a means candidly to confront them.

II
FACING REALITY

Why is legal discussion of fiscal equity issues shrouded in mythology? Why do many courts go to such lengths to avoid facing the real issues? Stated simply, and reflecting widespread public perceptions, the courts consider the real issues too hard to face.

A. The Real Issues

Five crucial issues affect current efforts to attain fiscal equity in education. By facing and understanding these real issues, we can more effectively focus litigation and remedies on improving educational quality for all students.

First, our educational system today is operating inconsistently with America's constitutional and ideological commitments to equal educational opportunity. Millions of American children are, in Jonathan Kozol's apt phrase, "savaged" by the grossly inferior education they receive. For example, students of a school in the Bronx (which is a former rollerskating rink) are expected to learn in the following setting:

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93. Abbott v. Burke, 575 A.2d 359, 401, 403 (N.J. 1990).

The New York Court of Appeals' recent upholding of plaintiffs' Title VI claim that the state's educational finance scheme has a disparate racial impact on the largely minority student population of New York City may provide a new legal route for equity to large city school districts—or at least to those with predominantly minority student populations. *See* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995).

> Two first-grade classes share a single room without a window, divided only by a blackboard. Four kindergartens and a sixth grade class of Spanish-speaking children have been packed into a single room in which, again, there is no window. A single grade bilingual class of thirty-seven children has its own room but again there is no window.
>
> By eleven o'clock, the lunchroom is already packed with appetite and life. The kids line up to get their meals, then eat them in ten minutes. After that, with no place they can go to play, they sit and wait until it's time to line up and go back to class.[94]

The pervasive and persistent educational deprivations experienced by most inner-city children affect not only their instructional progress, but also their basic humanity and sense of self-worth:

> Perhaps the worst result of [the belief that the poorest districts are beyond help] is the message that resources would be wasted on poor children. This message trickles down to districts, schools and classrooms. Children hear and understand this theme—they are poor investments—and behave accordingly.[95]

Second, fiscal resources are limited. Although we live in an era of budget cuts and "reinvented" government, many of the operative assumptions of our political system still hark back to the expansive, optimistic attitudes that supported the civil rights movement of the late 1950s and 1960s. In the 1990s, we can no longer assume that ours is an affluent society with an ever-expanding pie, that can provide increasing largess to all.[96]

Clearly, money can improve educational quality. But, the nation's present fiscal capacity cannot provide the financial resources necessary to fund the Comer model or similar initiatives. Unfortunately, schools today often need to overcome hunger, homelessness, and a myriad of personal tragedies to bring children to the point where they can concentrate effectively on learning. Realistically, current resources cannot provide quality education to all those who are educationally disadvantaged.

On the other hand, we can obtain substantial additional funds for education by confronting difficult priority-setting decisions, particularly concerning the current political sacred cows of Medicare and social security. In recent years, federal programs for those over sixty-five, who have an estimated poverty rate of 4 to 12 percent, have consumed 22 percent of the federal budget. In contrast, programs for those under eighteen, who have a

94. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 86 (1991).

95. *Id.* at 99.

96. Kozol denies this proposition, asserting that America has "limitless potential" and that "surely there is enough for everyone in this country." *Id.* at 233. However, his optimistic outlook is not buttressed by hard economic analysis of the extent of available wealth, currently or in the foreseeable future.

poverty rate of 17 to 20 percent, have received only 4.8 percent of federal expenditures.[97]

Third, residents of affluent school districts will not readily shift funds that now support their children's opportunities in order to ameliorate savage inequalities in poor districts. Educational achievement provides individuals with a route to personal advancement. Especially with recent increased apprehension about economic opportunities, many middle-class parents seek competitive advantages for their children, not equal educational opportunity for all. For these reasons, parents in affluent school districts will resist vehemently any actions that they perceive as jeopardizing their children's educational well-being.[98]

