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THE CONSTITUTIONALITY OF THE K-12 FUNDING SYSTEM IN ILLINOIS

Volume II: 1990 Supplement

With a Note on Abbott v. Burke

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For thirty-three years of
unwavering confidence and encouragement,
to Gloria

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INTRODUCTION

In Volume I of this two-volume study, the authors looked at the history of litigation designed to challenge state systems of financing public school education. Beginning with the first significant judicial decision in this area in 1912 and continuing until the Serrano I decision in 1971, these cases may be viewed as preliminary actions without a clearly focused set of legal arguments directed toward specific aspects of school finance systems. Serrano I and the later cases contained in Volume I changed this diffusion of focus to one concentrating on claims involving federal and state constitutional guarantees of equal protection of the laws. Although the Rodriguez decision eliminated, for all practical purposes, this claim based upon the Fourteenth Amendment to the United States Constitution, various plaintiffs continued to press this issue in state courts under state constitutions. The results of these efforts indicated that nine states were found to have school finance systems which failed to survive such challenges and ten states were upheld in defending their state school finance systems.

Volume I also considered cases which included legal questions related to state aid to public schools in Illinois and applied all of the foregoing to Illinois in order to identify the fundamental questions, issues, and facts which tended to support the present Illinois system and those which would tend to indicate that this system might not withstand constitutional scrutiny. Finally, although clear trends were not found which would indicate how the Illinois system might fair if judicially challenged in an Illinois court, four criteria were identified as being necessary in order to expect a court to find this system unconstitutional. Given the lack of clarity regarding these criteria in Illinois, it was determined that, based upon the analysis of prior cases dealing with the system of financing public schools in Illinois, it may be reasonably concluded that to successfully mount such an attack today would be "difficult at best."

This 1990 Volume II is intended to present the results of new and/or continued litigation challenging the constitutionality of state school finance systems since the publication of Volume I. It will become apparent to the reader that at least two significant trends are illustrated by these more recent cases. First, the litigation in this area has not only continued but has increased in the number of cases. This trend indicates a continued willingness to seek school finance reform through state judicial systems rather than the more traditional political activities and lobbying efforts. In this sense, readers may observe a second trend in the duration of such cases. While California, for example, is a state which represents a history of fifteen years of litigation, more recent cases tend to move through the judicial system more expediently. Second, the litigation in this area has developed new lines of legal argument. While each case previously reported in Volume I was based primarily on financial equity arguments, more recent cases have added adequacy and efficiency as major lines of reasoning. While it is not clear from the cases reported in Volume II if the expansion of the bases for challenging a state's school finance system is a short- or long-term trend, the fact that such an expansion has occurred is illustrated herein.

As was the format in Volume I, the final effort in this 1990 Supplement to Volume I is to apply the foregoing to the present system of state aid to public schools in Illinois and to identify the characteristics which the Illinois system has in common with these cases. Finally, an attempt will be made to apply these characteristics to the present Illinois system in order to "forecast" what would be the likely outcome of a similar challenge mounted in the Illinois judicial system.

One final caution is warranted. Volume II is intended to be a companion to Volume I and should not be viewed as standing alone. No attempt is made in Volume II to reiterate or capsulize the cases, trends or conclusion contained in Volume I. The reader who would undertake a full review of all of the significant litigation in this area, and attempt to understand some of the possible implications such cases have for Illinois, must consider both volumes as a full-range presentation of the litigation challenging the constitutionality of public school finance systems in these United States.

CHAPTER I

STATE AID SYSTEMS JUDICIALLY UPHELD

Following the decision of the United States Supreme Court in Rodriguez holding that education is not a fundamental right under the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution, the arena for judicial challenges to state public school finances systems shifted from federal to state courts.[1] As described in Volume I, state-level challenges were specifically decided in support of various public school finance systems in Arizona, Michigan, Idaho, Oregon, Pennsylvania, Ohio, Georgia, Colorado, New York and Maryland. In this chapter, the state cases which were decided after these ten cases are reviewed. Major emphasis is again placed on identifying the fundamental characteristics of each state's school finance system, the basis in state constitutional and/or statutory low employed by plaintiffs, what each court found with respect to equal protection claims, what school finance concepts--such as wealth discrimination, fiscal neutrality, equity, adequacy, efficiency, equal educational inputs and equal educational outcomes--were involved in each case, and the basis of each decision.

Mississippi

While not a direct challenge to a state's system of public school finance, a 1986 United States Supreme Court decision in a case originating in Mississippi is instructive concerning the distribution of revenue generated from use of federal school land grants.[2] Under the applicable statutes, federal school aid grants commonly referred to as "Sixteenth Sections," constituted property held in trust for the benefit of the public schools."[3] Mississippi statutes also provided that all funds derived from the Sixteenth Section Lands shall be credited to the school districts of the townships in which the lands were located. Consequently, all proceeds derived from such lands were allocated directly to townships. Such lands which were located in the Chickasaw Indian Nation territory and which were ceded to the United States by treaty in 1832, were sold by the State with the provision the "interest" would be paid by the State which would take the form of an annual appropriation to the "Chickasaw Cession" schools. This dual treatment resulted in a disparity in the level of school funds for the Chickasaw Cession schools in 23 counties as compared to the rest of the schools in the State with the average income for the latter schools being much greater than the average income per pupil in the Chickasaw Cession schools. When challenged by the local school officials and school children from the Chickasaw Cession schools, in part arguing that this funding disparity deprived these children of a "minimally adequate level of education" and of the equal protection of the law as guaranteed by the Fourteenth Amendment, the State claimed, in part,that such a funding differential was not unconstitutional under the Supreme Court's prior ruling in Rodriguez.[4]

Factually, a significant difference existed in the amount of money generated to support public schools from the Sixteenth Section in the State compared to those located in the Chickasaw Cession's 23 counties. In the latter, $.63 per pupil was generated while in the remainder of the State, $75.34 per pupil was generated. This 120:1 ratio was the funding disparity which gave rise to this legal action which sought various forms of relief including legislative appropriations to correct the funding imbalance which was claimed, by the plaintiffs, to deny them "their rights to an interest in a minimally adequate level of education, or reasonable opportunity therefore" while assuring such rights to the other school children in the State.[5]

The Supreme Court, while restating the Rodriguez decision that education is not a "fundamental right" within the meaning of the Fourteenth Amendment, recognized that the complaint in this case included both a claim of the denial of the right to a minimally adequate

education and that this right was "fundamental" because it had been infringed by the State and not on the distribution of taxable wealth between school districts as in Rodriguez. It was further argued that, since this was a State action, the Court should apply the more stringent "strict scrutiny" analysis as opposed to the "rational relationship" test applied in Rodriguez. In approaching its analysis in this case, the Court also recognized that:

> . . .this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened [strict scrutiny analysis] equal protection review.[6]

To the disappointment of the school finance reformers who look to judicial remedies for corrective action, the Court elected not to resolve these issues in this case.

While accepting the factual allegations presented in the complaint as true, the Court also stated:

> Petitioners' allegation that, by reason of the funding disparities relating to the Sixteenth Section Lands, they have been deprived of a minimally adequate education is just such an allegation. Petitioners do not allege that schoolchildren in the Chickasaw Counties are not taught to read or write; they do not allege that they receive no instruction or even the educational basics; they allege no school facts in support of their assertion that they have been deprived of a minimally adequate education. As we see it, we are not bound to credit and may disregard the allegations that petitioners have been denied a minimally adequate education.
>
> Concentrating instead on the disparities in terms of Sixteenth Section Lands, benefits that the complaint in fact alleged and that are documented in the public record, we are persuaded that...Rodriguez dictates the applicable standard of review [rational relationship test]. The differential treatment alleged here constitutes an equal protection violation only if it is not rationally related to a legitimate state interest.[7]

Recognizing that this case did not directly challenge the overall school funding system in Mississippi, nor the local ad valorem tax component of that system, the Court held that the Rodriguez decision may not be controlling in this instance. The question remained as to whether or not the Mississippi variations in the benefits received by school districts from Sixteenth Section Lands were rationally related to a legitimate state interest. As viewed by the Court, the question posed in this case was: "Given that the State has title to assets granted to it by the Federal Government for the use of the State's schools, does the Equal Protection Clause permit it to distribute the benefits of these assets unequally among the school districts as it now does?"[8] This equity case was remanded to the U.S. Court of Appeals for the resolution of this question.

North Carolina

The first opportunity for the Court of Appeals of North Carolina to consider a direct constitutionally-based challenge to the state's public school finance system occurred in 1987.[9] In this case the plaintiffs were students enrolled in public schools along with their parents or legal guardians. They alleged that the statutory school finance system resulted in inequities in educational programs and facilities between public schools within counties which had relatively small tax bases from which to draw funds and those in counties with relatively high tax bases. The basis of this complaint included the claim that in their county of residency, Robeson County,

the operation of five separate school districts prohibited effective use of facilities and staff and promoted inequitable use of state and local funds, and as a result of these factors they were "being deprived of equal opportunity to a free public school education in violation of Article IX, Section 2(1), and Article I, Sections 1, 15 and 19 of the Constitution of the State of North Carolina"[10] They did not claim that they were the victims of discrimination, or that they were a suspect class, due to the financing and administrative organization of their schools. As a remedy, they asked the court to order the school finance system to be discontinued and to order the five separate school districts in Robeson County to be consolidated into one administrative unit.

Both claims were predicated upon the argument that they were being denied a fundamental right to equal educational opportunity guaranteed them by Article 1, Section 15, and Article IX, Section 2(1) of the North Carolina Constitution which respectively provided:

> The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.
>
> The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year and wherein equal opportunities shall be provided for all students.[11]

Plaintiffs argued that the foregoing provisions conferred upon them a "fundamental right to equal educational opportunity," that is to say that each student in the State had a fundamental right to an education substantially equal to that enjoyed by every other student in the State, and that the present statutory scheme for financing public education violated that right. According to their argument, the system was constitutionally impermissible because it required the State to provide flat rate grants to local school administrative units based solely upon the average number of pupils in attendance, without taking into account other factors affecting the units' needs for financial assistance. Responsibility for building, maintaining and improving facilities, as well as the responsibility for other costs involved in providing educational resources and services, was placed upon the local school boards, resulting in disparities in the educational opportunities which might be offered by counties with a large tax base, as opposed to those offered in counties such as Robeson which may not have an adequate tax base to adequately fund the facilities required by the statute. They also contended that the multiple school systems in Robeson County fragmented the pupil population to such an extent that educational programs available to some students in the county were not available to others who were in a different school system.

In rejecting the constitutionality argument raised in this action, the court reviewed the history and language of the cited constitutional articles and sections and concluded:

> The fundamental right that is guaranteed by our Constitution, then, is to equal <u>access</u> to our public schools--that is, every child has a fundamental right to receive an education in our public schools. Furthermore, the State is given responsibility for overseeing the public schools of this State in order to ensure that every student in the State receives the education to which he or she is entitled. In the present case, plaintiffs have not alleged that they are being denied an education, but only that they are not receiving the same educational opportunities as students in some other places in the State. The State is required to provide a general and uniform education for the students in its charge. There is no requirement that it provide identical opportunities to each and every student. (Emphasis in original)

> Plaintiffs contend that their argument does not require absolute equality from system to system, but rather requires only that the State can not ignore the relative ability of counties to raise funds when disparities in county wealth deprive students of equal educational opportunity. However, if our Constitution demands that each child receive equality of opportunity in the sense argued by plaintiffs, only absolute equality between all systems across the State will satisfy the constitutional mandate. Any disparity between systems results in opportunities offered some students and denied others. Our Constitution clearly does not contemplate such absolute uniformity across the State.[12]

Turning to the issue of what the mandate "equal opportunities shall be provided for all students" was intended to guarantee, the court determined that it was intended to replace the "separate but equal" provision of the repealed 1868 Constitution. In this context, the current mandate was viewed as a commitment to provide all students, regardless of race or other classification, with equal access to full participation in the public schools. As stated by the court: "Any other interpretation, we believe, would require drawing inferences and conclusion that not only cannot be supported, but are, in fact, contradicted by the history surrounding the adoption of the Constitution [1970]."[13]

The only question remaining before the court, therefore, related to the "wisdom" of the Legislature in providing the challenged method of school finance and of permitting five separate school systems to be maintained in Robeson County. The court rejected this challenge by concluding that such matters were of "purely legislative concern" and stated that "as to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts--it is a political question".[14]

Although plaintiffs appealed the North Carolina Court of Appeals decision to the State Supreme Court, the high court dismissed their appeal without commenting on the constitutionality claims involved in this case.[15]

Oklahoma

Although the Supreme Court of Oklahoma had dealt with a school finance system question dealing with the funding of a "minimum program" in public schools, this case was not a frontal assault on the constitutionality of the total state aid system.[16] In 1987, however, an action was brought to the Supreme Court of Oklahoma by public school students and others directly challenging the constitutionality of the state's system of financing public schools.[17]

The plaintiffs in this case, the Fair School Finance Council, Inc., an Oklahoma nonprofit corporation whose members included the board of education of 38 school districts, 44 school children, and 58 tax paying residents residing in these districts, brought a class action suit against the Governor, State Superintendent of Public Instruction, the State Board of Education, and the Treasurer of the State of Oklahoma. The plaintiffs sought a judgment declaring that the method of financing public education in the State violated both the United States and the Oklahoma Constitutions by being based upon disparities in taxable wealth among the various school districts as well as the effect of these differences upon the fiscal ability of poorer districts to provide their students with educational opportunities comparable to those of the most affluent school districts.

The constitutional provisions identified as being violated by the plaintiffs were the "Equal Protection Clause" of the Fourteenth Amendment, a claim which was fundamentally rejected based on the Rodriguez decision, and two Oklahoma Constitution provisions which provided:

> Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all children of the State....[18]

> The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated.[19]

In its efforts to carry out these constitutional mandates, the Oklahoma Legislature designed a system of financing public elementary and secondary education which relied primarily on two sources of revenue--local and state funds. A third but minor source of funding was that received from the federal government.

The greatest local sources of revenues for financing public education were various ad valorem taxes levied on the real and personal property located within school districts. Each county was required to levy a tax of four mills on the dollar valuation of all taxable property in the county for school purposes. Unless a different method was provided by statute, the proceeds of this levy were to be apportioned among the county school districts based upon the level average daily attendance (ADA) for the preceding school year.

School districts could also levy taxes. Upon certification of need by a board of education, any school district could levy an additional tax of 15 mills on the dollar valuation of all taxable property in the district. With voter approval, a district could also make an emergency levy of up to five mills and a local support levy of up to 10 mills. The emergency and support levels could only provide sufficient additional revenue to meet the district's needs for a fiscal year as determined by the local board. Thus, the maximum ad valorem tax levy allowed by statute for a school district's general operating fund was 35 mills on the value of the taxable property within a district.

Additional ad valorem taxes could also be approved by the district's voters for education-related purposes. Article 10, Section 10, of the Oklahoma Constitution allowed a levy of up to five mills for a building fund, which could be used for erecting or repairing school buildings and for purchasing furniture. Article 10, Section 26, also permitted a school district to incur in any one year an indebtedness in an amount, including existing indebtedness, of up to five percent of the valuation of the taxable property of the district for all purposes. If an absolute need existed, a district was permitted to increase such indebtedness to 10 percent for the purpose of acquiring or improving school sites; constructing, repairing, remodeling, or equipping buildings; or acquiring school furniture or equipment. In addition to these primary sources of locally generated revenues, small revenue generating sources existed from fees, tuition, and transfer fees, and proceeds from the sale or rental of property.

Because local sources of revenue were derived primarily from ad valorem taxes, the amount of that revenue varied greatly among school districts. This variation was effected by several factors, including differences in assessment ratios and in the methods employed to establish property values. The greatest factor however, was the difference in property wealth, upon which the tax was based, among the districts. These differences greatly affect the amount of revenue per pupil which each district could raise for the support of its schools.

This variation in property wealth could be seen by comparing the assessed valuation of property per ADA among the districts. For 1978-79, the assessed valuation per ADA for all school districts in the state was $11,264.42. In contrast, all but five of the plaintiff school districts had assessed valuations per ADA below the state average; and the average among the plaintiff districts was only $7,780.40. The effect of these differences in property wealth among the districts become more apparent by comparing the amount of local revenue per pupil in ADA which was available to the districts. All of the plaintiff school districts levied the full thirty-five mills allowed by law; yet they still could not raise as much revenue per pupil as the wealthier

districts, some of which levied at a much lower rate. In addition, when this action was commenced, all of the plaintiff districts were levying the full five mills allowed by law for a building fund, and all but two levied a tax for a "sinking fund." In contrast, thirty-eight of the remaining districts either had no tax, or were levying less than five mills, for a building fund, and one hundred seventy-four districts levied no tax for a sinking fund. Twenty school districts had no tax for either a building fund or a sinking fund.

The level of property wealth within a district also affected the amount of indebtedness which the district could incur for acquiring and improving school sites, constructing and equipping school buildings, and acquiring school furniture and equipment. The state constitution prevented a district from becoming indebted beyond a certain level even though the district's voters might be willing to tax themselves at greater rates to satisfy such indebtedness. This limitation obviously affected all school districts of the State; but it had a greater impact upon the less wealthy ones, whose maximum levels of indebtedness naturally were much smaller.

The other primary source of revenue for public schools was the State itself. State sources of revenue included various taxes designated for school purposes, proceeds from the permanent school fund and monies allocated for specific programs or expenditures. The most important source, State Aid, was designed to allow the State and the local school districts to work together to provide full educational opportunities for every child in Oklahoma.

The State Aid program consisted of two parts, Foundation Program Aid and Incentive Aid. The Foundation Program consisted of a certain amount of money per pupil which the Legislature had determined to be necessary to operate a minimum program within a school district. From this amount was subtracted various sums, known as Foundation Program Income, which were received by a district from certain sources. One of these items was the net assessed valuation of the property within the district during the preceding year multiplied by fifteen mills. In theory, Foundation Program Income reflected a district's wealth and ability to support itself. A transportation supplement was added to the difference between the Foundation Program and Foundation Program Income. The total of these was Foundation Aid.

In addition to Foundation Aid, a district also might receive certain funds known as Incentive Aid. The Incentive Aid Formula had a two-fold purpose: (1) to reflect the district's property valuation per ADA in relation to the average valuation per ADA within the State and (2) to recognize the effort, in the form of mills exceeding fifteen, which a district made by way of levies to finance its schools. The formula included minimum and maximum amounts which a school district could receive. As a result, districts which otherwise would not qualify for Incentive Aid, or would qualify for only a small amount, received at least the minimum amount; and districts whose need was greater could not receive more than the maximum amount. All districts received some Incentive Aid, with the poorest districts receiving only about twice as much as the richest.

In addition to the monies distributed through Foundation and Incentive Aid, a large portion of the funds appropriated for education were allocated in "flat grants" to all school districts. These grants had been awarded on a purely categorical basis, without consideration of the district's financial ability. Some grants had been distributed through the State Aid program for special education, vocational education, and transportation. The largest allocation of this type had been for school personnel salary increases. The Legislature had increased these grants over the years and the percentage of the total education funds which were allocated to the State Aid program had become smaller.

In recent years, state resources began to constitute a greater percentage of total school revenues. As recently as 1968-69, local sources accounted for more than half the revenues received by the districts. After that time period, this figure began to decline and the percentage

provided by the State began to increase. In 1978-79, the districts received 53% of their total revenues from the State and only 36% from local sources.

A third source of revenue for financing public education was the federal government. Most of these funds were granted on a categorical basis and restricted to specific uses designated by federal law. In 1978-79, federal funds constituted 11% of the revenues received by Oklahoma school districts. These federal funds could not be used to reduce State Aid.

In short, the system of financing public education permitted a wide difference in the amount of revenues available per pupil among the several school districts. Local sources varied primarily because of differences in property wealth among the districts. State Aid provided some additional support but did not equalize the total amount of funds per ADA which was available through both local and state sources.

The plaintiffs in this case claimed that this system violated the two mandates of the Oklahoma Constitution because the "system fails to provide equal educational opportunities for all children in the State."[20] While plaintiffs did not define the phrase "equal educational opportunities," they alleged only that the educational opportunities which they were able to provide or receive were "material inferior" to those of other, wealthier school districts. Thus, by "equal educational opportunities," plaintiffs implied that the system should provide equal revenues per ADA. The plaintiffs argued further that the present school finance scheme denied them equal protection under the state constitution and that under this constitution, education was a fundamental interest or right requiring the court to apply the test of strict scrutiny.

In considering the arguments presented, the Oklahoma Supreme Court addressed those questions which were raised by the claim that education was a fundamental interest or right in Oklahoma. These questions were identified by the court as:

> First, there is the question whether the mere mention of a subject in that constitution makes that subject a fundamental interest or creates a fundamental right.
>
> Second, if it does not, then the question arises whether by its terms the constitutional provision creates a fundamental right. Third, assuming that a fundamental right is created, there is the question of the exact nature of the right or guarantee.
>
> Once this has been ascertained, then we must also determine the appropriate standard of judicial review. (Emphasis in original)[21]

The court's view concerning the application of the strict scrutiny test was that not all rights mentioned in the state's constitution were intended to be fundamental and thus requiring this standard of analysis. The Oklahoma Constitution, being one which addressed areas which were fundamental rights and those which could have been left to statutory enactment, did not make education a fundamental right merely by its inclusion. Nor was equal educational opportunity, in the sense of equal expenditures per pupil, guaranteed by the expressed terms of the state constitution. In the courts view, Article 1, Section 5, and Article 13, Section 1, merely mandated actions by the Legislature to establish and maintain a system of free public schools. They did not on their face guarantee equal expenditures per pupil. The right guaranteed by Article 13, Section 1, was viewed as one of a "basic, adequate education according to the standards that may be established by the State Board of Education. There is nothing...which suggests that the Legislature must provide equal expenditures per pupil in order to accomplish this objective."[22] The court concluded, therefore, that state funds do not have to be allocated to the schools on an equal per-pupil basis, but could be distributed as the Legislature saw fit. Finding that the Legislature did have a rational basis for the present school finance system, the

court refused to apply the strict scrutiny test or to accept the claims pressed by the plaintiffs in this case. As a final statement to this effect, the court stated:

> The plaintiffs alleged that the present school financing system denies them "equal educational opportunities." The plaintiffs do not allege that they or their children are completely denied an education. Nor do they allege that the education they are able to provide or receive is in any way an inadequate one. In fact, the plaintiffs admit that 'no schoolchildren in this State are in imminent danger of receiving a wholly inadequate education.' Despite this, the plaintiffs seek to strike down an entire state-wide school financing system simply because it is unable to provide as much money per pupil as do the wealthier districts. Because we find that neither the United States nor the Oklahoma Constitution requires the school funding regime to guarantee equal expenditures per child, at least where there is no claim that the system denies any child a basic, adequate education, we must decline to disturb the trial court's judgment. (Emphasis in original)
>
> The the trial court is accordingly affirmed.[23]

Pennsylvania

On two separate occasions the Supreme Court of Pennsylvania has indicated that the Pennsylvania Constitution vests the power to govern public schools in the hands of the General Assembly. As early as 1939 the court stated that the Constitution "has placed the educational system in the hands of the legislature, free from any interference from the judiciary save as required by constitutional limitations."[24] Forty years later the court retained this basic perspective in a direct challenge to the constitutionality of the state aid system to public schools for failing to provide the mandated "thorough and efficient system of public education."[25] In the latter case the court found that the challenger, the Philadelphia School District, did not have a duty to provide a certain level of educational services, which the district argued it could not fulfill due to disparities in state funding between taxable property rich and property poor school districts, because the district had no greater duty to provide education for the children of Philadelphia than the legislature delegated to it and provide the means to fulfill.