In New Jersey, for example, the Quality Education Act of 1990 substantially raised taxes, increased state aid to poor urban districts, phased out the payment of minimum aid to wealthy districts, and in other ways adversely affected affluent districts.[99] In the November 1990 elections, taxpayer revolt against these changes caused the near defeat of U.S. Senator Bill Bradley and the loss of many Democratic legislative seats. In the wake of these results, the legislature modified the law to provide greater property tax relief to taxpayers, grant less aid to the financially-strapped urban districts, and place a less detrimental burden on affluent districts.[100]

Thorough equalization also conflicts with the increasingly accepted view that a degree of educational elitism is necessary to maintain America's position in the competitive international economy. Robert Reich, claiming that "no other society prepares its most fortunate young people as well for lifetimes of creative problem-solving, -identifying, and -brokering,"[101] describes the education of "symbolic analysts" who constitute the country's dynamic professional and managerial elite:

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97. SYLVIA ANN HEWLETT, WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN 141 (1991). *Cf.* E. L. DOCTOROW, THE WATERWORKS (1994)(describing in graphic allegorical terms the horror of a society in which frail, elderly plutocrats extend their lives by literally feeding off the blood of impoverished, neglected children).

98. The attempt to recapture tax revenues from affluent local school districts "has been the single greatest practical problem with judicial decrees of fiscal neutrality." WILLIAM H. CLUNE, *supra* note 21, at 731. Clune adds that

> wealthier districts have proven the most determined foes of fiscal neutrality in constitutional litigation. Much of the delay and uncertainty in reaching stable legislative solutions has revolved around the rich districts. Recapture led to at least two state supreme court cases [in Texas and Wisconsin] that held equalization through recapture unconstitutional.

Id. (footnotes omitted). *See also* Mark G. Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499 (1991).

99. N.J. STAT. ANN. §§ 18A:7D-7 to -9, 7D-11 to -12, 7D-33 (Supp. 1991).

100. *See* MARGARET E. GOERTZ, EAGLETON INSTITUTE OF POLITICS, RUTGERS UNIVERSITY, THE DEVELOPMENT AND IMPLEMENTATION OF THE QUALITY EDUCATION ACT OF 1990 13-14 (1992) (on file with author).

101. ROBERT B. REICH, THE WORK OF NATIONS 228 (1992).

> The truth is that while the vast majority of American children are still subjected to a standardized education designed for a standardized economy, a small fraction are not. By the 1990s, the average American child was ill equipped to compete in the high-value global economy, but within that average was a wide variation . . . . Some American children receive almost no education, and many more get a poor one. But some American children—no more than 15 to 20 percent—are being perfectly prepared for a lifetime of symbolic-analytic work. . . . Some of these young people attend elite private schools, followed by the most selective universities and prestigious graduate schools; a majority spend childhood within high quality suburban public schools where they are tracked through advanced courses in the company of other similarly fortunate symbolic-analytic offspring, and thence to good four-year colleges.[102]

This elitist perspective perhaps explains why the nation's political leadership has responded lackadaisically to the intensifying concern of professional educators in the trenches about the growing crisis in education.

Fourth, there is a widespread perception of endemic waste, mismanagement,[103] and political gridlock[104] in many large, urban school districts, which many believe is irremediable and unique to these districts. Although mismanagement and waste may, in fact, be as endemic in affluent suburban districts, the public doubts this. There is little incentive to provide massive new funding to urban school districts because few people believe these districts will put the funds to good use.

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102. *Id.* at 227.

103. The extensive public opposition that led to modification of New Jersey's Quality Education Act was due not only to concern over increased taxes, but also to two specific, polarizing fears. These were a) apprehension of a "bottomless pit" of wasted funding to mismanaged urban school districts, and b) resistance to snuffing out the "lighthouses" by leveling down high quality education in affluent suburban school districts. WILLIAM FIRESTONE, MARGARET GOERTZ, GARY NATRIELLO, BRIANNA NAGLE & MORGAN COLLINS, EAGLETON INSTITUTE OF POLITICS, RUTGERS UNIVERSITY, NEW JERSEY'S QUALITY EDUCATION ACT: FISCAL, PROGRAMMATIC, CURRICULAR AND INTERGOVERNMENTAL EFFECTS 2-3 (1994) (on file with author).

104. John Chubb and Terry Moe, in POLITICS, MARKETS & AMERICA'S SCHOOLS (1990), describe how the combination of extensive federal and state mandates and the hold of powerful vested interest groups make innovation and democratic decisionmaking virtually impossible in most large American school districts. Although their proposed educational vouchers may create more problems than they solve, the systemic failures and impediments to reform they describe are significant and formidable. *Id. See also* SEYMOUR BERNARD SARASON, THE PREDICTABLE FAILURE OF EDUCATIONAL REFORM (1990) (discussing obstacles to education reform efforts).

Finally, the judiciary reveals an institutional reluctance to deal with substantive policy issues. Most judges believe these issues are more properly resolved by the legislative or executive branches of government, consistent with classical separation of powers theory.[105] Although in the area of fiscal equity reform, many legislatures and governors have failed to carry out their responsibilities appropriately, courts are nevertheless reluctant to enter the fiscal equity fray. Even when holding the government liable, the judicial inclination is to leave the formulation of a remedy up to the same legislative and executive leadership that failed to address the problem in the first place.[106]

In summary, when we acknowledge that savage denials of equal opportunity, resource limitations, educational elitism, fear of urban mismanagement, and judicial institutional capacity are the real issues, we more easily understand why few political leaders or judges want to face them. The diverse, competing interests involved cannot readily be satisfied. Moreover, dealing directly with these hard issues raises some risk of increased political confrontation and the worsening of racial, class, generational, and geographic antagonisms.

However, continued dissembling and avoidance of the real issues is exacting a heavy price. That price includes the high cost of crime, unemployment, welfare, and other aspects of urban decay that result from educational deprivation. Perhaps even more troubling in the longer run, this unwillingness to confront honestly the gross denials of equal educational opportunity to millions of American school children amounts to a renunciation of the American dream. Such social neglect creates despair among the disadvantaged and opportunistic cynicism among the privileged elite and rots the democratic soul within American civilization.

B. Civic Dialogue: A Way to Confront the Real Issues Candidly

Democracy operates through two modes: representative institutions and direct participatory processes. The pluralistic, compromising processes that prevail in the representative legislative and executive branch institutions deal inadequately with deep-rooted ideological and moral issues like fiscal equity in education.[107] Such core concerns require direct citizen interchanges and consideration of the overall public interest. Contemporary

105. *See generally* MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICYMAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM (1982).

106. *See* REBELL, HUGHES & GRUMET, *supra* note 8, at A-1 to A-93 (recounting judicial, legislative and executive interactions in 10 states that have attempted to remedy inequities in funding for education).

107. For a detailed discussion of the legislative logrolling, mutual adjustment process, see CHARLES E. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY (1965). *See also* MARTHA DERTHICK, UNCONTROLLABLE SPENDING FOR SOCIAL SERVICE GRANTS (1975) (discussing mutual adjustment development of social policy in the administrative implementation process).

proponents of participatory democracy stress the importance of civic dialogue in dealing with issues of this type. In such civic dialogues, "citizens [can] put their moral beliefs to the test of public deliberation and strengthen their convictions or change their minds in response to arguments in which they engage under conditions governed by the principals of accommodation."[108]

Participatory democracy does not require consensus, and it does not imply that perfect solutions will be found for the hard problems that exist in an imperfect world. Civic dialogue does, however, require an honest attempt to consider the needs of the entire polity and to find a solution which a majority—and hopefully a large majority, cutting across class, race, and geographic divisions—can accept.