A somewhat restricted challenge against the state school finance system was considered by the Commonwealth Court of Pennsylvania in 1987.[26] Rather than attacking the entire state aid system as was attempted in 1979, this case was brought challenging the constitutionality of the legislative provisions setting minimum and maximum increases to the state subsidies to school districts. This school district and taxpayer's suit was brought to have a specific provision of the Public School Code declared unconstitutional. The statutory scheme established by the Code for the funding of Commonwealth public schools provided for state subsidies to supplement local district taxing efforts. The subsidies were determined for each school district by a complex formula which involved a consideration of student enrollment, district spending, and a district's relative wealth. In this system, if a district's wealth base was low, state support was higher, but if the wealth base was high, state support was lower. The petitioners' challenged certain adjustments that had been made to this method of calculating state subsidies since 1979.

In preparing the budget for the 1979-80 school year, the legislature adopted Section 2502.6 of the Code which provided that each school district would receive a proportionate reduction in its subsidy if the appropriation for a given school year was not sufficient to meet statewide entitlements. The "hold harmless" provision of this section, which was challenged by the school district and the taxpayers, proscribed that even if a district's entitlement, derived

from the statutory formula, decreased for a given school year, the district would receive at least as much as it did the previous year.

In 1983, as a further adjustment to the subsidy calculation, the legislature enacted Section 2502.5 of the Code which established an "artificial floor" and "artificial ceiling" provision whereby, for the 1982-83 school year, districts would be limited to a 9% increase over their previous year's subsidy and were assured at least a 2% increase. This provision was eventually updated to provide for an increased "floor" of 2% and and increased "ceiling" of 7%. The legislature subsequently amended this section to provide that no school district would receive less than 80% of its entitlement for the 1983-84 school years, or less than 85% for the 1985-1986 school year.

The challengers in this case claimed that these provisions, purporting to limit or guarantee a district's subsidy based on the subsidy it received the previous year, did not bear a rational relationship to any legitimate governmental purpose and was, therefore, unconstitutional. Under the Pennsylvania Constitution, the General Assembly was charged with providing "for the maintenance and support of a thorough and efficient system of public education." The court, however, just as occurred in 1979, refused to recognize that this constitutional mandate created a fundamental right to education which would require a court to apply the strict judicial scrutiny standard of analysis. From this perspective, the court stated that:

> The proper question for our review, therefore, is whether the challenged legislative scheme meets the rational basis test, i.e., whether it bears a reasonable relation to the provision of a thorough and efficient system of public education. In so reviewing the challenged portions of the Code's subsidy provisions, we must bear in mind that the appropriation and distribution of the school subsidy is a peculiar prerogative of the legislature....[27]

Fundamental to the challenge in this case was the claim that the "artificial floor" and "artificial ceiling" sections of the Code were arbitrary and bore no potential relation to the goals of the state subsidy system. The claim that the practical effect of these sections was that a district with a sharp decline in enrollment from the previous year would be guaranteed a 2% increase in its subsidy, even if its entitlement, based on the aid ratio formula, would actually decrease. A district with a sudden increase in enrollment over the previous year would be limited to a 9% increase, even if its entitlements were much greater. The petitioners alleged that their school district received far less than their entitlement under the basic formula, because of the "floor" and "ceiling" provisions. In actual dollars, it was claimed that their district was deprived of $2,324,342 for the 1983-1984 school year, and would be deprived of $2,699,381 for the 1984-1985 school year. While recognizing that it was not unreasonable for the legislature to attempt to protect districts from sudden decreases in subsidies, the challengers maintained that it was irrational to guarantee increases to all districts regardless of actual enrollments.

The court did not, however, find these claims persuasive. In rejecting all of the petitioner school district claims, the court concluded:

> Petitioners'arguments that Respondents have failed to establish the reasonable basis on the artificial floor and ceiling and the hold harmless provisions ignores Petitioners' own burden of proving that the Code provisions clearly, palpably, and plainly violate the Constitution. The burden must remain upon the person challenging the constitutionality of the legislation to demonstrate that it does not have a rational basis. Should the reviewing court detect such a basis, from whatever source, the legislation must be upheld.

> While we are not indifferent to the financial difficulties of individual school districts, we believe in this instance that the legislature has properly exercised its prerogative to appropriate and distribute the school subsidies. The artificial floor, as Petitioners concede, protects districts from sudden decreases in entitlements due, for example, to a sharp decline in enrollment from one year to the next.
>
> Further, as Respondents assert in their brief to this Court, the artificial ceiling provision is a reasonable way to protect available funds from theoretically unlimited entitlements and thereby ensures the adequate funding of the statewide public school system. This concern for maintaining an equitable distribution of the Commonwealth's limited resources provides a rational basis for the challenged Code provisions.
>
> The provisions, we conclude, bear a reasonable relation to the legislature's constitutional mandate to provide a thorough and efficient public school system. As Petitioners have not proved that the Code's funding scheme 'clearly, palpably, and plainly' violates the Constitution, we will uphold the challenged sections.[28]

This decision was taken to the Pennsylvania Supreme Court which ruled that the lower courts issuance off a summary judgment in favor of the Commonwealth of Pennsylvania was improper.[29] Fundamentally, this court found that the appellant school district asserted two bases in their claim: first, that the school subsidy program was unconstitutional "on its face," which was viewed as a purely legal question requiring no development of evidence; and second, that the subsidy program was unconstitutional "as applied," which was viewed as a factual question requiring the appellant school district to demonstrate, at a minimum, the unreasonably disparate effects they alleged to result from this funding scheme. This second claim would also require the appellant to prove that there was an alternative system which would achieve the desired goal of greater parity. The court found that the school district's motion for summary judgment addressed itself only to the first claim in seeking relief but gave no indication that they intended to abandon their second claim. In the court's view, therefore, the district's second claim maintained "a viable cause of action"; the lower court improperly entered summary judgment against the district's entire case and the case was remanded for further consideration. At the present time, the results of any further proceedings in this case are not known.

South Carolina

In 1966, the Supreme Court of South Carolina, in a case primarily involving the issuance of school bonds, upheld a public school finance system while recognizing that inequities existed within the system.[30] With state and county-wide taxes apportioned among a county's school districts on the basis of pupil enrollment, and local districts with high taxable wealth generated more funds than those without such taxable wealth, inequities resulted. The court, however, concluded that, while school funds may not be distributed by the State on an arbitrary basis, the mere fact that tax monies were apportioned so that some districts received less than the amount of the levy in their county did not amount to an arbitrary system. Although equity was viewed as being an "aim of the law," it was a goal which was viewed as "seldom" achieved. The inequities which resulted in the South Carolina system were not considered to be "fatal" to the legality of the system.

This 1966 decision did not bode well for a direct constitutional challenge of the South Carolina system. A challenge was mounted, however, and the Supreme Court of South Carolina followed this line of reasoning in 1988 by upholding the constitutionality of the public education financing system.[31]

In this 1988 action several residents, electors, and taxpayers' in Richland County brought suit against Campbell, Governor of the State of South Carolina, attacking the constitutionality of the South Carolina Education Finance Act (EFA), the Education Improvement Act (EIA), and the validity of the requirement that local school districts contribute to the funding of local schools under Article XI, Section 3, of the South Carolina Constitution. Both the EFA and the EIA were enacted to provide a system of shared funding of a minimum program of public education by the combined financial efforts of the state and local school districts. This "shared funding" system resulted in disparate production of revenue and unequal educational opportunities because it was based upon formulas which took account of the individual wealth of various school districts. These Acts were promulgated under Article XI, Section 3, of the South Carolina Constitution which stated that the legislature"...shall provide for the maintenance and support of a system of free public schools..." The challengers in this case argued that the EFA and EIA violated this constitutional mandate and that the State must reallocate school funds to remedy the disparities found in the state school finance system.

In rejecting this challenge, the Supreme Court of South Carolina interpreted the appellants' charges to basically be premised on a perception that the constitutional mandate required the legislature to "pay" for the cost of the public school system rather than "provide" for its maintenance and support. The court recognized that the current constitutional mandate was similar to a section in the 1946 South Carolina Constitution which required the General Assembly "...to provide for a liberal system of free public schools...." Although the 1946 provision was repealed in 1954, this section had been interpreted by the court to provide:

> The Constitution...places very few restrictions on the powers of the General Assembly in the general field of public education. It is required 'to provide a liberal system of free public schools,' but the details are left to its discretion....
>
> The development of our school system in South Carolina has demonstrated the wisdom of the framers of the Constitution in leaving the General Assembly free to meet changing situations.[32]

The court found that the current constitution's Article XI, Section 3, similarly left the present legislature free to choose the means of funding the schools to meet modern needs. The court also found that the EFA and EIA were enacted as a valid means of providing for public education and the shared funding system did not, therefore, violate Article XI, Section 3.

A second claim against the school funding system was also raised and alleged that the shared funding plan denied students equal educational opportunities because the formula considered each school district's wealth. Since the EFA provided for a shared funding formula plan that took account of the individual wealth of each school district, school districts which lacked a sufficient tax base received proportionally more state funds, which required such districts to pay proportionally less of their locally generated revenue for public school operation, the court also rejected this claim.

The court concluded by stating that the shared funding plan implemented by the General Assembly through the EFA and EIA was a "rational" and constitutional means by which to equalize the educational standards of the public school system and the educational opportunities of all students. Without specifically identifying the exact judicial standard or test applied in this case, it is evident that the analysis applied by this court was identical to what other courts have termed the "minimum standard" as opposed to the strict scrutiny standard.

Wisconsin

The Supreme Court of Wisconsin held, in a 1976 decision that the system of financing public schools was in violation of the Wisconsin Constitution's mandate of uniform taxation.[33] Unlike several other state court holdings that a statewide school financing system violated a constitutional mandate regarding education, this decision was based on a uniform taxation mandate being violated due to a "negative-aid" provision in the school finance system which contained a distinct power equalization factor based upon the equalized valuation of real estate for taxation purposes located within each school district. Applying the strict scrutiny standard, the court decided that the classification established a strong incentive for taxpayers in negative-aid districts to spend less per pupil than taxpayers in positive-aid districts. The court concluded that, regardless of the merits of the legislative enactments or the worthiness of the cause, the State could not compel one school district to levy and collect a tax for the direct benefit of other school districts or for the sole benefit of the State.

Over a decade later, this same court considered another direct challenge to the constitutional and statutory legality of the Wisconsin formula governing state aid to public schools.[34] This case presented a two-prong attack on the state aid formula. The first challenge brought by the school districts, taxpayers and district residents plaintiffs asserted that the system of school finance was unconstitutional by failing to meet the mandates of the education clause. Secondly, the plaintiffs claimed that the system was unconstitutional by failing to meet the mandates of the equal protection clause.

The general public school finance scheme of equalization had remained fundamentally the same as that which was involved in the 1976 decision. Wisconsin's public schools were funded by a combination of state, local and federal funds which, in the 1985-86 school year, accounted for 36.07%, 59.25% and 4.68% of the per pupil costs respectively. The state's share consisted of both equalization aid and categorical grants. Equalization aid, which accounted for over $902 million of the over $1,142 billion of state aid in the 1985-86 school year, was distributed under the state general aid formula and was the focus of the challenge in this case. The purpose underlying the statutory equalization formula was expressed as follows:

> It is declared to be the policy of this state that education is a state function and that some relief should be afforded from the local general property tax as a source of public school revenue where such tax is excessive, and that other sources of revenue should contribute a large percentage of the total funds needed. It is further declared that in order to provide reasonable quality of educational opportunity for all the children of this state, the state must guarantee that a basic educational opportunity be available to each pupil, but that the state should be obligated to contribute to the educational program only if the school district provides a program which meets state standards. It is the purpose of the state aid formula... to cause the state to assume a greater proportion of the costs of public education and to relieve the general property of some of its tax burden.[35]

The general state aid formula responded to this purpose by providing for equalization of the property tax bases up to a certain level. The operation of the general state aid formula provided that the local tax base available for the education of each child would be determined by dividing the district's equalized valuation by its membership. The resulting equalized valuation per member varied widely, from a low of $77,927 to a high of $988,561 for districts offering grades kindergarten through 12 in 1985-86. If the local tax base provided the only source of revenue available to the local school district, the quality of education would likely vary widely among schools, depending on the ability of each district to raise sufficient property tax for operation of the schools. The state general aid formula, however, provided for equalization of the property tax base. A tax base of $270,100 in 1985-86 was guaranteed to support education

costs for each pupil in K-12 districts. If the district tax base fell below that amount, the state general aid formula supplemented the local tax base up to the guaranteed tax base level.

The Wisconsin equalization formula consisted primarily of two levels of sharing: primary and secondary school costs. The primary shared cost was the amount of a district's costs which was less than the primary ceiling cost determined by the legislature, and the secondary shared costs were those costs which exceeded the ceiling. As statutorally prescribed, "shared cost" was the sum of the net of the general fund and the net cost of the debt service fund. The "net cost" of the debt service fund included in shared cost could not exceed an amount equal to $90 multiplied by the membership. The "primary ceiling cost per member" was approximately $3,860 in the 1987-88 school year and $4,090 each school year thereafter unless otherwise provided by statute. The "primary shared cost" was that portion of a district's shared cost which was less than the primary ceiling cost per member multiplied by its membership. Also, the "secondary shared cost" was the portion of a district's shared cost which was not included in the primary shared cost.

The extent to which the state contributed to the shared costs depended upon the difference between the property value of each district, the district's equalized valuation, and the guaranteed valuation. The equalized valuation was considered to be the full value of the taxable property in a school district. The primary guaranteed valuation per member was based upon the appropriations for general equalization aid and was higher than the secondary guaranteed valuation per member which equaled 106% of the state's actual average equalized valuation. Guaranteed valuation was determined by multiplying these amounts by the number of pupils enrolled in the respective districts. The secondary guaranteed valuation per member was an amount, rounded to the next lowest dollar, determined by multiplying the equalized valuation of the state by 1.06, or by 3 in high school districts and 1.5 in elementary districts, and dividing the results by the state's total membership. As the count observed in 1976, the lower secondary guaranteed valuation served as a "built-in disincentive" against spending above the primary shared cost ceiling.[36]

Where the primary guaranteed valuation exceeded the equalized valuation, this difference was multiplied by the primary required levy note to determine primary state aid. The primary required levy rate, or mill rate, was the primary shared cost divided by the primary guaranteed valuation, with both of these figures computed as described above. Simply stated, the required levy rate was determined by dividing the amount of money which needed to be received by the guaranteed value of the property to be taxed. Where shared costs exceeded the primary cost ceiling, the difference between the secondary guaranteed valuation and the equalized valuation was multiplied by the secondary required levy rate to determine secondary aid. The secondary required levy was computed by dividing the secondary shared cost by the secondary guaranteed valuation. This formula may be illustrated as follows:

General State Aid =

$$\frac{\text{Primary Shared Cost}}{\text{Primary Guaranteed Valuation}} \times (\text{Primary Guaranteed Valuation} - \text{Equalized Valuation})$$

Plus

$$\frac{\text{Secondary Shared Cost}}{\text{Secondary Guaranteed Valuation}} \times (\text{Secondary Guaranteed Valuation} - \text{Equalized Valuation})$$

For the purposes of clarification, the following three examples illustrate the effect of variations in property wealth on district's entitlement to equalization aid assuming that districts taxed at the required levy rate: (1) A district whose tax base (equalized valuation) exceeds the primary guaranteed tax base (primary guaranteed valuation) receives no equalization aid; (2) a district whose tax base is 37% of the primary guaranteed tax base will pay 37% of the costs which do not exceed the primary cost ceiling; and (3) a district whose tax base is 66.7% of the primary guaranteed tax base will pay 66.7% of the costs which do not exceed the primary ceiling. Because the secondary guaranteed tax base is always lower than the primary guaranteed tax base, districts must pay for a proportionally greater amount of the costs that exceed the primary ceiling cost. Furthermore, the secondary cost calculation could operate to reduce primary aid where a district has a high per-pupil cost and high equalized property valuation. For example, in the last example given above, where the school district's tax base was 66.7% of the primary guaranteed tax base, the tax base exceeded the lower secondary guaranteed tax base by 20%. In such an instance, the state's share of the costs exceeding the primary ceiling would be - 20%. Therefore, although with the figures utilized in this example the district would be entitled to receive 33.3% of its primary costs from the state, or $916, under the first part of this calculation, that amount would be reduced by $150, representing 20% of $750, which constituted secondary costs. However, in no case may the aid under this section be less than zero.

As to this system, it may generally be observed that resources were allocated on the basis of ability to raise revenue from the districts' property tax base. Thus, all districts could be assured that if they spend at the same level per member, they could tax at the same rate regardless of property valuation differences.

The plaintiffs maintained that the constitutional deficiency in this system was that the school finance program failed to take into account the fact that children have differing educational needs, some of which may, as a result of socioeconomic factors, require greater financial resources to achieve the same level of educational opportunity. It was further argued that those districts with the greatest educational burden were the least capable of raising sufficient financing from property taxation as a result of lower property valuations or "municipal overburden" placing greater tax demands upon local property.

The deficiencies presented by the appellants in support of their argument that the method of school finance was unconstitutional specifically include the following. First, appellants argued that the finance system failed to compensate for the "educational overburden" resulting from a high concentration of poverty students and concomitant financial burden of providing for the following services more greatly needed in poverty districts: early childhood education; compensatory education; dropout prevention programs; vocational education; and supportive services, including the provision of social workers and psychologists. It was asserted that the need to provide programs to compensate for poverty effects on education required the redirection of funds from regular programs and, consequently, an inability to provide regular programs of instruction equal to those of higher expenditure districts. Additionally, appellants alleged deficiency in the system's failure to compensate for "municipal overburden." Municipal overburden was a term used to describe the circumstances of high municipal service needs and costs and resultant high property tax rates which preclude increases in revenue for school purposes. Related to the general argument regarding municipal overburden was the more specific factor of high costs of education in metropolitan districts due to higher labor costs; security and vandalism costs; and high maintenance and energy costs because of older school buildings. Finally, appellants argued that the disparities in per-pupil expenditures among districts were demonstrative of the deficiency in the operation of the challenged school finance system.

The trial court found, and the supreme court agreed, that the evidence clearly showed that districts with a high concentration of poverty students faced an educational overburden in the areas of early childhood education, compensatory education, dropout prevention programs for high-risk youth and vocational education. In addition the evidence indicated that while districts may deploy various personnel in different ways to attempt to meet the needs of poverty students, such districts had a supportive service overburden as it impacted on social workers, psychologists and nurses. It was recognized that there were wide disparities in operating expenditures among Wisconsin school districts and that insufficient categorical aide resulted in local revenues absorbing much of the cost of these programs and acting as a drain on local district resources. Both courts also agreed that the cost of education was higher in metropolitan districts due to such factors as higher salary costs, security and vandalism costs, high costs due to the operation of school in old structures, and that the non-school tax burdens made it difficult for taxpayers in districts such as Milwaukee to increase property taxes to provide appropriate educational programs for pupils.

As previously indicated, the first element of this two-prong challenge was based on the educational provision of Article X, Section 3, at the Wisconsin Constitution which provided, in pertinent part, that:

> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years.[37]

It was the position of the appellants-plaintiffs that the school finance system failed to meet this constitutional uniformity requirement since the system did not respond to the fact that districts experiencing educational overburden had the most limited educational resources and, consequently, expended substantially less per pupil than did more affluent districts. More generally stated, they asserted that because Article X, Section 3, required uniformity in educational opportunities, the school finance system which operated as a function of property valuation, as opposed to educational needs, was in contravention to the uniformity provision.

The respondent-defendant state officials claimed that this challenge was a determination of the degree to which uniformity was "practicable" and, consequently, was addressing a question which was within the exclusive presence of the Wisconsin Legislature. Additionally, they maintained that the degree of uniformity sought by the appellants was inconsistent with the concept of "local control" rooted in the Wisconsin Constitution.

Turning to the record of the constitutional debate that brought about the language of Article X, Section 3, of the Wisconsin Constitution, the court found that the phrase "as nearly uniform a practicable" did not indicate that the present system of school finance was inconsistent with this uniformity provision. The court found that this provision, with respect to the school finance system challenge contained in this case, did not mandate a scheme of financing which would distribute funds in a manner more responsive to wealth disparities. As stated by the court, the present equalization system "far exceeds the degree of uniformity" which might be accomplished under the constitutional provision. The constitutional provision provided only for each district to receive an equal amount of state resources per pupil. However, the present system provided a greater amount of state funds per pupil to districts with lower equalized property valuations. The general aid formula was viewed as operating to assure that all districts would be able to provide for the basic education of its pupils, regardless of property wealth, at a cost slightly higher than the average state cost per pupil of the previous year. To the extent that the needs of a district exceeded that cost ceiling, in addition to categorical grants, supplemental "secondary aid" may also be available to districts with relatively low property valuation.

As summarized by the court:

> Consequently, while greater uniformity in educational opportunities is, in the opinion of both parties, desirable and necessary, it is not something which is constitutionally mandated under the uniformity provision. The framers unequivocally and specifically provided for a mode of distribution of state funds to districts in other sections of art. X; the uniformity provision thus could only have been intended to assure that those resources distributed equally on a per-pupil basis were applied in such a manner as to assure that the "character" of instruction was as uniform as practicable. Viewed in this regard, the "character' of instruction which is constitutionally compelled to be uniform is legislatively regulated ... regarding, for example, minimum standards for teacher certification, minimal number of school days, and standard school curriculum. The state assures compliance with these standards by providing for the imposition of sanctions upon districts found not to be in compliance...The appellants have not asserted that due to the distribution of school aid under the equalization formula, their districts are unable to meet these standards, and there was testimony by appellants' witnesses that basic educational programs had in fact improved. Consequently, we hold that the school finance system...does not unconstitutionally impinge upon the uniformity requirements of Wis. Const. art. X, sec. 3.[38]

Turning to the issue of the school financing system being a violation of the equal protection clause of the Wisconsin Constitution, the same alleged deficiencies in the system asserted under the educational clause were raised. This argument was based on Article I, Section 1, of the Wisconsin Constitution which stated:

> All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.[39]

More specifically, the theoretical basis of appellants' position was that the finance system failed to treat similarly situated students equally to the extent that the quality of education a student received depended upon his or her place of residence. The appellants further asserted that the right to an equal opportunity for education was a fundamental right and that, consequently, the "legislative classification" was subject to "strict scrutiny" as opposed to the lesser "rational basis" standard.