The civic dialogue ideal is attracting increasing attention among academics and policymakers.[109] The most logical testing ground for its practical application is the educational sphere. The school setting is institutionally committed to positive visions and rational discourse. Since the ideal of education inspires optimistic hopes for progress and renewal, concern for the welfare of the nation's children can motivate parents,

108. Amy Gutmann & Dennis Thompson, *Moral Conflict and Political Consensus*, 101 ETHICS 64, 86-87 (1990). *See also* ROBERT N. BELLAH, RICARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER & STEVEN M. TIPTON, HABITS OF THE HEART 218 (1985); Joel F. Handler, *Dependent People, the State and Modern/Post-Modern Search for the Dialogic Community*, 35 UCLA L. REV. 990 (1988); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

109. Civic dialogue is currently promoted by adherents of two intellectual movements. The first is Civic Republicanism which began as a scholarly attempt to reinterpret the constitutional roots of the American political system in order to emphasize the importance to the founding fathers of classical republican concepts such as participatory democracy. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969); GARY S. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1978). Civic Republicanism more recently has developed into a broader political-legal perspective which "embraces an ongoing deliberative process . . . to arrive at the public good." Seidenfeld, *supra* note 108, at 1528. *See also* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

The second is the communitarian movement, which seeks to combine a commitment to basic civil rights with a sense of responsibility to the broader community. *See, e.g.*, AMAITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN AGENDA (1993); MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991). Apparently, the Clinton administration is taking communitarian concepts more and more seriously. *See, e.g.*, William Galston, *Point of View: Clinton and the Promise of Communitarianism*, CHRON. HIGHER EDUC., Dec. 2, 1992, at A52; R. A. Zaldivar, *Clinton the Communitarian: A New President and an Emerging Philosophy*, WIS. ST. J., Jan. 24, 1993, at 1E.

teachers, citizens, and their political leaders to moderate their personal interests and political differences in the pursuit of transcendent common goals.[110]

Clearly, this type of civic dialogue is relevant to fiscal equity concerns within the educational sphere:

> We cannot underestimate the power of public discourse in convincing the citizens of our states that major systemic changes need to take place to ensure the equal educational opportunity for all children for the future of our society. Public conversations can be a powerful device to arrive at social consensus.[111]

The significant potential for successful civic dialogue on the hard issues involved in fiscal equity reform is indicated by the fact that reform initiatives have encountered the least political opposition and brought about the most thorough change in states where broad-based citizen involvement preceded or dominated legislative action.

Kentucky is a prime case in point. Years before the Kentucky Supreme Court issued its decree in *Rose v. Council for Better Educ.*,[112] the "Pritchard Committee" initiated statewide dialogues on education reform.[113] As a non-partisan school reform group composed of ninety-nine members, the Pritchard Committee includes former governors, business leaders, civic activists, parents, and professionals. On one occasion, this committee sponsored a statewide town meeting which brought together 20,000 Kentuckians on one evening to discuss public school reform. Since the Kentucky Education Reform Act[114] was passed, the Committee has actively monitored its implementation.[115]

Similarly, in Arkansas, extensive public hearings in all seventy-five counties of the state, held by Hillary Rodham Clinton's Education Standards Committee,[116] preceded smooth passage and implementation of the Quality Education Act of 1983.[117] In Washington State, the activities of Citizens for Fair School Funding and other advocacy for educational reform contributed to the passage of the Washington Basic Education Act of

110. "Education is always cast as the means whereby citizens of a society learn to live with one another. It always reflects a society's views of what is excellent, worthy and necessary." Jean B. Elshtain, *Democracy and the Politics of Difference*, 4 RESPONSIVE COMMUNITY 9, 14 (Spring 1994).

111. James G. Ward, *Schools and the Struggle for Democracy*, *in* WHO PAYS FOR STUDENT DIVERSITY? 241, 250 (James G. Ward & Peter Anthony eds., 1992).

112. 790 S.W.2d 186 (Ky. 1989).

113. RONALD G. DOVE, JR., ACORNS IN A MOUNTAIN POOL: THE ROLE OF LITIGATION, LAW AND LAWYERS IN KENTUCKY EDUCATION REFORM (1991); JACOB E. ADAMS, THE PRITCHARD COMMITTEE FOR ACADEMIC EXCELLENCE: CREDIBLE ADVOCACY FOR KENTUCKY SCHOOLS (1993).