In setting the parameters for the equal protection standard to be applied in this case, the court, in a 4-to-3 decision, stated that, unless a statute may be found to affect a "fundamental right" or to create a classification based on a "suspect" criterion, the standard to be applied should be the "rational basis" test. In this case the court found that the claim was not presented that the challenged school finance system affected a "suspect" class. The court also offered the opinion that it would have "rejected a claim of wealth discrimination constituting a suspect criterion had such a claim been made."[40] This view was in agreement with the United States Supreme Court's opinion in Rodriguez that the Texas school finance system, which allegedly resulted in wealth discrimination, did not affect a suspect class.[41]

The court, however, did agree that "equal opportunity for education" was a fundamental right in Wisconsin. In qualifying this statement, however, the court continued by stating that equal opportunity for education did not mandate "absolute equality" is districts' per-pupil expenditures. In fact, the court stated that complete equalization was "constitutionally prohibited to the extent that it would necessarily inhibit local control."[42] As further explained by this court:

> Moreover, to the extent that art. X delineates state distribution of resources on an equal per-pupil basis, to assert that equal opportunity for education mandates an entirely different scheme of financing requiring the state to distribute resources unequally among students to respond to the particularized needs of each student is inconsistent with the intent evidenced in the express language of art. X. Accordingly, since the deficiency allegedly exists not in the denial of a right to attend a public school free of charge, nor in the less affluent districts' failure to meet the educational standards delineated under sec. 121.02...[Wisconsin Statutes], nor in the state's failure to distribute state resources to the less affluent districts on at least an equal per-pupil basis as distribution is made to wealthier districts, no fundamental right is implicated in the challenged spending disparity.[43]

While recognizing that it's decision upholding the constitutionality of the Wisconsin school finance system on equal protection grounds was consistent with the Supreme Court's decision in Rodriguez, the court's analysis differed with respect to the appropriate standard of review to be applied. Specifically, in Rodriguez, the court held that there was no fundamental right to education on the basis of its finding that such right was neither explicitly nor implicitly protected under the federal Constitution.[44] This holding was reaffirmed, although somewhat qualified, in 1982 when the court again stated that education was not a fundamental right, but stated that there could be no rational basis for the complete denial of education unless the discrimination "furthered some substantial goal of the state."[45]

Further clarification of the appropriate standard to be applied regarding a federal equal protection analysis concerning education was provided in Papasan.[46] In Papasan, the court reiterated that in Rodriguez the court did not "foreclose the possibility 'that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote].'"[47] However, allegations asserting the denial of a minimally adequate education were rejected in Papasan, where the claim focused upon spending "disparities" rather than alleging that the school children "are not taught to read or write...[or] that they receive no instruction on even the educational basics...."[48] Accordingly, in Papasan, the Rodriguez rational basis standard was applied.

Therefore, notwithstanding the Wisconsin court's recognition that education was, to a certain degree, a fundamental right, it applied, as did the United States Supreme Court in Rodriguez, a rational basis standard because the rights at issue in this case were premised upon spending disparities and not upon a complete denial of educational opportunity within the scope of Article X.

Prior to embarking on a consideration of the rational basis test, the court noted that any facial discrimination in the Wisconsin school finance system discriminated in favor of property-poor districts in pursuit of the goal of minimizing the impact of wealth disparities upon educational opportunities. As also noted by the court, to the extent that district per-pupil expenditures differed as a consequence of this system, this difference was a result of decisions made at the local level–a variation whose legitimacy was viewed as being grounded in the constitutional requirement that control was to be retained by localities. Since local districts retained the control to provide educational opportunities over and above those required by the state, they retained the power to raise and spend revenue "for the support of common school therein." Thus, the rights of the local control of school districts had their foundations in the Wisconsin Constitution.

In determining that the judiciary should defer to the legislative branch on the method of financing public schools, so long as the method was constitutional, the court stated:

> While our deference would abruptly ease should the legislature determine that it was "impracticable" to provide to each student a right to attend a public school at which a basic education could be obtained, or if funds were discriminatorily disbursed and there existed no rational basis for such finance system, we will otherwise defer to the legislature's determination of the degree to which fiscal policy can be applied to achieve uniformity. Consequently, we hold, for the reasons discussed above, that in the present case there is a rational basis justifying any disparities in per-pupil expenditures..., the rational basis being the preservation of local control over education as mandated by art. X of the Wisconsin Constitution.[49]

The court also speculated that, even if the strict scrutiny standard had been judged to be the appropriate test of constitutionality in this instance, the school finance system would still be found to be constitutional. Where strict scrutiny is applied, a statutory classification would be upheld only if the classification promoted a compelling governmental interest and was narrowly drawn to express only such an interest. The requirement that local control of schools be retained was viewed as being of "constitutional magnitude" and "necessarily compelling." In addition, since school aid was distributed under a formula which operated to equalize local tax bases by means of a minimum guaranteed valuation, the school finance scheme was viewed as being "narrowly drawn" to promote local control while assuring the maximum uniformity in educational opportunity deemed practicable.

In a statement basically implying that any problems contained in the present system were to be addressed by the legislature and not by the courts, the following perspective was provided:

> Because issues such as equality in education are peppered with political perceptions and emotionally laden views, we have carefully restrained our consideration of the constitutional issues before us from becoming so flavored. Therefore, our approach to the case at bar has been with a disciplined perception of the proper role of the courts in the resolution of our State's educational problems, and to that end, more specifically, judicial discernment of the reach of the mandates of our State Constitution in this regard. To do otherwise would be an unwise and unwarranted entry into the controversial area of public school financing, whereby this Court would convene as a "super-legislature," legislating in a turbulent field of social, economic and political policy.[50]

> What has been challenged in the case at bar is not that less affluent schools have insufficient funds to provide for basic education, but that they have inadequate funds to provide specialized programs and to meet the particularized needs of students related to the effects of poverty. We recognize that more and improved programs are needed in the less affluent or overburdened districts but find that these legitimate demands may not be correctly described as claims for uniformity under Wis. Const. art. X, sec. 3 or equal treatment under Wis. Const. art. I, sec. 1, but rather constitute demands for that amount of resources necessary to meet the additional costs imposed by the student constituency of these districts. Such demands cannot be remedied by claims of constitutional discrepancies, but rather must be made to the legislature and, perhaps, also to the community.[51]

In a separate concurring opinion, Justice Steinmetz opined that, although the plaintiffs-appellants had not proven their education clause and equal protection clause claims against the school finance system, he did not believe that the "local control" basis of the 4-to-3 majority opinion to be relevant to either of these two constitutional arguments. Justice Steinmetz argued that the appellants simply failed to meet their burden of proof that the educational system was

not uniform. In his opinion, the legislature was mandated to present an equal opportunity for an education to the students, and, since this was achieved in the present system, no student was denied a uniform opportunity for education or was treated unequally.

Justice Bablitch, joined by Chief Justice Heffernan and Justice Abrahamson, wrote a strongly worded dissenting opinion in this case by beginning his analysis with the following statements:

> The majority characterizes this case as one of "spending disparities." That is not at all the focus of this case. The primary issue is whether the state, through its system of school financing, has met its constitutional obligation to provide an equal opportunity for education to all children of this state, rich and poor alike. As the record amply demonstrates, it has not.
>
> Every member of this court agrees on four basic points:
> 1) that it is a fundamental right of every child in this state to have an equal opportunity for education.
> 2) that the state is constitutionally mandated to provide that opportunity;
> 3) that the method the state has chosen to fulfill its constitutional responsibility is the statutorily created system of financing K-12 public education;
> 4) that the trial record clearly establishes that the educational needs of a significant number of school children in this state, primarily those from high poverty districts, are very great, and these needs are not being met. These children come to school unready to learn. Compensatory education programs are unavailable to remedy their learning deficiencies. Supportive services and exceptional educational needs are insufficient to assist them. The little money that is channeled into these programs comes at the expense of the regular educational programs, thereby "shorting" the regular programs. The result, as one educator at trial stated, is that "until you meet those (social and emotional) needs, you're not going to be doing much educating..."
>
> The reason these educational needs are not being met was established beyond any doubt in the trial court; the state system of financing K-12 public education is fundamentally flawed.[52]

The dissenters viewed the "fundamental flaw" of the school finance formula as the distribution of dollars without regard to educational needs, or that every child begins his or her education from the same starting point. Since this was not "close to reality." the system resulted in a significant number of school children being denied an "equal opportunity to become educated people." Using a sports analogy to depict this perspective, Justice Bablitch stated:

> To use an analogy which everyone can understand, while a majority of our children are handed the "educational ball" on the twenty yard line, a significant number are handed this ball on the one yard line with a three-hundred pound lineman on their back. Unquestionably both groups of youngsters have the "opportunity" to score an educational touchdown. The opportunity however, is far from equal.
>
> I conclude that the uniformity clause of art. X, sec. 3, of the Wisconsin Constitution mandates that the state provide a character of instruction in the state schools such that each child is provided with a uniform opportunity to become an educated person. Neither absolute uniformity nor absolute equality is required. The funding may come in part from the state and part from local government, or in whole from

the state. However it comes, the opportunity to become an educated person must be relatively equal across the state. To use the analogy once more, the uniformity clause does not mandate that the character of instruction be such that everyone must score a touchdown; it does mandate that everyone on the playing field have an equal opportunity to do so. Because the state has the constitutional responsibility to provide this equal opportunity, and because it has failed to do so, I respectfully dissent.[53]

Also looking to the record of the constitutional convention's discussion of education, the dissenters reasoned that the mandate contained in Article X, Section 3, required the state to provide a "character of instruction" such that all children would be provided with a uniform opportunity to "become equipped for their future roles as citizens," in both political, economic and intellectual terms, and this state provided character of instruction was the "unequivocal intention of the framers of our constitution."[54] The dissenters found that the evidence showed that the wide expenditure and tax effect disparities lead to a substantial lack of equality and uniformity in the program of instruction available to all the children in low spending school districts and acted as a drain on the regular program of instruction in districts with very high poverty concentrations owing to the necessity of responding to various educational overburdens. The dissent specifically identified early childhood education, compensatory education, supportive services needs and exceptional educational needs, drop out prevention programs and vocational education as examples of the educational overburdens that burdened high poverty concentration districts and which the school finance scheme fell short of meeting the constitution's education mandate. The formula's component which was intended to equalize district property tax bases was viewed as a method to distribute money rather that to meet educational needs. This was viewed as "its fatal flaw." Since it did not address the needs of such impoverished districts which were unable to raise sufficient revenue for school funding, they must divert resources from regular programs of instruction to respond to various educational overburdens. This was viewed as a substantial disparity in basic educational opportunity for children in Wisconsin's public schools.

As summarized by the dissenters:

> The majority asserts that "the rights at issue in the case before the court are premised upon spending disparities and not upon a complete denial of educational opportunity within the scope of art. X." The majority offers no sense of where it would consider "spending disparities" to stop, and "denial of equal opportunity" to begin. If this record does not offer a denial of equal opportunity of education, what record will? In today's world, is the mere offering of a school house door with nothing more behind it than a basic education program sufficient to allow the state to wipe its hands of all other constitutional responsibility?
>
> For a state which prides itself on its commitment to education, this cannot and should not be enough. For a state which historically has placed a high value on free public education to rich and poor alike, this record is a disgrace.
>
> I would hold that the uniformity clause of art. X, sec. 3 of the Wisconsin Constitution mandates that the state provide a character of instruction in the state schools such that each child is provided with a uniform opportunity to become an educated person. I would further hold that the school finance formula, which is the state's only effort that is before us to fulfill its constitutional mandate, fails to do so.
>
> Does this mean there must be absolute uniformity, absolute equality? Clearly not. The constitution does not require absolute uniformity of educational opportunity nor an equal expenditure per district...To achieve reasonable equality in educational

> opportunity for those districts having disproportionately high concentrations of children with special needs (primarily the high poverty districts), there must be adequate funding allowing a district to provide not only basic courses of instruction but special needs programs to properly prepare these children for receiving such instruction, as well as other programs designed to give these children an equal opportunity to become educated citizens. The challenged school financing scheme is not designed to meet these objectives.[55]

Louisiana

Although Louisiana had not experienced a direct challenge to its system of financing public education, this issue was part of a 1965 case primarily involving the desegregation of public schools.[56] With respect to this system, which was based upon state fund allocations on a "per educable student" and equalization bases in order to provide a "minimum" educational program in all public schools, a federal court found that the State held a constitutional right to allocate and distribute funds on these bases since this system did not depend on the operation of a segregated or integrated school system. In 1987 and 1988, however, two direct attacks on this system were subject to judicial decisions.

In the first action local parish school boards, their individual members, and school children and their parents residing in these parishes brought a federal court civil rights action against the State Board of Elementary and Secondary Education and other officials.[57]

As was the case in all prior significant challenges, this case fundamentally claimed that the Louisiana system of public school finance discriminated against poor school districts and was, therefore, a violation of the Fourteenth Amendment to the United States Constitution.

At the time this litigation was initiated, Louisiana's public schools were funded by a combination of three funding sources. Federal funds constituted 9.8 percent of all funds expended, state revenue represented 53.4 percent, and locally generated revenues accounted for 36.8 percent in 1983-84. The major source of the state's contribution was the Minimum Foundation Program (MFP), the stated purpose of which was to provide funds sufficient to ensure an adequate minimum foundation program of education in all public schools in the state. The MFP was a mandate of the Louisiana Constitution which provided:

> (B) Minimum Foundation Program. The legislature shall appropriate funds sufficient to insure a minimum foundation program of education in all public elementary and secondary schools. The funds appropriated shall be equitably allocated to parish and city school systems according to formulas adopted by the State Board of Elementary and Secondary Education and approved by the legislature prior to making the appropriation.[58]

Pursuant to this constitutional mandate, the State Board of Elementary and Secondary Education (BESE) administered the MFP by adopting a funding formula each year by which these funds were allocated to Louisiana's sixty-six parish and city school systems. The Legislature held the authority to approve the formula before appropriating funds for the MFP which it had done for several years. As was true in previous years, the 1983-1984 formula contained a "cost side" and a "supply side." The cost side established the minimum cost of providing each of the services funded under the MFP. The supply side of the formula calculated the respective contributions of the state and the local districts on a district-by-district basis.

Pursuant to the cost side of the MFP formula, the cost of funding the MFP was calculated essentially on the basis of student membership (per capita basis). The formula allocated to local

school boards funds to provide at least one teacher for every twenty-five students, as well as funding for other support personnel including principals, assistant principals, instructional supervisors, visiting teachers, and social workers. Sabbatical and sick leave pay, injured and unemployed workers' compensation costs, utilities, insurance, and materials and supplies were also provided for, with the funds distributed on the basis of student membership. The MFP also funded a "special education program," which provided salaries for teachers and other personnel. The state, supplying funds from its general revenues, financed approximately ninety-four percent of the MFP, and the school districts in the aggregate were responsible for the remaining six percent.

The six percent aggregate local contribution was apportioned among districts in a manner designed to ameliorate, in part, the differences in each district's relative taxpaying ability. To achieve its partial equalizing effect, the MFP formula assumed that each local school board had passed and collected a uniform ad valorem property tax of five and a half mills on the currently assessed value of all taxable property in that district. The sum that such a tax would yield was then deducted from the cost of providing the MFP services for a given district, and the remainder represented the state's MFP contribution to that district.

Local school districts financed their share of MFP costs, along with supplemental funding for the schools within the district, with revenues from locally imposed property, sales and use taxes, from sixteenth-section lands, and from local bond issuances. Article 8, section 13 (C), of the Louisiana Constitution authorized each local school board to levy annually an ad valorem tax not to exceed five mills per dollar of taxable property within the district. The state constitution also permitted any school district to levy a special ad valorem property tax for the support of schools when authorized by vote of a majority of electors in the district. Neither the constitution nor the legislature had limited the rate or amount of special property taxes that the local electorate might authorize a school district to levy. With voter approval, local school boards could also levy a sales and use tax of up to four percent of revenues derived from personal property and services sold within the district.

In addition, local school boards could finance their contribution to public education within their districts with any funds the school board received from the state's "revenue sharing fund." The mandate to create the revenue-sharing fund was set forth in Article 7, Section 26 of the Louisiana Constitution. This provision established an annual $90,000,000 fund to be created as a special fund in the state treasury and to be distributed to parishes according to a legislatively derived formula. The stated purpose of the fund was to offset losses incurred due to Louisiana's constitutionally prescribed homestead exemption from state and local ad valorem property taxes. Revenue-sharing funds were distributed to each parish on the basis of the relative population of the parish (eighty percent of the fund) and the ratio of number of homesteads in the parish to the total number of homesteads throughout the state (twenty percent of the fund).

According to the legislature's formula, the revenue-sharing funds were then distributed to a number of tax recipient bodies within the parishes, including school boards. Any funds remaining after disbursement according to this formula were further allocated to eligible tax recipient bodies and municipalities. In parishes having a high percentage of property to which the homestead exemption applied, there were no "excesses" for further distribution, and in many cases, the funds allocated to a parish did not totally reimburse each of the tax recipient bodies for the full amount of revenues lost by virtue of the homestead exemption. Thus, in some parishes, the school board received revenue sharing funds sufficient to replace all the property tax revenues that could not be collected due to the homestead exemption, as well as additional monies from "excess" state revenue-sharing funds. In other parishes, however, amounts lost by virtue of the homestead exemption were not completely reimbursed and no excess funds were available for further distribution to the school board. In 1984, the parishes of the plaintiff school

boards were among thirty-eight parishes that were incompletely reimbursed for property tax revenues uncollectable due to the homestead exemption.

Basing their complaint solely on the Equal Protection Clause of the Fourteenth Amendment, the plaintiffs first argued that the supply side of the MFP formula, which reduced the state's contribution to each parish by the amount of revenues that would be generated by a locally-imposed five and one-half mills tax on that parish's taxable property, had an arbitrary rather than an equalizing effect. They also argued that because disparities existed in the amount of revenues available to parishes for support of public schools, and because part of that disparity was a result of the means authorized by the state for localities to generate school support revenues, the state must distribute MFP funds on the basis of "relative need," rather than according to its current, predominantly per capita basis. Finally, the plaintiffs also claimed that the legislature's formula for the distribution of the $90,000,000 revenue-sharing fund unlawfully discriminated against parishes having a large percentage of property subject to the homestead exemption by arbitrarily providing the school boards in those parishes less state funds for school support.

In addressing the issue of the proper standard of review appropriate for application in this case, the United States Court of Appeals for the Fifth Circuit rejected the strict scrutiny standard by stating:

> Our standards for testing the plaintiffs' equal protection challenges to Louisiana's system of funding public school education hinges upon the nature of the rights affected by the classification scheme at issue here. This is not a case where the state has failed to provide schoolchildren in the plaintiff parishes with a minimally adequate education. Although the plaintiffs so complain... they made no attempt to prove before the district court that any child received an inadequate education. Furthermore, the record contains no evidence whatever that any Louisiana schoolchild was deprived of a minimally adequate education because of insufficient funds. Consequently, the classifications challenged in this case are not entitled to any heightened scrutiny under the equal protection clause based upon any theory--the abstract validity of which we do not address--either of wealth being a suspect classification or of education being a fundamental right.
>
> Instead, the funding disparities attacked by the plaintiffs are properly analyzed under the so-called rational basis standard. Under this standard the state's school financing scheme will withstand equal protection clause scrutiny if it rationally furthers a legitimate state purpose or interest. In a rational basis analysis, we presume the constitutionality under the federal constitution of state-authorized discriminations. We require the parties challenging the state's judgment to show either that the state had no constitutionally valid purpose for developing the classifications at issue, or that the state could not reasonably have concluded that the allegedly unlawful classifications were rationally related to such a purpose.[59]

Applying the rational basis test to the plaintiff's claims, the court concluded that they had failed to meet their burden of proving that the state's scheme violated their Fourteenth Amendment rights to equal protection of the laws. The court viewed the "equalization factor" as being rationally related to its stated purpose of tending to equalize the local school district contribution to the MFP according to each district's wealth. As the court noted, the "cost side" of the MFP formula calculated for each district the total cost of providing every student in that district the educational services, such as one teacher per twenty-five students and appropriate numbers of other personnel, special education costs, utilities, supplies, insurance, and the like, which the MFP contemplated every district and student having. The state paid to each district an amount equal to the entire cost in that district less what that district could raise by uniform ad valorem

property tax of five and one-half mills of the current assessed value of all taxable property in the district. Thus districts with more taxable property paid a higher percentage of the cost of the MFP within the district, and the state paid a lesser percent. Districts with a high percentage of their total property in tax exempt homesteads were helped by this formula because only taxable property was used to calculate the amount generated by the hypothetical local tax, which amount served to reduce the portion of the MFP cost in that district borne by the state. Accordingly, the formula tended to favor districts which were "poorer" in terms of taxable property values.

From this perspective the court stated:

> We observe that the MFP cost formula is just that, namely, an attempt to measure the cost in each district of providing the same educational services to each student. This is because special factors in some districts--such as economy of scale, concentrations of special education students, or the like--may render it less expensive, on a per student basis, to provide the same services as are provided in other districts. In other words, what is uniform in this side of the MFP is the services to be provided per student, not the dollar cost per student. Thus, for example, the record reflects that in 1983-84 the total cost per student of the MFP contemplated educational services was $1,385 per student in Cameron Parish and $1,075 per student in Livingston Parish, though the services covered by the MFP were the same in each parish. This doubtless resulted, at least in substantial part, from differing economics of scale, as Livingston Parish had some 15,583 students and Cameron Parish only 2,150. We do not understand plaintiffs to have attacked the MFP total cost formula... That is to say, plaintiffs did not assert, and the record does not demonstrate, that there would be any material inequality if the state paid the entire MFP (instead of ninety-four percent of it) and no other funds (or nonfederal funds) were spent on public school education. Accordingly, as to the MFP, the relevant comparison between parishes is not the state MFP dollar contribution per student in each, but rather the percentage of the total MFP cost per student which the state bears in each parish respectively. (Emphasis in original)[60]

Throughout this litigation, the plaintiffs sought to compare the Livingston Parish school district with that of Cameron Parish, which was by far the most affluent district in the state. For 1983-84, the total per pupil educational expenditure from all sources was $1,892 in Livingston Parish, the lowest in the state, compared with $6,099 in Cameron Parish, the highest in the state. However, of the total MFP cost per student in Cameron Parish, the state contributed 77.08 percent, while in Livingston Parish the state contributed 98.43 percent of the total MFP cost per student and Livingston Parish contributed only 1.57 percent. The state's bearing a much higher percentage of the total MFP cost per student in Livingston Parish than in Cameron Parish resulted from the Cameron Parish assessed value of taxable property per student ($59,700) being much higher than that of Livingston Parish ($3,333, the next lowest in the state).

Based on the 1983-84 data submitted by the parties, it clearly appeared that the local districts with less value per student of taxable property contributed a smaller fraction of their per student MFP cost than did the districts having higher values per student of taxable property, with the state contributing a correspondingly higher fraction of the MFP cost in the former districts. Thus, while the supply side of the BESE equalization formula produced a local contribution that may reflect relative school district wealth less than if it also accounted for interdistrict differences in sales tax, bond, and sixteenth-section land revenues, the formula was not without some substantial equalizing effect. From this data the court concluded: "We find that the MFP formula's equalization factor does not violate the equal protection clause."[61]

Turning to the distribution of the MFP funds, the court also found an absence of an equal protection violation. Under the MFP, funds were allocated to each school district according to the cost-side of the BESE formula. The formula distributed funds on essentially a per capita cost of equal service basis. It determined teacher and other personnel costs, as well as costs of materials and utilities, on the basis of student membership. Of the numerous expenses funded under the program, only transportation costs were determined on the basis of actual cost, rather than on a per student basis.

As noted, the Louisiana Legislature authorized school boards to generate revenues not only by levying local ad valorem property taxes, but also by imposing a local sales and use tax and by issuing bonds. In addition, some school boards were able to obtain funds from revenues derived from sixteenth-section lands owned by their parish and/or from their allocation of revenue sharing funds. The plaintiffs complained that by authorizing local sales taxes and bond issuances and by then failing to account for these "state-fostered" revenue sources and for revenues from sixteenth-section lands owned by local districts in calculating the cost of funding public education, the state had acted to create inequalities among school districts in the amount of revenues available for school support.

The plaintiffs did not directly challenge the propriety of the state's chosen means of allowing local school districts to finance education at the local level. Instead, they argued that the equal protection clause required the state, through the BESE formula, to calculate educational costs in a manner that takes fully into account substantially all of the sources of inter-district disparities in local funding ability rather than on a predominantly per capita, "across-the-board" basis. Alternatively, they contended, to pass constitutional muster, the formula must offset the disparities in local funding ability by taking substantially all such disparities into account in determining the amount of each parish's contribution to the MFP. Thus, according to the plaintiffs, by allocating MFP funds on essentially a per capita basis and by equalizing local contributions only by the assumed five and one-half mills property tax, the MFP formula resulted in a state-fostered net inequality among parishes in available public school funding that violated the equal protection clause.

The court, in responding to this claim, stated:

> To the extent that we understand it, we find this argument unpersuasive. The district court found that Louisiana's MFP reflected two competing legitimate state goals, that of assuring each child in the state an opportunity for a basic education on an equal basis and of permitting and maintaining some measure of local autonomy over public education. We concur with the district court that Louisiana's allocation of MFP funds is responsive to these two goals. The program provides basic educational requirements on an equal basis throughout the state by allocating funds on the basis of student membership; yet, by not canceling out all disparities in local revenues available for school support, the program also gives local school districts encouragement and flexibility to supplement state funds. It is plain that the state's public school educational financing does not enhance, but rather materially diminishes, the inequalities in educational services which would exist between parishes if the state provided no such support and spent the funds in question for other purposes.
>
> It may be true, as the plaintiffs urge, the the failure of Louisiana's school financing system to ameliorate all differences in local district wealth serves as a disincentive in some poorer parishes to tax more heavily in order to make up for these differences. Nevertheless, the system cannot be condemned because it imperfectly and incompletely effectuates the state's goals. Moreover, as long as the state's means of achieving its objective is not so irrational as to be invidiously

> discriminatory, the financing scheme does not fail merely because other methods of serving these goals exist that would result in smaller inter-district disparities in school support expenditures. At least where, as here, no suspect class or fundamental right is involved, the equal protection clause "does not require absolute equality or precisely equal advantages." We find that the program's formula is rationally related to the MFP's goals of providing each child in each school district with certain basic educational necessities and of encouraging local governments to provide additional educational support on a local level, to the extent that they choose to and are financially able to do so. We therefore reject the plaintiffs' challenge to the MFP formula's method of allocating funds and determining local contribution.[62]

Finally, the court also rejected the plaintiff's claim based on the assertion that the revenue-sharing fund was unconstitutional because the revenue-sharing distribution formula failed to fully reimburse school boards in parishes having a disproportionately high percentage of property subject to the homestead exemption for the property tax revenues those school boards lost by operation of the homestead exemption. The plaintiffs complained that the legislature's formula for distribution of the state's revenue-sharing fund was not rationally related to its stated purpose of offsetting losses incurred by virtue of the homestead exemption.

In again disagreeing with plaintiff's claims, the court concluded that, while the distribution formula did not always directly reimburse local school boards for every dollar of property tax the school boards could not collect due to the homestead exemption, the "80% per capita, 20% per household" method of distributing the revenue-sharing fund was a rational one. The court concluded that it was not unreasonable for the state to suppose, as this formula did, that parishes with larger concentrations of population and homesteads would generally lose more property tax revenues due to the homestead exemption than would less populous parishes. As expressed by the court: "Rough accommodations are constitutionally permissible, even where not wholly logical or scientific."[63] As further stated by the court:

> Within each parish, the fund supplements resources available to a host of tax recipient bodies, not just school boards. The distribution of funds within the parishes recognizes the impact of the homestead exemption upon the local tax recipient bodies by proportioning the funds according to amounts lost. The revenue-sharing fund distribution formula is deliberately independent of the direct property tax revenue loss from the homestead exemption on a parish-by-parish basis because historical attempts at direct reimbursement on this basis resulted in deliberate manipulation of homestead exemption losses by some parishes. Furthermore, while the distribution formula disadvantages school boards in parishes with a high percentage of homestead exempt property by not fully reimbursing their loss of property tax revenues, the homestead exemption itself counteracts that loss to some extent by providing residents in those parishes with saved property tax dollars that can be used to stimulate the local economy, ease the burden of local sales taxes, and support local education in other ways. In sum, therefore, the state's homestead exemption and revenue-sharing fund reimbursement system involves a balancing of historical and economic factors that is reasonably related to the state's valid objectives of relieving poorer homeowners of the burdens of property taxation, and of partially reimbursing local governments for losses resulting from the exemption. Consequently, as with the other components of Louisiana's school financing system challenged in this lawsuit, we find no equal protection violation in the distribution of the state's revenue-sharing fund.[64]

In rejecting each argument advanced by the plaintiffs in this case, the court decided that the interparish disparities in specific formula funds and in total educational expenditures per

pupil did not violate the Equal Protection Clause of the Fourteenth Amendment. This was not, however to be the final word on the constitutionality of the Louisiana school finance scheme. In 1988 the scene shifted to the state courts and was predicated on the state's constitution rather than federal courts and the U.S. Constitution.[65] The basis of the argument in this most recent case also shifted from the Fourteenth Amendment to Article VIII, Section 13(B) of the Louisiana Constitution mandating a "Minimum Foundation Program" as previously presented.

The factual background involved in this case began in January 1986, when the Department of Education submitted a budget request to the Legislative Budget Committee requesting $976,876,802 to fund the MFP for the 1986-87 school year. The Legislature, however, appropriated $42,439,270 less than requested. In November, 1986, plaintiffs, the Louisiana Association of Educators (LAE) and others, sued the Governor and other state officials alleging that the legislature had violated Article VIII, Section 13(B), because it failed to appropriate the entire sum requested. Fundamentally, it was claimed that the Louisiana Legislature was constitutionally mandated to fully fund the MFP in accordance with the formula submitted by the BESE and approved by the legislature in 1984 and that the legislature violated the provisions of the Louisiana Constitution of 1974 by failing to fully fund the MFP.

In approaching this claim the Supreme Court of Louisiana recognized that the purpose of Section 13(B) was to insure that each public school child in the state received an equal educational opportunity regardless of the wealth of the parish in which the child resides. The court also recognized that the exact phrase "minimum foundation program," although it first appeared in the Louisiana Constitution of 1974, was a concept which dated back to the 1930 amendments to the Constitution of 1921. That amendment provided for as much as $2.00 per educable child to be known as the "state equalization fund" to be used for the purpose of securing equal public school facilities in all the parishes of the state. Through subsequent amendments the mandated legislative appropriation amount was increased and three-fourths of the amount was to be distributed among the parish and city school systems on a proportional basis and one-fourth on the basis of "equalization" to insure a minimum education program. In Section 13(B), this language was simplified by specifically addressing the MFP funding and fund distribution. From this historical perspective of Section 13(B), the court concluded that the responsibility for funding the MFP was vested in the legislature and had been so since 1921. The only difference between earlier provisions and Section 13(B) was viewed as being that the older language had set an actual dollar figure as a minimum amount for the school fund and the current language gave the legislature greater discretion although the Department of Education was charged with the responsibility of submitting a MFP budget to the Legislative Budget Committee. The department also submitted an equalization formula with this budget which included the measure of local wealth included in the support of the MFP which assessed the amount that each local school system could contribute to the MFP. This local district contribution was based on an ad valorem tax defined as the gross yield of 5.5 mills of current assessed value of taxable property. This formula also contained the net difference between the cost of the MFP and the local support. The legislature subsequently approved this formula for use in the 1986-1987 school year in the appropriation bill.

The plaintiffs argued that the legislature could not appropriate less money than what was requested in the MFP because the budget requested was based on the formula. To arrive at the total cost of the MFP, the Department of Education took each item listed in the formula, used the method for calculating the cost of that item as listed in the formula, and used these figures to calculate the total dollar amount. Plaintiffs argued that the legislature had no room for discretion in the amount that it appropriated for the MFP because the legislature approved the formula on which the budget was based. While the legislature was viewed as being able to reject the formula and adopt another if it did not intend to fund the MFP in accordance with the formula and the requested budget, it could not reject the amount requested as it had done.

In denying this reasoning, the court stated:

> Plaintiffs put the cart before the horse. Under the clear language of Article VIII, Section 13(B), the function of the formula is to distribute equitably whatever funds the legislature had appropriated; the purpose of the formula is not to set the level of funding. The unequivocal language of Article VIII, Section 13(B) dictates that the legislature set the level of funding, subject only to the constitutional mandate that the funds appropriated be sufficient to insure a "minimum foundation program of education in all public elementary and secondary schools."
>
> Not only is the language of Article VIII, Section 13(B) plain and unambiguous, but it is also in accord with well settled jurisprudence. The legislature has control over the finances of the state, except as limited by constitutional provisions.
>
> Moreover, had the members of the Constitutional Convention of 1973 wanted to allow a part of the executive branch–BESE or the Department of Education–to assume a legislative function, it would have done so in explicit language. Except as expressly provided by the constitution, no other branch of government, nor any person holding office in one of them, may exercise the legislative function.
>
> The mere fact that the legislature failed to appropriate the amount requested does not automatically yield the conclusion that the amount appropriated violated the constitutional mandate that the funds be sufficient to insure a "minimum foundation program in all public elementary and secondary schools." The legislature is not required to fund the "minimum foundation program" in accordance with the formula; the formula is a method for distribution of funds.[66]

From this reasoning the court declared that, under Article VIII, Section 13(B), of the Louisiana Constitution of 1974, the legislature possessed the sole authority to set the level of funding of the MFP subject only to the constitutional mandate that the funds be sufficient to insure a "minimum foundation program in all public elementary and secondary schools."

California

California, having had the distinction of being the state that launched the modern era of judicial challenges to state aid systems for public schools in 1970, was the first "success story" when the state supreme court declared a system largely based on local district taxable wealth to be in violation of the state's constitution.[67] In this instance, the Supreme Court of California found that education was a "fundamental interest," subject to strict scrutiny judicial analysis, and that the state did not have a fundamental interest in hinging a child's education on the relative wealth of his/her school district. Although the California legislature revised the school finance system to establish a "foundation approach" to school finance, another judicial challenge successfully demonstrated that substantial disparities continued in terms of expenditures per pupil resulting from differences in local taxable wealth.[68] In the second case, the court ordered the school finance system be brought into constitutional compliance by providing a system whereby each child would have, exclusive of categorical aids and special needs program funding, equal funding, within $100 per pupil as an acceptable deviation, to support his/her education. After the Legislature again amended the statutes governing school finance in California, a third challenge was mounted basically claiming that this new "district wealth power equalization" system failed to rectify the unconstitutional dependence on local district wealth.[69] The court, while recognizing that the $100 per pupil discrepancy guideline had not been achieved in all districts, upheld the school finance system as meeting constitutional mandates by

having reduced the dependency on local district property wealth to "insignificant differences" and was, therefore, "equitable."

In 1988, a new challenge was considered by the Supreme Court of California concerning one component of the state's school finance system. This suit involved a statute requiring local school districts to pay 10% of the "excess annual costs" of educating any pupil who attended a state-operated school for pupils not educable in a local district school and whose parents were residents of that district.[70] The statute being challenged in this case required:

> Notwithstanding any provision of this part to the contrary, the district of residence of the parent or guardian of any pupil attending a state-operated school pursuant to this part, excluding day pupils, shall pay the school of attendance for each pupil an amount equal to 10 percent of the excess annual cost of education of pupils attending a state-operated school pursuant to this part.[71]

The "state-operated" schools referred to in this statute included schools operated by the State Department of Education for severely handicapped students such as blind, neurologically handicapped and deaf students. "Excess annual cost[s]" were defined to mean the total cost of educating a pupil in such schools less a school districts' annual base revenue limit, multiplied by the estimated average daily attendance of the state-operated school.

The complaint based on this statute was grounded in the claim that it was a violation of the California Constitution which provided that the state must provide reimbursement "...when the Legislature...mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service..."[72] Under this challenge, the court was required to determine if this statute imposed a school district state-mandated "new program or higher level of service" for which the state was constitutionally obligated to provide reimbursement. Simply stated, the court sought to determine whether the statute created a "new program or higher level of service" and if so, whether the statute mandated a district to make the 10 percent of the excess annual costs for district residents attending state-operated schools.

Fundamentally, the defendant State Superintendent of Public Instruction argued that the statute did not mandate a new program or higher level of service inasmuch as specialized services to handicapped students was not a state mandate, but a federal mandate, and a local district was not compelled to place such students in state-operated schools and could provide the required services in the local district or refer them to private schools. The plaintiffs countered by showing that they "had no other reasonable alternative than to utilize the services of the state operated schools, as they are the least expensive alternative to educating handicapped children"[73] The evidence supported this claim by showing that in 1979-1980, the average cost to educate a student in an appropriate local district program was $5,527, $9,527 for a private school, and $15,556 at the least expensive state school. The local district was required to pay 30 percent of the cost for students placed in private schools.

In deciding in favor of the plaintiffs, the court concluded that "... the contribution required by Section 59300 is utilized to fund a 'new program' as defined in the constitutional provision, but that it is not clear from the record whether districts are 'mandated' to pay these costs."[74] A "program" was defined by the court as one that carries out a "government function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[75] From this definition, the court concluded:

Unquestionably the contributions called for in section 59300 are used to fund a "Program" within this definition, for the education of handicapped children is clearly a governmental function providing a service to the public, and the section imposes requirements on school districts not imposed on all the state's residents. Nor can there be any doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are concerned, since at the time section 59300 became effective they were not required to contribute to the education of students from their districts at such schools.

The fact that the impact of the section is to require plaintiffs to contribute funds to operate the state schools for the handicapped rather than to themselves administer the program does not detract from our conclusion that it calls for the establishment of a new program within the meaning of the constitutional provision. To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIIIB...Section 6 was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of these restrictions on the taxing and spending power of the local entities.

The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIIIB....

We conclude, therefore, that because section 59300 shifts partial financial responsibility for the support of students in the state operated schools from the state to school districts--an obligation the school districts did not have at the time article XIIIB was adopted--it calls for plaintiffs to support a "new program" within the meaning of section 6...[76]

With respect to the issue of whether or not the statute was a state "mandate" for local school districts, the court determined that this issue would be remanded for further consideration to be determined with respect to the court's decision in this case. This decision, there, is not available at the present time.

North Dakota

Although a case originating in North Dakota did not involve a direct attack on the state aid to public schools system in force, it did allow the United States Supreme Court to reinforce the position it took in 1972 regarding public education and the Equal Protection Clause of the Fourteenth Amendment.[77] The case involved a state statute which authorized nonreorganized school districts to charge a user fee for school bus service. In part, this statute was challenged as a violation of the Fourteenth Amendment's Equal Protection Clause as an unconstitutional discrimination based on wealth and on the distinction the statute drew between reorganized and nonreorganized school districts.

In deciding this case against the challenges to the state statute, the Supreme Court again, as was the finding in Rodriguez, stated that education was not a fundamental interest which would require the Court to apply the strict scrutiny level of analysis. As stated by this court:

> Unless a statute provokes "strict judicial scrutiny" because it interferes with a "fundamental right" or discriminates against a "suspect class," it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose...we are...being urged to apply a form of strict or "heightened" scrutiny to the North Dakota statute. Doing so would require us to extend the requirements of the Equal Protection Clause beyond the limits recognized in our cases, a step we decline to take.
>
> We have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny. Nor have we accepted the proposition that education is a "fundamental right," like equality of the franchise, which should trigger strict scrutiny when government interferes with an individual's access to it.[78]

In upholding the North Dakota statute, therefore, the Court again refused to equate wealth distinctions contained in a state's education statutes with a violation of the Equal Protection Clause of the Fourteenth Amendment.

In a second North Dakota based case, four public school districts brought an action against the State Superintendent of Public Instruction and the State of North Dakota challenging the state's method of calculating per-pupil foundation aid payments and seeking additional foundation aid payments for prior school years distributions.[79] Although three of the districts managed to secure an award of $371,548.28 plus interest and costs in the district court, the Supreme Court of North Dakota reversed this decision and, in reversing, held that the statute authorizing the state to make per-pupil foundation aid payments to public school districts did not create a "contractual relationship" between the state and its school districts. In the court's view, without the existence of a contractual relationship between the state and the school districts, the districts in this case were barred from bringing this suit by the doctrine of sovereign immunity.

Under the provisions of the North Dakota Constitution, "...suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct."[80] The court viewed this constitutional provision as investing the Legislature with the authority to modify or waive the State's immunity from suit, and that no suit could be maintained against the state "unless the Legislature has authorized it." Although the school districts attempted to argue that the per-pupil foundation aid payment system established a "contract" between the state and the school districts, the court found this claim to be "clearly erroneous." As stated by the court:

> State aid to school districts, however, is not reimbursement for or payment for anything. It is a grant in aid and in so far as the local districts are concerned, it is in the nature of a gratuity... We conclude that (per-pupil foundation aid payments)...does not create an express contract between the School Districts and the State. Thus, because this action is not one "arising under contract" it is barred by the doctrine of sovereign immunity.[81]

Because the court concluded that the school district's action was barred by sovereign immunity, the court expressed no opinion on the merits of the claim that the method employed by the State to calculate per-pupil foundation aid payments was contrary to law.

New York

State of New York appeals courts have heard three challenges to the constitutionality of the state's public school financing system with the final outcome holding that this system did not violate constitutional requirements.[82] Constitutionally, New York is required to provide a statewide public school system which assures minimal facilities and services and to make them available to all the state's children. The New York decisions found that, since such a system was available, the wide disparities which existed in per pupil expenditures due to heavy reliance on local district wealth was a matter of legislative and not judicial concern. This, however, did not halt judicial challenges directed to some aspects of New York's school finance scheme. In 1987, New York appeals courts issued three separate decisions in challenges involving some aspects of the school finance system previously held to be constitutional.

In the first of the three 1987 cases, a school district board, residents and taxpayers brought an action challenging the constitutionality of a state statute which resulted in a reduction of the district's state aid allocation.[83] A state statute modified the plaintiffs tax base after several thousand addresses in the Bay Shore School District were added to the Brentwood District which resulted in a substantial reduction in plaintiff's state aid for the 1985-1986 school year. As part of their challenge to this situation, the Brentwood District plaintiffs claimed that this statute did not empower the State Department of education to "unilaterally and selectively reduce plaintiff's state education aid."[84]

The statute at issue was intended to address inaccuracies in the system by which taxpayers reported the school district in which they resided. This information was crucial since the State Department of Education based the amount of school funding which districts would be entitled to receive on, among other things, the combined total gross adjusted income of the residents of each district. Part of the system for determining a school district's state aid provided for aid in an inverse proportion to the combined adjusted gross income of district residents. Put more simply, the less adjusted gross income a school district had, the more state aid based thereon it would receive. Taxpayers identified the school district in which they resided by use of a three-digit code entered by taxpayers on their New York State income tax returns. This system was not without conflict inasmuch as several disputes had occurred between neighboring school districts as to the accuracy of this identification by the taxpayer. In the instant case, if the Bay Shore residences would continue to be identified as being in the Brentwood School District, it would reduce Brentwood's state aid $771,584 in 1985-1986 from what it had received in 1984-1985, and would continue a similar reduction in each school year thereafter.

The statute challenged in this action, Chapter 889 of the Session Laws of 1984, required the Commissioners of Education and Taxation and the Director of the Budget to enter into a cooperative agreement:

> ...with respect to the validation and correction of the total New York adjusted gross income of identified school districts for use in the design and development of the appeals process. The term identified school districts shall be defined in such agreement so as to provide appropriate opportunities for validating the accuracy of income data for selected school districts.[85]

In addition, this joint agreement was to provide at least the following:

> ...(i) procedures to improve the accuracy of school district income data, in a manner which gives appropriate recognition to administrative feasibility and confidentiality implication; (ii) a methodology for determining where the incidence of incorrect reporting of school district codes by taxpayers may be the greatest; (iii) a process by which identified local school districts may review the basis upon

which the total New York adjusted gross income reported for such districts was detemined; (iv) the verification of permanent resident addresses reported by taxpayers for a given school district; and (v) the correction of verified inaccuracies.[86]

Section 2 of this statute also provided for a certain list to be promulgated for the identified school districts to be used solely for the purpose of verifying the legal residence and school district of individuals who on their tax returns reported that they lived in an identified district. Section 3 also provided for the creation of a temporary task force on income verification to conduct a study of alternatives for the establishment of a statewide address match and income verification system and to study and make recommendations with respect to improving and modifying the data used in distributing school aid to local school districts. In addition, in order to induce and encourage the "Identified School Districts" to participate in the pilot program, the state agreed to hold them harmless from any losses which they might sustain by reason of their involvement in the study. Twenty-four school districts were eventually identified based on a formula which would, hopefully, reveal the districts with the greatest number of taxpayers incorrectly deemed to be residing therein based on the current reporting method of specifying a school district on the State income tax return.

In part, plaintiff Brentwood School District challenged the right of the state to utilize the data generated by this pilot project, with Bay Shore being one of the pilot school districts used to recompute the state aid formula for non-pilot school districts such as Brentwood. The court agreed with Brentwood's claims that the state could not use the data generated by the pilot project to recompute the state aid formula for non-identified, or not one of the 24 pilot, school districts by stating:

> While adjustment of the school aid based on the "first round verification" might have been valid for the Identified School Districts, 22 of which participated in the process, (and all of which reported a decreased number of taxpayers, entitling them at least in theory to increased State aid) certainly there is not one iota of justification for reducing the State aid to those districts which are neighbors of the identified districts and which became the repository of the challenged tax return addresses. In Brentwood, the number of taxpayers added to its base were such that the District's tally was increased from 21,800 returns to 25,450 returns and the New York adjusted gross income in the District went from $405 million to more than $481 million...
>
> The same might well be said of the actions taken by defendants in utilizing the proposed new system to reduce plaintiff's State aid based upon the addresses defendant Bay Shore challenged. The defendants take the position that Chapter 889 "mandates that the data collected from this process be used to compute state school aid allocations to all districts." This court finds no support in the statute for this statement.[87]

The court continued by observing that, realistically, all that had been accomplished was that Bay Shore and the other pilot districts had been given the opportunity to "disclaim" certain taxpayers from their tax bases, with the resulting location of the tax base in neighboring districts such as Brentwood, thereby reducing their total adjusted gross income and increasing their entitlement to state aid. In fact, this is exactly what occurred in each of the pilot districts. Such verification of tax bases were "accepted as gospel" and the injured districts were denied the opportunity to examine the data upon which the changes were based and the opportunity to appeal such decisions.