114. *See supra* note 45 and accompanying text.

115. *See* REBELL, HUGHES & GRUMET, *supra* note 8, at A-27 n.74.

116. *Id.* at A-2.

117. ARK. CODE ANN. § 6-15 (Michie 1987).

1977.[118] Their success led one commentator to call the 1977 legislative session "a consensus looking for a solution."[119] In June, 1995, Arizona's Superintendent of Schools convened an "education finance summit" of parents, teachers, school board members, business leaders, legislators, and others to initiate dialogue on how to respond to the state supreme court's recent fiscal equity order.[120]

These experiences demonstrate that a meaningful participatory process can avoid the pitfalls of the standard legislative process and lead to significant broad-based agreement on substantive reforms. In a proper setting, the varied interests and competing values involved in fiscal equity reform can accomodate one another effectively to develop agreement on the fiscal, educational, and underlying values issues. Indeed, in recent decades in New York State all three commissions established to reconcile these competing values and interests have achieved consensus or substantial majority support for meaningful reform.[121] However, while these commissions created workable solutions, their recommendations were not taken seriously by the legislature because they lacked a base of political support among a broad spectrum of the populace.

Recent developments in the Alabama fiscal equity litigation[122] further illustrate this point. Rather than immediately remanding the matter to the legislature, the Alabama Supreme Court appointed a facilitator to work with the parties on a proposed remedial order.[123] The parties, through their attorneys, worked with a number of experts to develop a remedial plan. At the same time, a governor's task force heard testimony from

118. 1977 Wash. Laws ch. 359.

119. ROBERT PALAICH, STATE LEGISLATIVE VOTING IN LEADERSHIP: THE POLITICAL ECONOMY OF SCHOOL FINANCE 234 (1983).

Passage of Washington's 1993 outcomes-oriented reform bill was also preceded by extensive discussions of educational issues by the Business Roundtable and the Governor's Council on Education Reform and Funding. REBELL, HUGHES & GRUMET, *supra* note 8, at A-79.

Note also that in New Jersey, after years of judicial-legislative confrontations, plaintiffs have now joined with the state school boards association, teachers' union, other educational interest groups, and organized representatives of affluent and middle-tier school districts to try to find mutually acceptable proposals to present to the legislature. *Id.* at A-58 to A-59.

120. Mike McCloy, *School Funding Remedy Sought*, THE PHOENIX GAZETTE, June 6, 1995, at B1.

121. The "Salerno" commission's 1988 report began by noting that "members of the Commission have agreed to a consensus report and not to submit minority statements which might detract from the impact of the overall report as a blueprint for future state deliberations. This [did] not mean, however, that each commission member [was] in total agreement with every individual recommendation." FUNDING FOR FAIRNESS: REPORT OF THE NEW YORK STATE TEMPORARY COMMISSION ON THE DISTRIBUTION OF STATE AID TO LOCAL SCHOOL DISTRICTS 2 (1988). *See also* REPORT AND RECOMMENDATION OF THE NEW YORK STATE SPECIAL TASK FORCE ON EQUITY AND EXCELLENCE IN EDUCATION (1982); THE FLEISCHMANN REPORT ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION IN NEW YORK STATE (1973).

122. Opinion of the Justices 624 S.2d 107 (Ala. 1993).

123. *Id.* at 166.

school districts, civic and business groups, and others about a potential remedy.[124] This process built an impressive consensus among the parties on an extensive and ambitious proposed remedial order.[125]

However, Alabama has not yet implemented the consensus plan. The legislature still has not enacted the detailed equalization plan or allocated the necessary funding.[126] Furthermore, the plan became a partisan, hotly contested issue in the recent gubernatorial election and in the election for seats on the state board of education.[127]

What we need to do now is build on these previous community dialogue experiences. We can strive to overcome their limitations by expanding the deliberative process to include active participation by a much larger range of individuals and groups from all effected interests. By these means, we can confront, in a principled manner, the problematic clash of values that underlies the politics of fiscal equity reform in education.