In summary, the court upheld the challenged statute while at the same time finding the implementation of its provisions was not justifiable. As stated by the court:

> This court is satisfied that the statute is constitutional, but is equally persuaded that the manner of implementation and the revision of the school aid formula to adversely affect the non-identified districts by reducing their state aid receipts without any appellate review is a denial of their rights...[88]

The court, in granting the plaintiff's claims, ordered the Brentwood state aid claims for the 1985-1986 and 1986-1987 school years recalculated without giving effect to the Bay Shore verifications, and their state aid reimbursed accordingly.

The second 1987 New York court decision involved a variation of the issue in the above case.[89] In this case, the plaintiff school district, Peekskill, claimed the state utilized erroneous data to determine the district's adjusted gross income wealth for the purposes of calculating state aid. Peekskill claimed that the state's utilization of erroneous data to determine the district's adjusted gross income wealth resulted in a 1984-1985 school year loss of $1,232,602. The basic premise underlying state school aid, simply stated, was that the greater the district's wealth, the lesser the state aid to be paid. Conversely, the poorer the district, the greater the state aid. This school finance effect was dictated by a statute which required the Commissioner of Education to annually apportion the legislative appropriation for schools under a complex formula which required, among other factors, that the Commissioner calculate the "alternative pupil wealth rates" which was:

> ...the number computed to three decimals without rounding obtained when the adjusted gross income of a school district for the calendar year prior to the calendar year in which the base year began divided by the total wealth pupil units of such district is divided by the statewide adjusted gross income per total wealth pupil unit as computed by the commissioner pursuant to regulations adopted by him for such purpose. Such statewide average gross income per pupil shall be established each year by the commissioner pursuant to such regulations approved by the director of the budget and shall be transmitted to school districts by March first. For aid payable in the school year nineteen hundred eighty-four--eighty-five, such statewide average shall be forty-three thousand eight hundred dollars. For the purposes of this paragraph, the income data shall be computed in accordance with regulations adopted by the state tax commission based upon personal income tax returns for the calendar year two years prior to the calendar year in which the current school year commences... (Emphasis in original)[90]

Since 1981, the adjusted gross income of a school district, together with the assessed value of real property, had been used to calculate state appropriations. The measure of a school district's real property wealth was available from the assessment rolls. The determination of a district's adjusted gross income was achieved by adding amounts individuals reported on their tax returns as this reporting procedure was described in the previous case. Due to the difficulties experienced in verifying and correcting inaccurate data as reported on individual tax returns, 1983 tax data was used to compute 1985-1986 state aid.

Peekskill School District was identified as one of the districts with a high incidence of misreporting by taxpayers of their school district of residence. A computer list of addresses of 1983 taxpayers claiming residences in Peekskill was provided the Commissioner by the district. The Commissioner was instructed to verify whether or not these addresses were located in the district and to correct any inaccuracies. Peekskill claimed 2,352 out of a total of 9,012 taxpayers incorrectly identified Peekskill as their district of residence, and, therefore, these taxpayers should not have been considered in calculating state aid. Peekskill claimed, therefore, that the 1983 data was incorrect and should not be used as the basis for calculating its state aid.

In dismissing Peekskill's challenge, the court found that only 1982 income data was relevant to the computation of 1984-1985 state aid. The controlling statute provided that "income data shall be computed...based upon personal income tax returns for the calendar year two years prior to the calendar year in which the current school year commences." Therefore, the calendar year two years prior to 1984-1985 was 1982, not 1983 as claimed by Peekskill. The court also recognized the problems which might be created by supporting Peekskill's claims by observing:

> Of course, the state aid for that period had already been recomputed on the basis of 1982 income tax data; and, in fact, the first payment of that aid was received on September 17, 1984. Under these circumstances...had the state attempted to use the corrected 1983 data to compute the 1984-1985 aid, it would have violated the legislative fiat...to the extent that this claimant believes it was deprived of aid to which it was entitled in past years, before the problem was identified and attempts were being made to rectify it, I believe it must seek its relief in the Legislature, not in the courts. This is particularly so in view of the competing interest involved; i.e., for every dollar gained by the City School District of the City of Peekskill in a lawsuit, the State would have to obtain reimbursement from an "overpaid" district, or pay twice. It is not too difficult to imagine the disastrous effect...[of]...a retroactive application...[91]

In the final 1987 New York case a more direct school finance system challenge was mounted by attacking the statute involved in the previous two cases as being violative of equal protection insofar as it allocated state aid to school districts on a formula based on inaccurate income tax data and, in using this data, the implementation of the statute was arbitrary and capricious.[92] The plaintiff in this case, the Huntington Union Free School District School Board, claimed that since the constitutional guarantee of equal protection had been denied, they were entitled to adjustments to all disbursements they received for the school years 1980-1981 through 1984-1985 to the extent that these disbursements were predicated upon any formula utilizing the defective data-gathering mechanism.

In a very brief opinion, the court determined that the law, Section 3602, was constitutional insofar as it allocated state aid to school districts on a formula based on income tax data and that the implementation of the formula was not arbitrary or capricious. The court viewed this statute as enacting the legislative intent that the calculation of state aid be based upon the combined adjusted gross income of the residents of each school district. In keeping with the intent, the means chosen, the use of taxpayer identified school districts of residence, was rational to effectuate the legislative intent. As concluded by this court:

> We do not find that the district income data, considered as a whole was grossly inaccurate as alleged...The selected verification...found significant income overstatement in less than 3% of the school districts (22 of 737 districts) and that the amount of income so overstated was slightly over 1% of the total income reported on all New York long form tax returns for the year 1983. The use of such data was thus not arbitrary and capricious.
>
> While the plaintiffs concede that the use of the total adjusted gross income of taxpayers within a school district is proper in classifying districts for state aid, they contend that inaccuracy in such totals violates both the federal and state constitutions. We do not agree. In matters concerning the state's budget, equal protection does not require that all classifications be made with mathematical precision. Even flagrant unevenness in application will not prevent a statute from passing constitutional muster.[93]

CHAPTER II

STATE AID SYSTEMS JUDICIALLY OVERTURNED

Volume I presented nine state-level judicial actions which resulted in plaintiff's succeeding in overturning a specific state aid to public school's system. These states--New Jersey, Kansas, Wisconsin, California, although later decisions upheld new state aid systems in Wisconsin and California, Connecticut, Washington, West Virginia, Wyoming and Arkansas--experienced judicial decisions which fundamentally found that the state aid systems violated the state's education and/or equal protection clauses for a variety of reasons. As in the previous chapter, the major elements involved in the more recent state-level decisions are present below along with an explanation of the basis for each decision.

Wyoming

In 1987, the Supreme Court of Wyoming rendered its third decision on some aspect of the State's system of financing its' public schools. In the first Wyoming case, primarily involving school district reorganization, the court took judicial notices of the disparities in financial resources between districts in the state.[94] The court noted the tax advantages of school districts with a high-assessed valuation, and that if ad valorem taxes for school purposes were equalized throughout the state, inequalities in expenditures per pupil could be alleviated. Although the court stated that it could no longer ignore the inequalities in taxation for school purposes, in a later opinion in this case the court concluded that the corrective measures which might remedy this situation were properly a matter for the legislature and not the perogative of the court to substitute its judgment for that of the legislature.[95]

In an apparent change of opinion, this same court found that the state's system of financing public schools violated the Constitution of Wyoming.[96] Fundamentally, this court found education under the Wyoming Constitution was a "fundamental interest" and that:

> A classification on the basis of wealth is considered suspect, especially when applied to fundamental interests... The classification is therefore suspect. The respective tax bases of the school districts of this state and their per-student resources reflect discordant correlations which plainly demonstrate the failure of the current system to provide equal educational opportunity.[97]

Given the constitutional emphasis on education in Wyoming, the court held that the State had the burden of demonstrating a compelling state interest in financing its public schools in the manner which it employed. Since the State could not show such an interest, the court concluded that "the quality of a child's education in Wyoming, measured in terms of dollars available for that purpose, was dependent upon the property resources of his school district," and that "the right to an education cannot constitutionally be conditioned on wealth in that such a measure does not afford equal protection."[98] While declaring the system unconstitutional under the strict scrutiny standard, the court followed its' prior perspective by stating that the ultimate solution for resolving the school finance difficulty must be formulated by the legislature and not by the court.

In the most recent case, the Wyoming Supreme Court was presented with the question of the constitutionality of a statute calling for the withholding of state funds from a school district for alleged underassessments by the district's county assessor resulting in a reduction in the amount of local resources contributed within the total school funding formulae.[99] As a result of the Wyoming Supreme Court's prior decision declaring the state's school finance system unconstitutional, the legislature attempted to provide a broad-based state and local school

finance system. An immediate difficulty was encountered, however, by "unequal and inequitable local tax assessments, which directly affected state contributory responsibility."[100] This difficulty was centered on Section 21-13-310(c) of Wyoming's School Laws which provided:

> Annually, commencing on July 30, 1984, the state board of equalization, when determinable, shall certify to the department of education whether or not the level of local assessments for any category in each county is in accord with the requirements of the board of equalization and, if not, the percent by which the assessments are below the board's requirements. If the assessment level of locally assessed properties for any category in any school district is more than five percent (5%) below the board's requirements, the department shall increase the amount of revenue to be included in the sum of local district resources...by the amount of locally assessed value for any category necessary to comply with the board's requirements times the appropriate mill levies...[101]

By letter dated October 11, 1984, the chairman of the State Board of Equalization, the agency with the responsibility for tax assessment adequacy and equalization, advised the Superintendent of Public Education of underassessments. In the Laramie County School District No. 1, this resulted in the reduction of state allotments amounting to $322,731.67 in operational funding and $43,614.27 in construction funding. District No. One challenged this action by claiming that Section 21-13-310(c) was unconstitutional by violating Article 3, Section 27, of the Wyoming Constitution which provided:

> The legislature shall not pass local or special laws in any of the following cases, that it is to say: For...regulating county or township affairs;...for limitation of civil actions;...providing for the management of common schools;...remitting fines, penalties, or forfeitures;...for the assessment or collection of taxes;...exempting property from taxation;...in all other cases where a general law can be made applicable no special law shall be enacted.[102]

Several additional provisions contained in the Wyoming Constitution also impacted on the legislative responsibilities for providing public education. Among these provisions were the following:

> The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.[103]

> Provision shall be made by general law for the equitable distribution of such income among the several counties according to the number of children of school age in each; which several counties shall in like manner distribute the proportion of said fund by them received respectively to the several school districts embraced therein. But no appropriation shall be made from said fund to any district for the year in which a school has not been maintained for at least three months; nor shall any portion of any public school fund ever be used to support or assist any private school, or any school, academy, seminary, college, or other institution of learning controlled by any church or sectarian organization, or religious denomination whatsoever.[104]

> The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public schools, adequate to the proper instruction

> of all youth of the state, between the ages of six and twenty-one years, free of charge; and in view of such provision so made, the legislature shall require that every child of sufficient physical and mental ability shall attend a public school during the period between six and eighteen years for a time equivalent to three years, unless educated by other means.[105]
>
> The right of the citizens to opportunities for education should have practical recognition. The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts.
>
> No tax shall be imposed without the consent of the people or their authorized representatives. All taxation shall be equal and uniform.[106]

In approaching this challenge, the Wyoming Supreme Court again recognized its responsibility to apply the strict scrutiny standard in this educational funding case and also "to question any system that withholds funds because of transgressions of other segments of government."[107] Turning to the specific claim by District No. One that Section 21-13-310(c) was unconstitutional as being a special law in violation of Article 3, Section 27, the court determined that the proper test "for determining when a state constitutes an improper local or special law under the...constitutional provisions, was whether the classification contained in the statute was reasonable and whether the statute operated alike upon all persons or property in like or the same circumstances and conditions."[108]

The defendants argued, in part, that the challenged statute was enacted to force County Assessors to "do their jobs" in order to avoid the threatened reduction in school funding. The court discounted this argument by stating:

> ...the legislature, in 1983,...in an attempt to prove a complete, uniform system of public school funding...were committed to reducing the disparity in funding education among school districts. However, if the act is argued as being a means "to force county assessors to do their jobs," the provision at issue obviously failed in that seven school districts, including the Plaintiffs here, were penalized by a reduction of their foundation funds and...their recapture payments.
>
> There are already statutory provisions to force county assessors to do their job [criminal penalties, review and malfeasance statutes]...
>
> In other words, the legislative act is being argued by Defendants as being an attempt to equalize the funding of education among the various school districts by punishing a school district when the County Assessor of the county in which the school district is located fails to comply with the laws as to assessment and equalization of property for tax purposes. Stated differently, the act is an attempt to require school districts to police the responsibilities of their County Assessor or to bear the consequences of the assessor's errors. Such legislation is, on its face, arbitrary and without any just relationship to the allocation of school foundation funds and capital funds.[109]

West Virginia

After having found education to be a fundamental constitutional right, and that the state's public school finance system was unconstitutional for denying children located in property-poor school districts of their constitutional rights to equal protection and a "thorough and efficient" education, the Supreme Court of Appeals of West Virginia in 1979 required the

state to develop a funding system that would eliminate such "discriminatory classifications."[110] Five years later the same court ruled that after the state developed the "Master Plan for Public Education," "...the West Virginia Board of Education and the State Superintendent of Schools...have a duty to ensure the complete executive delivery and maintenance of a 'thorough and efficient system of free schools' in West Virginia as that plan is embodied in A Master Plan for Public Education..."[111] In 1984, therefore, it appeared that West Virginia had resolved the primary legal issues concerning it's public school financing system. Such, however, was not the case.

In the 1985-86 fiscal year, West Virginia Governor Moore line-item vetoed seven million dollars in the budget bill. This appropriation was intended to finance salary equity adjustments for school teachers and school service personnel. This action was immediately challenged in a class action suit claiming the propriety of the Governor's action.[112] Although the Governor claimed that he was not an "indispensable party" in this suit and should not, therefore, be a defendant in this action, the Supreme Court of Appeals of West Virginia ruled that the Governor was properly a defendant in this suit and had properly vetoed the appropriations bill. This decision helped to "pave-the-way" for a 1988 decision also involving the issue of salary equity.

In 1988 the court was presented with the claim that a statute which was implemented to assist the state in achieving salary equity among teachers and school service personnel in all counties statewide was unconstitutional.[113] As background to this case, the school boards in two counties had an excess levy in effect on January 1, 1984. This local levy was used for various purposes including the supplementation of professional and service personnel salaries and/or wages. Effective July 1, 1985, however, the legislature amended the West Virginia Code so as to prohibit counties which discontinued county supplements used for salaries after January 1, 1987, from receiving a pro rata equitable distribution of state equity funds. The specific term of this statute, as amended, provided, in pertinent part:

> To assist the state in meeting its objective of salary equity among the counties, on and after the first day of July, one thousand nine hundred eighty-four, subject to available state appropriations and the conditions set forth herein, each teacher and school service personnel shall receive a supplemental amount in addition to the amount from the state minimum salary schedules provided for in this article. Pursuant to this section, each teacher and school service personnel shall receive the amount that is the difference between their authorized state minimum salary and ninety-five percent of the maximum salary schedules prescribed in sections five-a and five-b of this article, reduced by any amount provided by the county as a salary supplement for teachers and school service personnel on the first day of January of the fiscal year immediately preceding that in which the salary equity appropriation is distributed: Provided, that no amount received pursuant to this section shall be decreased as a result of any county supplement increase instituted after the first day of January, one thousand nine hundred eighty-four, unless and until the objective of salary equity is received: Provided, however, That, in the event any county reduces funds allocated for salary supplements as provided for in sections five-a and five-b of this article, the amount received for equity pursuant to this section, if any, shall continue as a salary supplement in effect on the first day of January, one thousand nine hundred eighty-four, if any unless and until the objective of salary equity among the counties having no such reduction is reached pursuant to this section: Provided further, That any amount received pursuant to this section may be reduced proportionately based upon the amount of funds appropriated for this purpose.

No county may reduce any salary supplement that was in effect on the first day of January, one thousand nine hundred eighty-four, except as permitted by sections five-a and five-b of this article.[114]

As a result of this 18A-4-5 prohibition, although a county may have lost its excess levy because of a voter defeat at the polls, the State Board of Education could not consider that loss in its distribution of state equity funds.

In the two counties which were petitioners in this case, Grant County's excess levy expired on June 30, 1985, and Ritchie County's excess levy expired in June of 1986. Despite efforts to continue the levies in both counties, they were ultimately rejected by the voters. As a result of the requirements of 18A-4-5 that such excess levies be considered under the equity funding formula, and despite the loss of such funds to those counties after January 1, 1984, the two petitioner-counties contended that teacher and school service personnel salaries in their respective counties had dropped below the minimum mandated by the West Virginia Code. In fact, as a result of this situation, the teachers and school service personnel in Grant County were the lowest paid in the State for fiscal year 1987-88.

The narrowly drawn issue presented to the court by Grant and Richie counties was the claim that 18A-4-5 was unconstitutional. While this statute was designed to assist the State in attaining salary equity among the teachers and service personnel in all counties throughout the State, the effect permitted an unequal and discriminatory compensation system which resulted in a direct reduction in salaries to teachers and school service personnel in their respective counties. They contended that 18A-4-5 operated to perpetuate the inequalities it was implemented to abolish because counties which never passed excess levies were treated differently from countries which had excess levies as of January 1, 1984, but failed to renew them. This effect operated in opposition to other state statutes which established state minimum salaries for teachers and school service personnel, that each teacher and school service personnel was to receive a supplemental amount in addition to the minimum amount from the state minimum salary schedules, and statutes establishing guidelines for determining county salary supplements for teachers and school service personnel. In addition, the petitioner counties presented evidence to show that each county which did not have an excess levy in effect on January 1, 1984, received the maximum supplement permitted by 18A-4-5 from the State Board of Education. The petitioners who had excess levies in effect on January 1, 1984, were supplemented by the State Board of Education only to the extent necessary to bring the salaries in line with the maximum state equity under the equity funding formula as if the excess levies in the respective counties were still in effect. Thus, after the defeat of the excess levies at the polls, the petitioners received the same state equity funding with no county supplements, while counties which had no excess levy in effect on January 1, 1984, and still had no excess levy financing, received the maximum state equity funding.

In sum, the petitioners claimed this violated the West Virginia Constitution, Article XII, Section I, which succinctly states: "The legislature shall provide, by general law, for a thorough and efficient system of free schools."[115]

In establishing the framework for its decision, the court, as it had on two previous occasions, stated that, where a fundamental right such as education is involved and an equal protection challenge is presented, the State's action is to be given a stricter scrutiny and the State must advance a compelling state interest to uphold a discriminatory classification. Thus, a statute that creates a lack of uniformity in the West Virginia educational financing system is subject to strict scrutiny, requiring a compelling state interest to sustain its constitutionality. From this perspective, the court then concluded:

In the case now before us, the petitioners have demonstrated that the statute, W. Va. Code, 18A-4-5 (1985) contains an invidious classification which awards state equity funding for salary supplementation purposes in an amount based upon whether or not the particular county had in effect an excess levy to provide additional financing on a particular date... The respondents have failed to articulate any specific facts that would justify such disparate treatment nor do they point to any legislative history that would indicate any reason for the classification. We can find no compelling state interest to support this discriminatory system of educational financing.

Accordingly, we conclude that W. Va. Code, 18A-4-5 (1985), to the extent that it fixes a county's entitlement to state equity funding based upon whether an excess levy was in effect in that particular county on January 1, 1984, and continues to limit that county's funding to the specific amount awarded on January 1, 1984, despite the fact that the county's voters subsequently rejected continuation of the levy at the polls, violates equal protection principles because such a financing system operates to treat counties which never passed excess levies more favorably than those which had excess levies in effect on January 1, 1984, but failed to renew them.

The present system for financing salary supplements for teachers and school service personnel pursuant to W.Va. Code, 18A-4-5 (1985) allocates funds according to a county's ability not only to pass an excess levy but more significantly it is based upon a county's ability to retain the levy. Because of their inability or refusal to continue their respective levies, the petitioners cannot sustain the level of salaries attained by their teaching and service personnel when the excess levies were in effect. Under W. Va. Code, 18A-4-5 (1985), the system of allocation of state equity funds for salary supplementation is impermissibly based upon a county's ability to maintain an excess levy. Clearly, this factor bears no relationship to educational needs.

Several courts throughout the country have recognized that a child's education is vitally important, both to the child as an individual and to society as a whole... Critical to the fulfillment of this State's responsibility to provide each child enrolled in its public schools with a "thorough and efficient" education is the ability of a county school board to attract, employ, and retain a high quality staff of teaching and school services personnel...fluctuation in spending patterns has resulted in an unequal distribution of the State's funds earmarked for education. The case now before this Court is illustrative of the classic problem arising when the financing of a school system is based, even partially, on the passing and retention of excess levies. With such disparate treatment of the counties based upon their retention of excess levies, boards of education in counties which have failed to renew levies, like the petitioners, will undoubtedly be incapable of attaining and maintaining a high quality staff of professional and service personnel because salaries in such counties will naturally fall behind those in counties which never had excess levies.[116]

The court, in a statement similar to that which concluded the two prior West Virginia school finance system cases, charged that the duty to correct this unconstitutional element of the state's equity funding formula was legislative rather than judicial. In recognizing that some time would be necessary for the legislature to develop a statutory financing system which would pass constitutional muster, the effect of this decision was stayed until the beginning of fiscal year 1988-89.

In another 1988 action in West Virginia, a case was brought by the West Virginia Education Association (WVEA) challenging the constitutionality of cuts made in state education expenditures in the state's budget for fiscal year 1987-1988.[117] The WVEA sought a writ requiring the Governor to call a special session of the legislature and requiring the legislature to supplement the budgetary appropriation for education, or other such relief as the court deemed appropriate. Although the Supreme Court of Appeals of West Virginia concluded that the fiscal year 1987-1988 state budget was unconstitutional, it refused to issue the requested writ since, as an act of comity, the court presumed that the Governor and legislature would perform their mandated duties.

As its main argument, the WVEA claimed that the provisions of Article XII, Section 1 et seq. and Article X, Section 5, of the West Virginia Constitution, gave a "constitutional preferred status" to public education in the state. The court agreed and noted that it had previously held in 1979 that the mandate of Article XII, Section 1, that the legislature provide for a "thorough and efficient" public school system, required that body to develop high standards for educational quality statewide.[118] As such, education was viewed as an "essential constitutional right" in West Virginia and, therefore, the financing of public education was, among the constitutionally mandated public services, "the first constitutional priority."[119] As further stated by the court:

> This case vividly illustrates the concept of "rule of law." Rule of law implies subordination of the three branches of government (legislative, executive, and judicial) to principles of law enunciated in the constitution. The thorough and efficient system of free schools required by our constitutional law is to be provided for through enactment of general law by the Legislature. W. Va. Const. Art. XII, 1. Article nine A of chapter eighteen of the West Virginia Code sets forth a comprehensive plan for financial support of public schools.
>
> As such, Code 18-9A-1 to -22 is an integral part of the fundamental constitutional command that the Legislature provide for a thorough and efficient system of public education. The Legislature, in enacting and specifying the basic foundation program contained in article nine A has established public policy which is presumed to vindicate the constitution. That body has made a determination that presumes this basic foundation program is a necessary part of fulfilling the constitutional obligation.[120]

As defendants, both the Governor and Legislature admitted that the appropriations made by the legislature for public education failed to provide sufficient dollars to fund the basic foundation program. The court, therefore, found that the WVEA claim was correct in claiming that the 1987-1988 budget did not comport with the legislatively established public policy to vindicate the constitutional mandate for a thorough and efficient public school system. The court also observed that the legislature was not bound forever to fully fund the public support program currently found in West Virginia's statutes. It could amend this program so long as any new statute met the constitutional mandates of Article XII, Section 1, Article X, Section 5, and the prior rulings of the court. What the legislature was not viewed to be free to do, however, was to cut educational funding pro rata along with constitutionally nonpreferred expenditures in violation of the legislature's own previously determined constitutionally based public policy.

In summary, the court concluded:

> It is clear that the Governor and the Legislature have the responsibility for preparing and enacting a proper budget... we hold the budget for fiscal 1987-88 to be unconstitutional...[121]

A word of caution was raised in a dissenting opinion by two justices. While fundamentally arguing with the majority on the writ issue to effectuate a plan to correct the deficiencies correctly presented by the WVEA, the dissenters observed:

> The majority opinion reads as if its purpose were to make educators believe that this Court embraces education as an essential constitutional right, and believes financing education is among the mandated public services entitled to constitutional priority. This much may be true. It also reads, however, as if it were improving the budget appropriations for education. In fact, the majority opinion is like fool's gold-all glitter and no money in the bank. It gives a false sense of security, like a town crier shouting, "Educators sleep soundly. The 1987-88 budget of this State is invalid and ye shall reap great bounty therefrom. All is well." But when morning comes the educators will awake to find that eleven twelfths of the fiscal year has passed. Alas, they will realize that the carriage which carried them to the great ball has turned into a pumpkin.[122]

Following the 1979 decision by the Supreme Court of Appeals of West Virginia holding the school finance system to be in violation of the educational and equal protection rights of school children, the court remanded the case to the Circuit Court of Kanawha County to determine whether the lack of a high quality educational system was the result of a failure to follow existing statutes and standards or whether it was due to an inadequacy of the system; whether the financing of the existing educational system was equitable on the state and local levels, whether various state agencies and officials were performing their constitutional and statutory duties with respect to education, and whether local school officials were properly performing their duties.[123] This decision firmly established education as a fundamental right in West Virginia, that a "thorough and efficient system of free schools" was constitutionally mandated in the State, and that the system, which favored counties which were property-wealthy, was "woefully inadequate."

In 1988, this same court was called upon to decide a consolidated case raising a constitutional challenge to the "excess levy" provision of the West Virginia Constitution which was designed to help finance the State's public schools.[124] In this case, the tax commissioner, the auditor, and thirty-three county boards of education sought to prohibit the implementation of a circuit court order which would withhold a proportion of state school funding from counties with excess levies, and distribute the sums withheld equitably to other counties.

Fundamental to this action was the school financing formula in affect at that time. The formula contemplated a shared responsibility of educational costs to be borne by the State and the individual counties.

Very broadly, the operation of the formula may be described as follows. First, a county's estimated level of need, or "basic foundation program," was determined. The basic foundation program was the total sum required for each of seven categories of need, viz., professional educators, service personnel, fixed costs, transportation costs, administrative costs, other current expenses and substitute employees, and improvement of instructional programs.

Second, the county's "local share" was to be computed. Local share was the amount of tax revenue which would be produced by levies, at specified rates, on all real property situated in the county. Local share thus represented the county's contribution to education costs on the basis of the value of its real property. State funding was provided to the county in an amount equal to the differences between the basic foundation program and the local share.

Other funds, however, could also be raised. Article X, Section 10, of the West Virginia Constitution provided, in part:

> Notwithstanding any other provision of the Constitution to the contrary, the maximum rates authorized and allocated by law for tax levies on the several classes of property for the support of public schools may be increased in any school district for a period not to exceed five years, and in an amount not to exceed one hundred percent of such maximum rates. If such increase is approved, in the manner provided by law, by at least a majority of the votes cast for and against the same.[125]

Basically, this provision authorized any county to increase, by as much as 100 percent, the maximum levy rates allowable for public schools. These increases, or "excess levies," must be approved by a majority vote and were valid for up to five years. Revenues derived from excess levies were used for a wide variety of purposes, including salary supplements for school personnel, free textbooks for students, and other current operating expenses. It was argued by the parties that forty-three West Virginia counties presently had excess levies. The anticipated revenues from these levies for the fiscal year 1987-88 was over $121,000,000. This situation raised the issues of whether, and to what extent, the school finance system's dependence on such county excess levies promoted "unequal educational opportunities."

Initially, the court recognized its 1979 reasoning that excess levies per se were not subject to an equal protection challenge because they were constitutionally provided for and they were determined voluntarily by the voters in a county. The court also noted in 1979 that "there are limits to the amount of reliance that can be placed on this source of funds, considering the State government's constitutional responsibility to assume a thorough and efficient system of schools."[126]

From this perspective, the remand to the circuit court of the original 1979 decision resulted in a detailed opinion and order declaring some features of the school financing system to be "constitutionally infirm" and noted that the inequities were attributable to an undue reliance on excess levies which favored property-rich counties. This was considered to be constitutionally infirmed basically because of the reliance on locally funded excess levies to provide educational programs essential to meet the constitutionally mandated "thorough and efficient" system of education and because the amount of revenue that was raised through such excess levies varied dramatically among counties based upon the local property wealth of the county and the ability of voters to approve an excess levy. Counties that were unable to pass an excess levy could not fund high quality programs. Many counties were also unable to provide high quality programs because, even with a 100 percent excess levy, the funds generated were inadequate to meet the county's needs. Since the state bore the responsibility for providing a thorough and efficient system of education, it was concluded that it could not make the fulfillment of this responsibility dependent on the ability to pass an excess levy or on the amount of money that could be raised by an excess levy.

The court appointed a committee to develop a "master plan" to bring the system into constitutional compliance. As submitted to the court, the master plan recommended the enactment of a statewide excess levy to supplant the various county excess levies. The plan was approved, as revised, by order of March 4, 1983. The court declined to adopt a timetable for implementation of the plan, but rather called on the Governor and Legislature to promptly fulfill their constitutional duties.

On January 8, 1985, after almost two years of inactivity, the plaintiffs in the 1988 case moved the court to address the excess levy problem. A December 5, 1985, order of the circuit court stated that if the Legislature did not by July 1, 1987, replace or equalize excess levy revenues by one of the methods enumerated--a statewide excess levy, an increased ratio of real property assessments to fair market value, a dedicated tax, or additional funds from general revenue--the court would direct a more equitable distribution. The Legislature promptly adopted

a constitutional amendment to authorize a statewide excess levy. This proposed amendment was to be submitted to the voters in a special election to be held on March 5, 1988.

The court also entered a supplemental order on June 29, 1987. This order provided that if the statewide excess levy was not approved, a sum equal to 20 percent of each county's excess levy revenues would be withheld from State school funding in fiscal year 1988-89. The sums withheld were to be increased by an additional 20 percent in each of the next four fiscal years. These sums were to be distributed to other counties "on an equitable basis" prescribed by the court. The statewide excess levy amendment was defeated at the special election held on March 5, 1988, and the supplemental order thereby became operative. The tax commissioner and auditor then petition for a writ of prohibition to bar enforcement of the supplemental order and the thirty-three county school boards challenged this action on equal protection grounds.

The Supreme Court of Appeals, in considering the equal protection principles implicit in the general language of the West Virginia Constitution, denied this challenge by finding that:

> The equal protection mandates of these various provisions of our Constitution are broad and, literally construed, would reach innumerable objects. Thus, they come within... a broad constitutional precept to be tempered by a more specific constitutional one. Here the language of W. Va Const. art. X, Sec. 10 authorizing excess levies deals specifically with this subject. It cannot be said from its language that there is any discriminatory classification, as it operates evenly on all property. We find...that the excess levy provision does not violate equal protection principles since W. Va. Const. art. X, Sec. 10 expressly authorizes these very levies. Excess levies are withdrawn from the operation and scope of equal protection principles.
>
> There is a further constitutional principle that comes into play. It is that a more recent constitutional amendment will prevail over a prior constitutional provision that is in conflict therewith. We note that each of the provisions from which our equal protection jurisprudence was drawn dates from at least the 1872 Constitution. It was not until November, 1958, that W. Va. Const. art. X, Sec. 10, which authorizes excess levies, was added to our Constitution.[127]

In applying this "priority-in-time" principle, the court rejected this challenge by stating:

> W.Va. Const. art. X, Sec. 10, in plain words, authorizes the residents of any county to approve by a majority vote the imposition of higher taxes on property in the county for the support of the county's public schools. This authority may be exercised notwithstanding any other provision of the constitution to the contrary. To the extent that the equal protection mandates of our Constitution would dictate otherwise, they must be deemed to be superseded by W. Va. Const. art. X, Sec. 10, as the last word from the people.
>
> We thus conclude, consistently with the foregoing principles of construction, that the authority of the residents of a county to vote for and approve an excess levy for the support of public schools in the county, pursuant to W. Va. Const. art. X, Sec. 10, is not subject to equal protection principles.[128]

This court also concluded that the circuit court exceeded its legitimate powers by the entry of an unconstitutional order which would indirectly proscribe county excess levies. Such an action would penalize counties that currently had excess levies and, if not prohibited, would make it impossible to approve such levies in the future.

In a continuation of its opinion, the court offered "guidance for further development of the Pauley case." As stated by the court:

> ...the focus of equal protection is not merely on the existence of financing disparities. Local excess levies will undoubtedly promote some disparities between counties. These disparities are expressly countenanced by W. Va. Const. art. X, Sec. 10. They represent the initiative of individual counties whose residents are willing to tax themselves to improve the level of local education.
>
> We find the true focus of Pauley to be whether the State has complied with its constitutional duty to provide school financing in a manner, and at a level, that is thorough and efficient. This requires an examination of the school financing formula, without consideration of excess levy revenues. There are two pertinent inquiries. First, the formula must be scrutinized facially. Is the basic foundation program, the minimum level of funding guaranteed by the State, constitutionally sufficient to meet the county's education needs? Second, the formula must be examined as it is applied. Is the total funding actually received by the county, including the local share from its regular levy, constitutionally sufficient to meet the county's education needs?
>
> It is particularly the latter inquiry, the application of the formula, that requires further exploration below. One of the issues we identified for remand in Pauley was whether the method of appraisal used by individual counties affected their ability to raise tax revenues and to meet their local shares. Exhibits appended to the briefs of the parties herein tend to show that property appraisals do not correspond to fair market value and are not uniform in all counties.
>
> We take this opportunity to restate two constitutional commands that relate to property appraisals. First, all property situated in the State must be appraised uniformly in accordance with its value. Value is to be determined by means of a statewide reappraisal of property authorized and implemented by the Legislature. Second, property is to be assessed by the counties, for tax purposes, at 60 percent of its value unless otherwise directed by the Legislature.
>
> It appears that a primary cause of the school financing problem may lie with the appraisal system. The statewide reappraisal contemplated by W. Va. Const. art. X, Sec. 1b is, as yet, unrealized. In a 1983 statute, the Legislature provided that the reappraisal process was to be completed by March 1, 1985. Numerous complaints of errors and misinformation resulted in a flood of appeals, and the Legislature responded with a revised appeals process and a delay in implementation. Subject to certification, the reappraisal was most recently scheduled to be implemented this year. We are informed that the reappraisal was, in fact, not implemented as required by the statute.
>
> It will, therefore, be appropriate for the circuit court to consider the extent to which the statewide reappraisal will remedy the financing disparities between counties. To this end, it may be advisable to inquire into the reasons for the delay in implementation of the reappraisal and, if necessary, to order such implementation as soon as practicable.[129]

This "guidance for further development" offered by the court would imply, particularly with reference to the final paragraph, that this 1988 decision is not likely to be the final judicial proceeding directed toward the West Virginia scheme of financing its' public schools.

Montana

Although not a case directly challenging the constitutionality of the Montana system for financing public education, the Montana Supreme Court did decide a taxation case in 1974 that included the courts opinion that the constitutional mandate that the legislature was required to fully fund the public schools did not mandate the legislature to fully fund the state's phase of the cost of basic education.[130] In essence, the court concluded that the constitutional mandate did not specify the means by which the legislature must fund public education and it could employ a statewide property tax. After the revenue from this tax was realized, the legislature was viewed as being "free to use the proceeds realized by the tax for any public purpose, including fulfillment of the duty to fund public education."[131] In 1989, however, this court found that the Montana system of funding public schools did violate the constitutional guarantee of equal educational opportunity.[132]

In the latest case, Helena Elementary School District No. 1 and the Montana Education Association brought suit against the State of Montana, the Montana Board of Public Education and the Montana Superintendent of Public Instruction. The case was brought as a direct challenge to the constitutionality of the 1985-86 method of financing public elementary and secondary schools. In the 1985-86 school year, there were 545 school districts, 382 elementary and 163 secondary, in Montana with a total student enrollment of 153,869. Nearly 459 of these districts enrolled less than 100 students.

As in most states, Montana funded public school districts through a combination of local, state and federal funding sources. In addition to a "General Fund," each school district used up to nine other types of budgeted funds. These included transportation funds, teacher retirement funds, debt service funds, and building reserve funds. Some of these depended upon voted levies and all were primarily funded on a district or county level. School districts also had nonbudgeted funds including food service, traffic education, rental funds, sick leave reserves, block grants, building funds, endowment funds, and interlocal agreement funds. Expenditures from these nonbudgeted funds could only be made from cash on hand.

The General Fund, which provided 70% of school funding in Montana, included several components. In 1949, the Montana Legislature enacted the Montana School Foundation Program. Under that program, every two years the legislature set a "Maximum General Fund Budget Without a Vote" (MGFBWV) schedule for elementary and secondary school districts in the state. Eighty per cent of the MGFBWV was funded by county and state equalization revenues. These equalization revenues were derived from levies of 45 mills on all taxable property in each county and state aid from such sources as earmarked revenues, surplus county Foundation Program revenue, and direct legislative appropriations.

The remaining 20% of the funding of MGFBWV was through permissive mill levies of up to 6 mills for elementary districts and 4 mills for high school districts. These levies were made without a vote. If the school district was unable to obtain the MGFBWV level through permissive levies and other specified nonlevy revenue, state permissive equalization revenues were used to make up the difference.

The evidence in this case showed that, in 1985-86, most school districts adopted budgets in excess of the MGFBWV. They utilized a third stage of funding under which monies were obtained primarily from property tax levies voted by each school district. Other revenues which were used in this third level of funding included vehicle taxes, interest income, tuition income, and federal funds. By 1985-86, 35% of all General Fund budgets were obtained from this level of funding. In contrast, in 1950, the Foundation Program furnished 81.2% of all general fund revenues in Montana, leaving less than 20% of the revenues to be obtained by local levies and other sources.

Plaintiffs presented voluminous evidence to support their theory that the system of funding public education in Montana was unconstitutional. The evidence established great differences in the wealth of the various school districts and, more significantly, established disparities of spending per pupil as high as 8 to 1 in comparisons between similarly-sized school districts. For example, the Drummond and Geraldine districts were very similar in size at both the elementary and high school levels. Geraldine's taxable valuation was, however, more than twice that of Drummond's. The tax efforts for the elementary schools were comparable but Geraldine levied more General Fund mills than Drummond at the high school level. Consequently, Geraldine spent approximately $1,000 more per pupil than Drummond at the elementary level and over $2,000 more at the high school level. Approximately 40% of Geraldine's General Fund revenues were derived from the voted levy, while at Drummond, the voted levy supplied approximately 15% of the General Fund revenues. This illustrated the fact that wealthier districts were able to rely to a greater extent on the voted levy to generate revenues for the General Fund.

In addition to the actual ability to generate greater revenues, the plaintiffs also presented testimony to indicate that better funded districts tended to offer more enriched and expanded curricula than those offered in districts with less money and that they were better equipped in the areas of textbooks, instructional equipment, audio-visual instructional materials, and consumable supplies, their buildings and facilities were better maintained, and that:

> Availability of funds clearly affect the extent and quality of the educational opportunities.
>
> There is a positive correlation between the level of school funding and the level of educational opportunity.
>
> The better funded districts have a greater flexibility in the reallocation of resources to programs where there is a need.
>
> The differences in spending between the better funded and underfunded districts are clearly invested in educationally related programs.[133]

In general, the evidence presented by the plaintiffs indicated that substantial differences in educational opportunities among Montana school districts existed and these differences "are manifested significantly between the high versus low expenditure" districts.[134]

The problem was compounded by the adoption of "Initiative 105" in the November, 1986 general election. This initiative had the effect of freezing property tax levies at 1986 levels which resulted in the "locking in" of any disparities and inequities.

The district court concluded that education was a fundamental right under Montana's Constitution. It concluded that, under the 1985-86 system of funding public elementary and secondary schools, disparities in per pupil spending among schools as a result of disparities in local property wealth do not even pass the rational basis test of equal protection analysis. It also concluded that the concept of local control was not related to the spending disparities present and that the State's budgetary difficulties did not constitute a legal defense to these inequalities.

This court also concluded that the Montana School Accreditation Standard did not define the constitutional right to education. The district court ordered that the present system of school funding could remain in effect until October 1, 1989, and left to the Legislature the task of fashioning a constitutional school funding system.

In considering the appeal brought by the State, the Montana Supreme Court succinctly stated the issue as "Does Montana's system of funding the public schools violate the Education Article, Art. X, of the Montana Constitution"[135] Article X, Section 1, of the Montana Constitution provided:

> (1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state...
>
> (3) The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.[136]

By relying on the transcript of the 1972 Montana Constitutional Convention, the State defendants argued that provision of subsection (1), that the "equality of educational opportunity is guaranteed to each person," was an "aspirational goal," only. In rejecting this claim the court stated:

> In interpreting the Constitution, as in statutory construction, this Court must first look to the plain meaning of the words used. In the first sentence of Art. X, Sec. 1(1), the framers of the Constitution clearly stated the "goal" of the people to establish a system of education which will develop the full educational potential of each person. In the next sentence, the framers did not use the term "goal." Instead they stated that equality of educational opportunity "is guaranteed" to each person of the state. As we review our Constitution, we do not find any other instance in which the Constitution "guarantees" a particular right. We conclude that the plain meaning of the second sentence of subsection (1) is that each person is guaranteed equality of educational opportunity. The plain meaning of that sentence is clear and unambiguous.[137]

The State also argued that the last sentence of subsection (3) limited the Legislature's duty is connection with the guarantee of equal educational opportunity. It pointed out that Foundation Program funds were distributed in an equitable manner and, since such funds were distributed in an equitable manner as required under the last sentence of subsection (3), the Legislature had met its constitutional obligation as required under Article X, Section 1. Also in rejection of this argument, the court stated:

> Art. X, Sec. 1(3), Mont. Cost., requires that the Legislature shall provide a basic system of free quality education, that it may provide various types of educational institutions and programs, and that the state's share of the cost of the basic system shall be distributed in an equitable manner. There is nothing in the plain wording of subsection (3) to suggest that the clear statement of the obligations on the part of the Legislature in some manner was intended to be a limitation on the guarantee of equal educational opportunity contained in subsection (1). The guarantee provision of subsection (1) is not limited to any one branch of government. Clearly the guarantee of equal educational opportunity is binding upon all three branches of government, the legislative as well as the executive and judicial branches. We specifically conclude that the guarantee of equality of educational opportunity applies to each person of the State of Montana, and is binding upon all branches of government whether at the state, local, or school district level. We hold that the last sentence of subsection (3) is not a limiting provision on the guarantee of equal educational opportunity contained in subsection (1)[138]

With respect to the equal educational opportunity mandate the court found that the evidence present at the trial court "clearly and unequivocally" established large differences, unrelated to "educationally relevant factors," in per pupil spending among the various school districts of Montana. This evidence was found to demonstrate that the discrepancies in spending as large as that found in Montana translated into unequal educational opportunity.

The State also attempted to argue that equality of educational opportunity was more appropriately measured by output, that is, by analysis of the success of students from the different school districts, rather than by input of dollars and that the statewide fiscal difficulties in Montana in the few years immediately preceding this case "excused" the disparities in per pupil spending in the various school districts. In rejecting these arguments, the court found that the State failed to submit convincing evidence to support their claim on using the output theory of measurement and that the State's recent fiscal difficulties "in no way justify perpetuating inequities."[139]

The State also attempted to argue that Article X, Section 8, of the Montana Constitution, which provided that "The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.", mandated local control and such local control required that the spending disparities among the districts be allowed to exist. In rejecting this argument, the count found that the spending disparities could not be described as resulting from local control and, in fact, the challenged funding system denied poorer school districts a significant level of local control because they had fewer options due to fewer resources.

In concluding that the school finance system was unconstitutional, the Montana Supreme Court stated:

> We conclude that as a result of the failure to adequately fund the Foundation Program, forcing an excessive reliance on permissive and voted levies, the State has failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed under Art. X, Sec. 1, Mont. Const. We specifically affirm that portion of the District Court's conclusion ... which holds that the spending disparities among the State's school districts translate into a denial of equality of educational opportunity. We hold that the 1985-86 system of funding public elementary and secondary schools in Montana is in violation of Article X, Section 1 of the Montana Constitution.[140]

An additional issue in this case involved the arguments concerning the definition of a "quality education." The Montana Board of Public Education, which held general supervisory power over the state's public school system, had adopted statewide accreditation standards for elementary and secondary schools. These standards required teachers to be certified by the State, limited teachers' class loads, outlined a minimum instructional program (for example, courses required for high school graduation), and established minimum size, maintenance, and safety standards for school facilities. The Board argued that these standards established the instructional component of a basic system of free quality public elementary and secondary schools.