Broad coalitions of citizens must accept certain kinds of compromises if fiscal equity reform is to succeed. Some resources must shift from affluent districts to poorer districts. At the same time, civic dialogue must persuade society as a whole to make education a higher spending priority, perhaps at the expense of some programs for the elderly. Some degree of educational elitism inevitably will persist, but the qualifications for entering that elite must be based on true competency measures, rather than the accidents of being born white or to privileged parents. Residents of the affluent suburbs will need to identify with the plight of the inhabitants of the inner city, but the city dwellers, to give credence to their demands for greater resources, will have to prove that they can put the money to productive use.

An extensive, on-going dialogue on these kinds of issues needs to be undertaken at all levels. Citizens in local school districts must examine their educational and funding priorities, their personal and communal commitments to values of equity and values of excellence, and their ability to relate to parents and citizens in other local school districts on these issues. Political and educational leaders at the state and federal levels need to find

124. Letter from Helen Hershkoff, counsel for plaintiffs, (Nov. 4, 1994) (containing details of the Alabama process) (on file with author).

125. The agreement is set forth in the court's Remedy Order of October 22, 1993 (on file with author). It calls for all schools to be funded at a sufficient level to achieve statutory standards of adequate education and for extensive reforms of the statewide educational system, including "adequate education standards, performance-based student achievement assessments, educator performance standards, school level assessments and penalties, staff development, early childhood programs, and guarantees of adequate instructional materials and appropriate facilities."

126. Millicent Lawton, *Ala. Judge Asked to Extend Deadline for Finance Reforms*, EDUC. WEEK, Aug. 3, 1994, at 22.

127. Millicent Lawton, *G.O.P. Board Candidates Target Ala. Reform Plan*, EDUC. WEEK, Oct. 19, 1994, at 11. Conservative Republican candidates associated the plan with the Democratic governor and attacked it as being a "latter-day 'war on poverty' type boondoggle." *Id.*

ways to re-examine the nation's educational goals and to promote broad-based, probing discussions on how our limited resources can best be applied to maximize both excellence and equity. In addition, legislators must be genuinely open to the recommendations that emerge from civic dialogues of this sort. They need to find ways to transcend their concern with their constituents' "naked preferences"[128] and to turn "manipulative politics to a deliberate, transformative politics"[129] in order to consider conscientiously their more deep-rooted moral and civic interests. Courts deciding fiscal equity issues must find remedial approaches that will promote dialogue at the local, state, and national levels to bring meaningful and lasting solutions to these difficult, but ultimately solvable, problems.

CONCLUSION

Two decades after the United States Supreme Court returned the issue of fiscal equity reform to the states, fourteen of the highest state courts have upheld plaintiffs' fiscal equity claims, with eight of these plaintiff victories occurring in the past five years. Cases are currently pending in more than a dozen additional states. Thus far, however, few of the remedies imposed by the courts have been fully successful.

A major reason for this remedial impasse is that courts and policymakers have accepted in whole or in part doctrinal myths that have developed over the decades. They have failed to confront candidly the hard underlying realities of savage denials of equal opportunity, resource limitations, educational elitism, fears of urban mismanagement, and judicial institutional incapacity.

Fiscal equity reform has now reached a decision point. We can continue to dissemble and attempt to muddle through, or we can face these hard realities and seek to find democratic solutions through new forms of civic dialogue. The latter route entails risks, but it is also the only hope for revitalizing our nation's schools—and for maintaining the integrity of the nation's democratic institutions.

128. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (interpreting various constitutional mechanisms that curb naked preferences as reflective of an underlying Civic Republican structure to the Constitution).

129. MICHAEL J. PERRY, MORALITY, POLITICS & LAW 152 (1988).