The court recognized that these standards were "minimum standards upon which quality education must be built" but such accreditation standards "do not fully define a quality education." As specifically summarized by the court:

> Thus, the Montana School Accreditation Standards do not fully define either the constitutional rights of students or the constitutional responsibilities of the State of Montana for funding its public elementary and secondary schools.[141]

The Supreme Court, as was the case with the trial court, refused to rule that its' holding in this case would be immediately effective in order to provide the Montana Legislature with the "opportunity to search for and present an equitable system of school finance." As further stated by the count in this regard:

> Several of the parties suggested that in the event we concluded the school funding was unconstitutional, we should spell out the percentages which are required on the part of the State under the Foundation Program and for the districts under the voted levy system. We are not able to reach that type of a conclusion. As previously indicated, the 1985-86 school funding involved more than 20 different funds. The control of such funds is primarily in the Legislature. Our opinion is not directed at only one element of the system of funding public schools in Montana, as we recognize that the Legislature has the power to increase or reduce various parts of these elements, and in addition to add other elements for such funding.
>
> While this opinion discusses spending disparities so far as pupils are concerned, we do not suggest that financial considerations of that type are the sole elements of a quality education or of equal educational opportunity. There are a number of additional factors which are a significant part of the education of each person in Montana, including but not limited to such elements as individual teachers, classroom size, support of the parents of students, and the desire and motivation on the part of the student which moves him or her to seek earnestly after an education. By not discussing these elements, we do not in any way suggest they are irrelevant, for the financing of education is only one aspect of equal education opportunity.[142]

Kentucky

Although the State of Kentucky had experienced a skirmish with a judicial challenge to the scheme employed to distribute school funds within counties based on non-average daily attendance factors, a direct challenge to the entire school financing system was not to be decided for nearly two decades.[143] The direct case was decided on June 8, 1989, and slightly modified on September 28, 1989, when the Kentucky Supreme Court ruled that the General Assembly had failed to comply with the constitutional mandate to provide an "efficient system" of common school throughout the state.[144]

This case was originally brought by multiple plaintiffs including parents of public school students, individual school districts, and the Council for Better Education, Inc., a non-profit Kentucky corporation whose membership consisted of sixty-six local school districts in the state. The defendants included Rose, the President Pro Tempore of the Kentucky Senate, the Governor, the State Board of Education and the Superintendent of Public Instruction, and other state government officials. In challenging the Kentucky school financial system, the plaintiffs alleged that the system provided by the General Assembly was inadequate, placed too much emphasis on local school board resources, and resulted in inadequacies, inequities and inequalities throughout the state so as to result in an inefficient system in violation of Sections 1, and 3 of the Kentucky Constitution, and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. The plaintiff's complaint also maintained that the entire system was not "efficient" as mandated by Section 183 of the Kentucky Constitution.

Fundamentally, the defendants responded by claiming that the court did not have jurisdiction in this matter since it was a purely "political" issue, that the alleged constitutional violations were unfounded and other claims attempting to challenge the legal standing of the plaintiffs to bring this case. The defendants also filed an "affirmative defense" claim basically

arguing that the educational reform laws passed by the Kentucky General Assembly in 1985, along with various budget changes and other educational laws passed in 1986, inferentially corrected the school financing situation challenged by the plaintiffs. The Franklin County Circuit Court denied these claims and held, in part, that the Kentucky common school finance system was unconstitutional discriminatory and that the General Assembly had not produced the constitutionally mandated efficient system of common schools throughout the state.

In deciding the issue, the circuit court judge, in three separate documents, prepared extensive findings of fact, conclusions of law and judgments which were heavily relied on by the Kentucky Supreme Court in upholding the plaintiff's changes. The first document, entitled "Findings of Fact, Conclusions of Law and Judgment," identified four issues before the court:

> (1) The necessity for defining the phrase "an efficient system of common schools" as contained in Section 183 of the Kentucky Constitution; (2) Whether education is a "fundamental right" under our Constitution; (3) Whether Kentucky's current method of financing its common schools violates Section 183, and (4) Whether students in the so-called "poor" school districts are denied equal protection of the laws.[145]

In the opinion of the trial judge, "efficient," in the constitutional sense, was to be defined as a system which required "substantial uniformity, substantial equality of financial resources and substantial equal educational opportunity for all students."[146] Efficient was also interpreted to require that the educational system must be "adequate, uniform and unitary." With respect to education being a "fundamental right," the trial judge considered the language of Section 183 of the Kentucky Constitution which provided:

> General Assembly to provide for school system -- The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.[147]

Because of this language in Section 183, the trial court ruled that education, indeed, was a fundamental right in Kentucky.

In ruling on the issue of whether Kentucky's method of school finance violated Section 183, and underpinning the point with extensive findings of fact, the trial court declared that students in property poor school districts were offered a minimal level of educational opportunities which was inferior to those offered to students in more affluent districts. Such "invidious" discrimination, based on the place of a student's residence, was determined to be unconstitutional. The trial court ruled therefore, that the school finance system violated the equal protection guarantees of Section 1 and 3 of the Kentucky Constitution.

In its judgment, the trial court ruled that the Kentucky "system" of financing its common schools was unconstitutional and discriminatory, and that it was not "efficient." The court then indicated that it would appoint a "small select committee" whose purpose would be to review all relevant data, provide additional analysis, consult with financial experts and propose remedies to "correct the deficiencies in the present common school financing system." The report of this committee would be an "aid" to serve the count as a guide in establishing "the parameters of the constitutional requirement, of Section 1, 3 and 183."[148]

The second document appointed the members of the "select committee" and emphasized its role as "advisory only" to the trial court judge. In addition, document two, modifying or explaining part of document one, emphatically stated that there was "no judicial intent to merely redivide the funds now available to the common school districts."[149] Moreover, the trial judge emphasized that funds should not be taken away (presumably by the General

Assembly) from any school district to increase the funding level of more impoverished districts. The Kentucky Supreme Court, however, in interpreting this second document, concluded by strongly suggesting that additional revenues were needed to make the system "efficient."

Document number three, which was the major focus of the appeal by the state government defendants, addressed the report presented to the trial judge by the select committee. While steadfastly maintaining that the adoption of this report was "only part" of his decision, the trial judge agreed with the report that the goals set out by the committee for the establishment of an "efficient" school system were "salutary" ones. While not technically adopting the report, the trial judge adopted certain principles from the report as part of his final "Findings of Fact, Conclusion of Law and Judgment." In his additional "Findings of Fact," the trial judge modified his previous definition of an "efficient" system of schools. It was a "...tax supported, coordinated organization, which provides a free, adequate education to all students throughout the state, regardless of geographical location or local fiscal resources."[150] He opined that an efficient system (of schools) also must have "substantial" uniformity.

Ever broadening the definition and setting non-instructional standards, the trial court required an efficient school system to provide sufficient physical facilities, teachers, support personnel, and instructional materials to enhance the education process. An adequate school system must also include careful and comprehensive supervision at all levels to monitor personnel performance and minimize waste. If and where waste and mismanagement existed, including but no limited to improper nepotism, favoritism, and misallocation of school monies, they must be eliminated, through state intervention if necessary. The General Assembly was recognized as having the power necessary to guarantee that the resources provided by Kentucky taxpayers for schools were spent wisely.

The trial court had thus, with a very broad brush, included in its constitutional definition of "efficient" goals to be met by an education and requirements for school financing, curriculum, personnel, accessibility to all children, physical facilities, instructional materials and management of the schools.

Moreover, the trial court made it clear that the duty--the absolute, unequivocal duty--to provide this system was solely the responsibility of the General Assembly. The court reiterated that its judicial power did not extend to specifying to the General Assembly the methods by which to implement and maintain this efficient system of education.

Addressing again the question of financing this massive task, the trial court stated directly what had been implied previously, that "substantial additional monies" would have to be raised to provide this constitutionally mandated school system. The court suggested three possible ways of financing: 1) increasing existing taxes, 2) levying new taxes, or 3) reallocating existing funds. Since a major reallocation of funds would "cripple" other government functions, the trial court postulated that the imposition of new taxes appeared to be the only viable alternative.

The trial judge recognized that the separation of powers doctrine would prohibit courts from directing the General Assembly as to how the school system should be financed. He reiterated, however that the General Assembly must provide an efficient system. Finally, although the trial court encouraged the protection of local school boards, he re-emphasized the General Assembly's authority and responsibility for the establishment and maintenance of the school system.

In the "judgment," the trial judge retained continuing jurisdiction over the subject matter for the purpose of enforcing the judgment. To that effect, he ordered a progress report be made to him on a specific day.

With this lengthy series of documents, the Franklin Circuit Court brought into sharp focus a problem that many dedicated citizens of the Commonwealth of Kentucky had "wrestled" with for many years. It placed the sole responsibility for the establishment and maintenance of an efficient system of common schools on the General Assembly. It defined "efficient" in an multi-faceted manner, and directed that all these criteria are not only relevant, but are essential, if the development of a constitutionally valid system of common schools is to be had. The trial court examined the evidence and declared that the present school system was unconstitutional.

On appeal, the Kentucky Supreme Court first considered a brief history of public school financing and a review of the evidence presented at trial. The court recognized that historically, Section 183 of the Kentucky Constitution mandated that school funds appropriated by the General Assembly be apportioned to school districts on the basis of the number of children, age five through 17 years, regardless of whether or not they attended school. In this early state aid system, differences in the populations of the state's school districts was not perceived as affecting the quality of the education. A 1930 law attempting to appropriate state money for an equalization fund, designed to increase per-pupil expenditures in those districts where the standard of education was low, was eventually invalidated by the supreme court on the basis that this attempt to equalize expenditures violated the mandate of Section 183--viz., state funds were viewed as being limited to a per capita appropriation.

In 1941, Section 183 was amended to permit 10% of the state's funds to be used for equalization purposes and in 1944 an additional amendment raised this limit to 25%. In 1952, the constitutional provision requiring per capita expenditures was eliminated. This latter action greatly strengthen the role of the Kentucky General Assembly in providing for an "efficient" system of common schools as mandated by Section 183.

In an apparent response to the 1952 constitutional amendment, and in an attempt to equalize inequities in the educational efforts and abilities to encourage more financial input and effort by local school districts, the General Assembly enacted a Minimum Foundation Program (MFP). The stated legislative purpose for this enactment was to "assure substantially equal public school educational opportunities."[151] To qualify as a MFP participant, a school district was required to levy a minimum real property tax of $1.10 per $100 of assessed value (AV) in the district. The maximum tax rate was set at $1.50 per $100 of AV or 1 1/2% of the total AV of the real property in the district. Most school districts, due to low assessed property values, levied the $1.50 maximum rate. The assessments ranged from 33 1/3% of the fair cash value of the real property, to as low as 12 1/2%, with a statewide median assessment rate of 27%.

As a result of the statute creating the MFP, and due to the diversity of local assessments of fair cash value, a suit was filed directly attacking the MFP statute and the problem of the built-in disparity in local school district tax levies. The outcome of this lawsuit was a court order that Section 172 of the Kentucky Constitution required real property to be assessed at 100% of fair cash value and the court directed the state's revenue cabinet to see that all property in the Commonwealth was so assessed. Immediately following this decision the General Assembly enacted legislation known as the "rollback law" which reduced the tax rates on property proportionately to offset the increase in assessment ordered by the court. This "rollback law" continued, or even exacerbated, the inequities the court attempted to correct by reducing, in practically all cases, property tax revenues to their 1965 level. This law virtually froze the revenues available to local school districts and created the "ominous spectacle" of different maximum tax rates for the then 180 local school districts in Kentucky.

This action was followed by several additional enactments, including the passage of equalization legislation establishing a "Power Equalization Program" (PEP), with the net result of little or no increase in the revenue received by school districts with respect to their total AV.

Through this period of legislated change, the state's contribution to local school districts continued to be based primarily on the MFP and the 1976 statute's creation of the PEP.

To qualify as a participant in the MFP, a local school district must operate and pay its teachers for 185 days per school year, and it must actually operate its school(s) the same number of days. The State Superintendent of Public Instruction allotted the classroom units to each district, the number of which depended on the average daily attendance (ADA) in each grade. Each district received a grant of money from the MFP based on the number of classroom units assigned to it. The funds could be used for teachers' salaries, current expenses, capital outlay and transportation of students. The state also provided financial resources to local school districts through the PEP. Each year, the Kentucky Department of Revenue determined the equalized fair cash value of all taxable property in each local school district. That data was certified to the Superintendent of Public Instruction. The Superintendent determined annually the maximum tax rate that the PEP fund would equalize and then applied an equal rate to all districts. In order for a local district to receive funds, each local school district must levy a minimum equivalent tax rate of $.25 per $100 of valuation, or the maximum rate supported by the PEP, whichever was greater. The "minimum equivalent tax rate" was defined as the quotient derived from dividing the districts' previous year's income from tax levies by the total assessed property valuation plus the assessment for motor vehicles.

As pointed out by the trial court, the mandated underlying tax rate had been so low that the results were that only a fraction of the $.25 local tax was actually equalized through the PEP. Specifically, these rates were nine cents per $100 in 1985-86, 10 cents in 1986-87, and 13 cents per $100 thereafter.

In summarizing this brief historical account of Kentucky school finance, the supreme court opined:

> If one were to summarize the history of school funding in Kentucky, one might well say that every forward step taken to provide funds to local districts and to equalize money spent for the poor districts has been countered by one backward step.
>
> It is certainly true that the General Assembly, over the years, has made substantial efforts to infuse money into the system to improve and equalize the educational efforts in the common schools of Kentucky. What we must decide, based solely on the evidence in the record as tested by the Kentucky Constitution, Section 183, is whether the trial court was correct in declaring that those efforts have failed to create an efficient system of common schools in this Commonwealth.[152]

In considering whether or not the evidence presented in this case supported the trial courts conclusion that the Kentucky system was not efficient, and, therefore, violated Section 183, the Supreme Court bluntly stated:

> The evidence in this case consists of numerous depositions, volumes of oral evidence heard by the trial court, and a seemingly endless amount of statistical data, reports, etc. We will not unduly lengthen this opinion with an extensive discussion of that evidence. As a matter of fact, such is really not necessary. The overall effect of appellants' evidence is a virtual concession that Kentucky's system of common schools is underfunded and inadequate; is fraught with inequalities and inequities throughout the 177 local school districts; is ranked nationally in the lower 20-25% in virtually every category that is used to evaluate educational performance; and is not uniform among the districts in educational opportunities. When one considers the evidence presented by the appellants,

there is little or no evidence to even begin to negate that of the appellees. The tidal wave of the appellees' evidence literally engulfs that of the appellants.[153]

The court concluded that, in spite of the MFP and PEP, there were wide variations in both financial resources and the disposition of the financial resources which resulted in "unequal educational opportunities throughout Kentucky." Even a total elimination of all "mismanagement and waste" in local school districts would not, in the courts view, correct the situation of the large variance in taxable property per student in local districts. The court also noted that a "substantial difference" existed with respect to the curricula offered in poorer school districts, when contrasted with that of the richer districts, particularly in the areas of foreign language, science, mathematics, music and art. The court also observed that the achievement test scores in the poorer districts were lower than those in the richer districts and that expert opinion presented during the trial court's proceedings "clearly established" that there was a correlation between such scores and the wealth of the districts. Moreover, the court found that student-teacher ratios were higher in the poorer districts and, although Kentucky's per capita income was low, Kentucky made an even lower per capita effort to support its common schools. In one sentence, this court's succinct conclusion was stated as:

> Students in property poor districts receive inadequate and inferior educational opportunities as compared to those offered to those students in the more affluent districts.[154]

This court also took the somewhat unusual step of comparing Kentucky's overall effect and achievement in the area of primary and secondary education with national and neighboring state norms. This comparison resulted in the court's recognizing that Kentucky, on both a national and neighboring states companion, ranked low. Thirty-five percent of Kentucky's adult population were high school drop-outs, 80 percent of it's school districts were "poor" in terms of taxable property, and 30 percent of its school districts were "functionally bankrupt." In addition, Kentucky was ranked 37th nationally with respect to the average annual salary paid to instructional personnel with classroom teachers salaries of 84.68% of the national average and per pupil expenditures at 78.20% of the national average. With these and other comparative statistics, numerous expert witnesses who testified at the trial court level described Kentucky's educational "effort" as being "inadequate" and "well below" the national and neighboring states effort.

From this comparison-based background, the supreme court directed its attention to the trial court's findings relative to the inequity and lack of uniformity in the states' school districts, the educational opportunities offered, and to the disparity in financial effort and support. At trial, numerous expert witnesses testified, without exception, that there were great disparities in the poor and the more affluent school districts with regard to classroom teachers' pay, provision of basic educational materials, student-teacher ratios, curriculum, quality of basic management, size, adequacy and condition of school physical plants, and in per year expenditures per student. In accepting this testimony, the court concluded that the quality of education in the poorer districts was "substantial less" in most, if not all of the above categories and stated that "Kentucky's children, simply because of their place of residence, are offered a virtual hodgepodge of educational opportunities."[155] The court continued by stating:

> Can anyone seriously argue that these disparities do not affect the basic educational opportunities of those children in the poorer districts? To ask the question is to answer it. Children in 80% of local school districts in this Commonwealth are not as well-educated as those in the other 20%.

> Moreover, most of the witnesses before the trial court testified that not only were the state's educational opportunities unequal and lacking in uniformity, but that all were inadequate. Testimony indicated that not only do the so-called poorer districts provide inadequate education to fulfill the needs of the students but the more affluent districts' efforts are inadequate as well, as judged by accepted national standards.
>
> As stated, when one reads the record,...one can find no proof, no statement that contradicts the evidence about the existing inequalities and lack of uniformity in the overall performance of Kentucky's system of common schools. (Emphasis in original)[156]

With respect to the issue of educational effort, the appellant state government officials basically argued that the General Assembly, by enacting such programs as the MFP and PEP over the years, and since the overall amount of money appropriated for local schools had been substantially increased, had adequately addressed this issue. In denying this "we have done our best" argument, the court concluded that, in spite of the legislative efforts, the total local and state effect in education in Kentucky's public schools was "inadequate and is lacking in uniformity" and was discriminatory with regards to the children served in 80% of the local school districts.

Turning to the financial effort and support issue, the court again accepted the testimony of the expert witnesses, and the data submitted at the circuit court level, that a definite correlation existed between the money spent per child on education and the quality of the education received. Noting that the Kentucky school finance system did not require a minimum local effort, and that the MFP, being based on average daily attendance, infused more money into each local district, the court recognized that the MFP was not designed to correct the problems of inequality and lack of uniformity between local school districts. Even the PEP did not correct this problem since it was underfunded. As expressed by the court:

> The disparity in per pupil expenditure by the local school boards runs in the thousands of dollars per year. Moreover, between the extreme high allocation and the extreme low allocation lies a wide range of annual per pupil expenditures. In theory (and perhaps in actual practice) there could be 177 different per pupil expenditures, thus leading to 177 different educational efforts. The financing effort of local school districts is, figuratively speaking, a jigsaw puzzle.[157]

In rejecting the appellants argument that the so-called "permissive taxes" were at least part of the solution to equalizing local financial efforts, the court adopted two separate reasons for denying this claim. First, the taxes were permissive and were not, in response to voter resistance to the imposition of taxes, adopted in many districts and did not, therefore, produce additional local revenue. Secondly, even if all of the permissive taxes were enacted, the financial effort would still be inadequate. Also, because the population of the districts was in direct proportion to the amount of money that could be raised by these taxes, the overall problem of unequal local effort would be exacerbated by the enactment of such taxes. The permissive taxes were, therefore, viewed as not being the solution to the financial effort and support problem since such taxes contributed to the disparity of per pupil expenditures. The court additionally noted that, because the assessable and taxable real and personal property in the 177 districts was so varied, and also because of the lack of uniformity in the tax rates, the local school boards' tax effort was not only lacking in uniformity but was also lacking in adequate effort.

Turning to the critical question of what is an "efficient system of common schools?", the court again recognized the importance placed on education by the framers at the Kentucky Constitution by declaring that the "General Assembly", by "appropriate legislation", was obligated to provide for an "efficient system of common schools" throughout the State. As a constitutional mandate, it was the sole obligation of the Kentucky General Assembly to provide an "efficient" system. The task the court, therefore, established for itself was to discern the meaning of the word "efficient" as used in Section 183.

Using the constitutional debates which led to the adoption of the Kentucky Constitution as a springboard, the court recognized the high degree of importance the delegates placed on education. As an example, the court quoted two delegate's perceptions that Section 183 was intended to mean at least the following:

> The providing of public education through a system of common schools by the General Assembly is the most "vital question" presented to them.
>
> Education of children must not be minimized to the "slightest degree."
>
> Education must be provided to the children of the rich and poor alike.
>
> Education of children is essential to the prosperity of our state.
>
> Education of children should be supervised by the State.
>
> There must be a constant and continuing effort to make our schools more efficient.
>
> We must not finance our schools in a de minimis fashion.
>
> All schools and children stand upon one level in their entitlement to equal state support.[158]

Recognizing that these clearly expressed purposes by two of the framers of Section 183 must serve, at least in part, as a guide for the court in attempting to define the word "efficient", the court concluded that the framers intended Section 183 to emphasize that education was essential to the welfare of the citizens of the Commonwealth. Then the court stated the critical conclusion, based on this constitutional history, that "By this animus to Section 183, we recognize that education is a fundamental right in Kentucky."[159]

The court did not, however, stop at an analysis of the constitutional history behind it's "education is a fundamental right in Kentucky" conclusion. The court also reviewed several prior judicial decisions involving education in Kentucky and found strong support for this conclusion from prior case language such as a stated prohibition against any practice which would "impair the equal benefits" of the common school system to all students, that the state had the duty to "promote public education," that all schools must afford "equal opportunity for all," and that "uniformity and equality" was the overall goal of the school system. In a statement briefly summarizing the language of these prior decisions the court concluded:

> In other words, although by accident of birth and residence, a student lives in a poor, financially deprived area, he or she is still entitled to the same educational opportunities that those children in the wealthier districts obtain. What principle could be more fair, more just, and more importantly, what would be more consistent with the purpose of Section 183 and the common school system it spawned?[160]

More specifically, the court identified several conclusions which had been previously drawn by the Kentucky Supreme Court concerning Section 183 of the present constitution. These conclusions included:

1. The General Assembly is mandated, is duty bound, to create and maintain a system of common schools--throughout the state.
2. The expressed purpose of providing such service is vital and critical to the well being of the state.
3. The system of common schools must be efficient.
4. The system of common schools must be free.
5. The system of common schools must provide equal educational opportunities for all students in the Commonwealth.
6. The state must control and administer the system.
7. The system must be, if not uniform, "substantially uniform," with respect to the state as a whole.
8. The system must be equal to and for all students.[161]

Recognizing that the court, under the separation of powers doctrine, did not hold the constitutional authority to substitute its judgment for that of the General Assembly, and that the correction of any constitutional infirmities in the public school system was a legislative and not a judicial matter, the court addressed the "ultimate issue" under Section 183; the "efficient" mandate. In reasoning similar to that followed by the West Virginia Supreme Court's interpretation of the "thorough and efficient" system of school's constitutional mandate,[162] the court, in again accepting the expert testimony presented at trial, found that an "efficient" system of common schools in Kentucky should have the following elements:

1. The system is the sole responsibility of the General Assembly.
2. The tax effort should be evenly spread.
3. The system must provide the necessary resources throughout the state--they must be uniform.
4. The system must provide an adequate education.
5. The system must be properly managed.[163]

In directly addressing the definition of "efficient" as contained in Section 183, the court clearly presented the factors it viewed as being significant by stating:

> We now hone in on the heart of this litigation. In defining "efficient," we use all the tools that are made available to us. In spite of any protestations to the contrary, we do not engage in judicial legislating. We do not make policy. We do not substitute our judgment for that of the General Assembly. We simply take the plain directive of the Constitution, and, armed with its purpose, we decide what our General Assembly must achieve in complying with its solemn constitutional duty.
>
> Any system of common schools must be created and maintained with the premise that education is absolutely vital to the present and to the future of our Commonwealth....No tax proceeds have a more important position or purpose than those for education in the grand scheme of our government. The importance of common schools and the education they provide Kentucky's children cannot be overemphasized or overstated.
>
> The sole responsibility for providing the system of common schools is that of our General Assembly. It is a duty--it is a constitutional mandate placed by the people on the 138 members of that body who represent those selfsame people.

The General Assembly must not only establish the system, but it must monitor it on a continuing basis so that it will always be maintained in a constitutional manner. The General Assembly must carefully supervise it, so that there is no waste, no duplication, no mismanagement, at any level.

The system of common schools must be adequately funded to achieve its goals. The system of common schools must be substantially uniform throughout the state. Each child, every child, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education. This obligation cannot be shifted to local counties and local school districts. (Emphasis in original.)[164]

The court, recognizing that Section 183 required the General Assembly to establish a system of common schools that would provide an equal opportunity for all children to have an adequate education, clearly specified that the constitution did not limit the General Assembly's power to create local school entities or to grant to those entities the authority to supplement the state system. The state could require local school entities to enact local revenue initiatives to supplement the uniform, equal educational effort that the General Assembly must provide. This included the use of revenue measures similar to the special taxes previously described and to assess local ad valorem taxes on real property at a rate over and above that set by the General Assembly to fund the statewide system of common schools. Such local efforts could not, however, be used by the General Assembly as a substitute for providing an adequate, equal and substantially uniform educational system throughout Kentucky. As specifically stated by the court:

Having declared the system of common schools to be constitutionally deficient, we have directed the General Assembly to recreate and redesign a new system that will comply with the standards we have set out. Such system will guarantee to all children the opportunity for an adequate education through a state system. To allow local citizens and taxpayers to make a supplementary effort in no way reduces or negates the minimum quality of education required in the statewide system. (Emphasis in original)[165]

We do not instruct the General Assembly to enact any specific legislation. We do not direct the General Assembly to raise taxes. It is their decision how best to achieve efficiency. We only decide the nature of the constitutional mandate. We only determine the intent of the framers. Carrying-out that intent is the duty of the General Assembly.

A child's right to an adequate education is a fundamental one under our Constitution. The General Assembly must protect and advance that right. We concur with the trial court that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and

pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[166]

After identifying the above seven characteristics as the minimum goals to be provided by an "adequate" education, the court presented the essential, and the minimal, characteristics of an "efficient" system of common schools, as follows:

1. The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility to the General Assembly.
2. Common schools shall be free to all.
3. Common schools shall be available to all Kentucky children.
4. Common schools shall be substantially uniform throughout the state.
5. Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.
6. Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
7. The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.
8. The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.
9. An adequate education is one which has as its goal the development of the seven capacities recited previously.[167]

Applying this "test of efficiency" to the system of common schools in Kentucky led the court to conclude that the system "falls short of the mark" of meeting the constitutional mandate of "efficient." All of the evidence noted, including the overall inadequacy of the system, the national and adjacent states comparisons, the great disparities in educational opportunities throughout the state, the great disparity and inadequacy of the financial effort throughout the state, and the expert testimony, convinced the court that "no other decision is possible."

Again acknowledging the limitation placed on the judicial system by the separation of powers doctrine, the court recognized that it could not direct the legislature to raise taxes for the benefit of the common school system or to direct the legislature to distribute funds in a specific manner. The court held the authority to determine if the system meet the "efficient" mandate of the constitution, that education was a "fundamental constitutional right," and that, to be "efficient," the educational system must have certain characteristics. This authority was exercised by the court and, based on such constitutional authority, the court directed the General Assembly to bring the system of common schools into compliance with Section 183 according to the criteria, standards and goals identified by the court as derived from Section 183. The specifics of the legislation to bring the system into compliance with the constitutional mandates "will be left up to the wisdom of the General Assembly."[168]

In an overview statement regarding the court's duty and the disposition of the case, the court stated:

> Our job is to determine the constitutional validity of the system of common schools within the meaning of the Kentucky Constitution, Section 183. We have done so. We have declared the system of common schools to be unconstitutional. It is now up to the General Assembly to re-create, and re-establish a system of common schools within this state which will be in compliance with the Constitution. We have no doubt they will proceed with their duty.[169]

In a final capsulizing statement the court opined:

We have decided one legal issue--and one legal issue only--viz., that the General Assembly of the Commonwealth has failed to establish an efficient system of common schools throughout the Commonwealth.

Lest there by any doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system - all its parts and parcels. This decision applies to the statutes creating, implementing and financing the system and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification - the whole gamut of the common school system in Kentucky.

While individual statutes are not herein addressed specifically or considered and declared to be facially unconstitutional, the statutory system as a whole and the interrelationship of the parts therein are hereby declared to be in violation of Section 183 of the Kentucky Constitution. Just as the bricks and mortar used in the construction of a schoolhouse, while contributing to the building's facade, do not ensure the overall structural adequacy of the schoolhouse, particular statutes drafted by the legislature in crafting and designing the current school system are not unconstitutional in and of themselves. Like the crumbling schoolhouse which must be redesigned and revitalized for more efficient use, with some component parts found to be adequate, some found to be less than adequate, statutes relating to education may be re-enacted as components of a constitutional system if they combine with other component statutes to form an efficient and thereby constitutional system.

Since we have, by this decision, declared the system of common schools in Kentucky to be unconstitutional, Section 183 places an absolute duty on the General Assembly to re-create, re-establish a new system of common schools in the Commonwealth. As we have said, the premise of this opinion is that education is a basic fundamental constitutional right that is available to all children within this Commonwealth. The General Assembly should begin with the same premise as it goes about its duty. The system, as we have said, must be efficient, and the criteria we have set out are binding on the General Assembly as it develops Kentucky's new system of common schools.

As we have previously emphasized, the sole responsibility for providing the system of common schools lies with the General Assembly. If they choose to delegate any of this duty to institutions such as the local boards of education, the General Assembly must provide a mechanism to assure that the ultimate control remains with the General Assembly, and assure that those local school districts also exercise the delegated duties in an efficient manner.

The General Assembly must provide adequate funding for the system. How they do this is their decision. However, if ad valorem taxes on real and personal property are used by the General Assembly as part of the financing of the redesigned state system of common schools, the General Assembly has the obligation to see that all such property is assessed at 100% of its fair market value....moreover, because of the great disparity of local tax efforts in the present

system of common schools, the General Assembly must establish a uniform tax rate for such property. In this way, all owners of real and personal property throughout the state will make a comparable effort in the financing of the state system of common schools. (Emphasis in original)[170]

In an apparent attempt to communicate the reasoning applied in the decision, the court continued by stating:

> This decision has not been reached without much thought and consideration. We do not take our responsibilities lightly, and we have decided this case based on our perception and interpretation of the Kentucky Constitution. We intend no criticism of any person, persons or institutions. We view this decision as an opportunity for the General Assembly to launch the Commonwealth into a new era of educational opportunity which will ensure a strong economic, cultural and political future.
>
> Because of the enormity of the task before the General Assembly to recreate a new statutory system of common schools in the Commonwealth, and because we realize that the educational process must continue, we withhold the finality of this decision until the adjournment of the General Assembly, sine die, at its regular session in 1990. (Emphasis in original)[171]

In a separate concurring opinion Justice Gant agreed that the Kentucky General Assembly failed to comply with the "efficient system of common schools" mandate of Section 183. Justice Gant, however, argued that the court should have taken the additional step of directing the trial court to issue appropriate writs to compel correction of the constitutional deficiency. Justice Gant even argued that the trial court should direct the Governor to call an "extraordinary Session" of the General Assembly and to require the General Assembly to enact legislation necessary to bring the Kentucky school system into compliance with Section 183 of the Kentucky Constitution.

Disagreeing with Justice Gant's views, Justice Wintersheimer, also writing in a separate concurring opinion, additionally argued that the court should not give the General Assembly any particular deadline with the understanding that adjournment sine die contemplates adjournment without any future date being designated for resumption. He argued that this situation could "easily be addressed" procedurally by the legislature. He also recognized that this case was "unique" inasmuch as the court was not asked to declare a single act of the legislature unconstitutional but was decided by a declaration that the system was unconstitutional because it was not efficient. In his separate opinion, Justice Wintersheimer cautioned that:

> Although the majority opinion declares the entire system of education unconstitutional, it should be obvious to any student of government that an overwhelming percentage of the laws now in place must be re-enacted by the legislature to provide any form or substance to the system in Kentucky.
>
> The school system is based on many detailed statutes and regulations, none of which have been specifically challenged and many of which have no constitutional impact. Local effort cannot be destroyed; such a conclusion would not be efficient by any definition and is well beyond the scope of the relief sought in this action.
>
> It is beyond question that educational opportunity should be equal for all Kentucky children. The General Assembly has the constitutional responsibility of providing a minimum level of opportunity by establishing an efficient system of common schools throughout the state. Under no circumstances does that mandate preclude

local school districts from supplementing the funds received from the state by specific local effort. Although such local taxes may now be considered as state taxes...they should be treated as trust funds and scrupulously attributed to the local district involved. The General Assembly might wish to make such treatment a statutory reality. The total independence and authority of local school districts to supplement any state effort should be carefully preserved.

The only concern we might have is to what specific areas the legislature will change. Such a determination is totally within their authority. It may be that they will properly determine that they must only fine-tune certain aspects of the system. Obviously they should not throw out the good with the bad without careful thought and particular attention to detail. My concern is that the language of the majority is too sweeping when it asserts that the result of the decision is that the entire system of common schools is unconstitutional. We must leave it to the good common sense of the legislature to develop an appropriate system of legislation.

Great care must be taken to differentiate the holding of the majority from dicta that arises from the many words used in the opinion. As an example, references to adequacy, a unitary system and definitions of efficiency are not binding on the General Assembly in any sense.

I concur with the majority in again emphasizing that the sole responsibility for providing a system of efficient common schools throughout the state lies with the General Assembly. That is the sole holding of this case.[172]

In a separate dissenting opinion by Justice Leibon, while agreeing in principle that the General Assembly had failed to provide the Section 183 mandated "efficient system of common schools," believed that the case should have been dismissed as lacking a "justifiable controversy." This view was based, in major part, on the opinion that the plaintiffs did not ask for a specific remedy or relief which the court was empowered to grant, no particular statute or statues were challenged and the school system was "nothing more and nothing less than the statutes, individually and collectively, structuring its existence and providing for its financing," and that the "system does not exist apart from the statutes, and cannot be declared unconstitutional without specifying which of its components, in whole or in part, make it so."[173] The majority opinions, therefore, "declares everything unconstitutional and nothing unconstitutional" in Justice Leibon's view.

In a second dissenting opinion, Justice Vance argued that the majority opinion was inherently inconsistent in that it said the system, to be constitutionally efficient, must provide substantially equal educational opportunity for children throughout the state yet it permitted the continuation of such a system. As stated by Justice Vance:

I believe this is so because the opinion expressly holds that individual school districts may continue to levy taxes for school purposes to be used solely within the district. Primarily, it is the levy of these taxes by local school districts, which produces greatly disparate revenues in richer counties than in poorer ones, that has caused the great disparity throughout the Commonwealth.

Although there are factors other than the amount of money available per child that must be considered when determining the equality at educational opportunity, I submit that this whole case is predicated upon the proposition that children who reside in districts where the amount of funding available per child is disproportionately less than is available in other districts will be denied an educational

opportunity which is equal to the educational opportunity afforded in districts with vastly greater resources.[174]

In Justice Vance's opinion, the continuation of such a tax policy would not change the condition whereby students in wealthier districts would continue to enjoy better educational opportunities. This dissent also argued that the evidence did not show that the system was constitutionally under-funded or inadequate. Basically, Justice Vance argued that, while the constitution mandated equality of educational opportunity, the constitution did not mandate a particular level of funding. In addressing the issue of funding, this dissenter argued that:

> I do not believe it is within the province of this court to interfere with legislative discretion as to the level of school funding unless it clearly appears from the record that the level of funding is so low that it cannot reasonably accomplish basic educational necessities. Not all academic failure is the result of under-funding...
>
> Above the minimum level of funding that is constitutionally required for a system of common schools to be efficient, there is room for unlimited enhancement of educational opportunity. The range of this enhancement of educational opportunity above the minimum requirements must be left to the General Assembly. The General Assembly is the representative of the people and is the proper branch of government to determine public policy. The question of how much enhancement there should be of educational opportunity above the minimum requirements is a matter of public policy.[175]

Texas

Few changes had been made in the Texas system of financing public education in the dozen years following the U.S. Supreme Court's refusal to find this system in violation of the Fourteenth Amendment.[176] The system continued to be composed of over one thousand school districts with approximately three million students in attendance. Under the financing system, the state and each local district shared the cost of school operations but not the cost of facilities, which was borne entirely by local districts. Of the total education costs, the State provided approximately forty-two percent, the school districts approximately fifty percent with this support being derived from local property taxes, and the remainder coming from various other sources, including federal funds. Because taxable property wealth varied from district to district, a school district's ability to generate revenue varied resulting in wide disparities in the level of expenditures per student between the wealthy and the less wealthy school districts. Wealthier districts were able to provide their students with better physical facilities, more extensive curriculum, larger libraries and better trained teachers than less wealthy districts.

Local district tax rates also varied widely from district to district. The less wealthy districts frequently had to set a higher than average tax rate to achieve the necessary revenue to meet minimum educational standards.

The State, through its Foundation School Program, offset to a degree the inability of the less wealthy school districts to generate revenue. The purpose of this program was to insure that each district had the necessary funds to provide each of its students with at least a basic education. Under this program, the amount of state aid received by any given local district was "equalized" according to a complex formula, so that low property wealth districts generally received substantially more state aid than did the high property wealth districts.

While recognizing that a second challenge to this system would likely be fruitless if directed toward a federal court, several property poor school districts, individual taxpayers and

parents continued to consider judicial action. These plaintiffs mounted a renewed attack in the Texas judicial system which restated many points of argument originally raised in the federal challenge and resulted in a trial court's conclusion that:

> After considering the evidence, argument of counsel, the papers and record herein, the Court is of the opinion, and so finds, that the Texas School Financing System (Texas Education Code Sec. 16.01 et seq., implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education) is impermissible, unlawful, violative of, and prohibited by the Constitution and the laws of Texas.[177]

With this statement as a "FINAL JUDGMENT," the Texas system of financing public education was voided by the trial court of Travis County, Texas, as unconstitutional and unenforceable in law. The court reached this conclusion by finding that the Texas system failed to insure that each school district in the state had the same ability as every other district to obtain, by state legislative appropriation or by local taxation, or both, funds for educational expenditures, including facilities and equipment, such that each student would have the same opportunity to educational funds as every other student in the state, limited only by discretion given local districts to set local tax rates, provided this does not prohibit the State from taking into consideration the legitimate district and students needs and district and student cost differences associated with providing a public education. This failure was viewed as denying the plaintiffs in this case, as well as to over one million public school students living in property-poor school districts, the equal protection of the law, equality under the law, and the privileges and immunities guaranteed by the Texas Constitution.

While specifically recognizing that its opinion was limited to the ability of school districts to raise and spend funds for education greater than that raised or spent by some or all other school districts so long as each district had available, either through property wealth within its boundaries or state appropriations, the same opportunity to educational funds, the court struck this system due to property poor school district plaintiffs not having the ability to raise and spend equal amounts per student after taking into consideration the legitimate cost differences in educating students. This consideration further motivated the court to find that the Texas school finance system was not an "efficient system of free public schools" as required by and guaranteed by Article VII, Section 1 of the Texas Constitution.

In enjoining the State from continuing to distribute money under this school finance system "in conjunction with local school district boundaries that contain unequal taxable property wealth for financing of public education," the court provided a brief period of success for the plaintiffs in this action.[178] Any feeling that this judicial action was a permanent correction was dashed when a Texas appeals court overturned the district court's decision.

In dissecting the district court's opinion, the appellate court recognized that the judgment was based on the Texas Constitution's "equal rights" provision (Art. I, sec. 3), "due process of law" provision (Art., sec. 19) and efficient school system mandate (Art. VII, sec. 1). The district court concluded that education was a "fundamental right," that wealth was a "suspect classification" in the school finance context, that the existing system was unconstitutionally "inefficient," and that the Texas Constitution demanded "fiscal neutrality" in public school funding, i.e., the level of expenditures per pupil in any district could not vary according to the property wealth of a district.

As had been the case in several other state-level decisions, much of the outcome at the appellate level was dependent on the level of analysis adopted by the court. The trial court accepted the position that the proper level of analysis was "strict scrutiny" in evaluating the constitutionality of the school finance system because education was deemed a " fundamental

right" and wealth was deemed to be a "suspect classification." This level of analysis consideration was succinctly stated by the appellate court as follows:

> In an equal protection or equal rights analysis, the appellate court, of necessity, must begin by recognizing the applicable standard of judicial review. If the questioned statute infringes upon a "fundamental right" or creates an inherently "suspect classification," the statute will be subjected to strict judicial scrutiny. Such scrutiny requires the state to establish a compelling interest in its enactment. To discharge such a burden the state must demonstrate that its purpose or interest is both constitutionally permissible and compelling, and that its use of the classification is necessary to the accomplishment of its purpose. On the other hand, if the statute does not collide with a fundamental right or create a suspect classification, the statute is accorded a presumption of constitutionality. The presumption may not be disturbed unless the enactment rests upon grounds wholly irrelevant to the achievement of a legitimate state objective.[179]

From this perspective the appellate court had no difficulty agreeing with the trial court's opinions that education as vitally important in Texas and that education was specifically referred to in the Texas Constitution. The higher court did not concur, however, that these factors established education as fundamental right since the importance of a state service along is "not controlling in ascertaining whether fundamental constitutional rights are involved."[180] More specifically, the Texas Constitution, Article VII, Section I, provided:

> 1. Support and maintenance of system of public free schools. Sec. 1. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.[181]

Although this relatively strongly phrased educational provision was constitutionally specified, the appellate court found that education was not thereby established as a fundamental right. The court reasoned that the Texas Constitution addressed a great number of subjects and the large majority were not established as fundamental rights. The Constitution provided for the establishment of county "poor houses and farms," "mechanic liens," "water storage facilities," and other provisions in addition to education and mere mention did not establish any one as a fundamental right. The court found that, rather than such provisions being fundamental rights, they were established as "legislative-type provisions" of the Texas Constitution. As such, the education provision was viewed as implying an affirmative obligation upon the Texas government to provide for public education. It did not mandate a particular funding system which the legislature was constitutionally bound to provide.

The appellate court also found that the district court erred in determining that district wealth constituted a "suspect classification" in this case. Since education was not a fundamental right under the Texas Constitution, unequal funding of school districts did not establish district wealth as a suspect class. This analysis, therefore, lead the court to reject the strict scrutiny standard of analysis for the standard of a rational relationship to a legitimate state purpose. As stated by the court:

> Because the Texas public school finance system neither collides with a fundamental right nor creates a suspect classification, such system is accorded a presumption of constitutionality. Such presumption may not be disturbed unless the public school finance system bears no rational relationship to any legitimate state purpose. Utilizing local property taxation revenues to partly finance free public schools is rationally related to effectuating local control of education. The

use of local taxes allows a school district the freedom to devote more funds toward educating its children than are otherwise available in the state-guaranteed amount. It also enables the local citizen greater influence and participation in the decision-making process as to how these local dollars are spent.

Although this Court recognizes that, because of disparities in wealth, the practical effect of the existing finance system can lead to low property-value districts having less fiscal control than wealthier districts, this undesirable result, by itself, can not invalidate the entire system. The fact that obvious disparities in wealth may promote more local control in some districts than in others does not entirely invalidate the legitimate goal of local participation. A legislative scheme may not be condemned simply because it does not effectuate the state's goals with perfection.[182]

The appellate court also determined that further provisions of the Texas Constitution authorized the State to finance its public schools in the manner challenged in this case. According to other relevant parts of Article VII, Section 3,:

> One fourth of the revenue derived from the State occupation taxes and poll tax of one dollar on every inhabitant of the State, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; ...and it shall be the duty of the State Board of Education to set aside a sufficient amount of the said tax to provide free text books for the use of children attending the public free schools of this State; provided, however, that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State and the Legislature may also provide for the formation of school district [sic] by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one (1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law.[183]

The court found that historically this provision intended that school districts should be formed and maintained by local citizens and the legislature was empowered to establish the method for creating new districts as such needs arose. Within limits, the local citizens could impose a tax on themselves to help maintain such schools thereby giving districts the option of raising greater revenue for the support of their schools. In summary, the intent of the Constitution was to set up a school system which retained a significant degree of local control and the scheme of local financing that evolved was not wholly irrelevant or unconstitutional as far as achieving the goal of local control.

Finally, this court also rejected the district court's conclusion that the present system was "inefficient" in violation of Article VII, Section 1, of the Texas Constitution. Recognizing that the Constitution required the school system to be "efficient," this court did not find the constitutional provision provided "guidance" as how this or any other court may arrive at a determination of what is efficient or inefficient.[184] From this perspective the court concluded that what was or was not "efficient" was essentially a "political question" and not one which was suitable for judicial review.

The appellate court, in an apparent attempt to illustrate that its decision was narrowly drawn on the sole question of constitutionality, concluded its opinion by providing the following comment:

> A rather "patched-up and overly cobbled" system of administration and finance for public education has evolved in this state over the past one hundred years. The system does not provide an ideal education for all students nor a completely fair distribution of tax benefits and burdens among all of the school patrons. Nevertheless, under our system of government, efforts to achieve those ideals come from the people through constitutional amendments and legislative enactments and not through judgments of courts.
>
> The opinion and judgment of this Court should not be viewed as an affirmation that the present school financing system is desirable or that it should continue without change; rather, our conclusion is solely that the system is not in violation of the Constitution of Texas.[185]

In a strongly worded dissenting opinion, Justice Gammage concluded that the constitutional requirement of an "efficient" school system must comport with the equal rights of law requirement and, so long as the program of instruction available to one child could not "truly be deemed adequate or efficient" if other children were afforded a better educational program and were thereby "consistently advantaged in the lifelong competition for money, status, and political influence," this constitutional mandate was not being met.[186] In his opinion, when the wealthiest school district in Texas had over $14,000,000 of property wealth per student, and the poorest district had approximately $20,000 of property wealth per student, and the per pupil spending varied between districts from $19,333 to $2,112, the "efficient" mandate of the constitution was being violated. Gammage's dissent also concluded that the Foundation School Program did not guarantee each eligible student a basic instructional program suitable to his or her educational needs, and students in low wealth districts did not have an equal opportunity to obtain instruction under the State's requirements. Justice Gammage, therefore, believed that education was a "fundamental right" under the Texas Constitution, that district wealth was a "suspect classification," and that the Texas system of school finance was a violation of the Texas Constitution's education mandates.

In a 9-to-0 reversal of the Appellate Court's 2-to-1 decision, the Texas Supreme Court ruled that the public school financing system did not meet the requirements of the Texas Constitution.[187]

In a brief recap of the system that financed the education of approximately three million public school children in Texas in 1985-86, the court noted that schools, which were governmental subdivisions of the state, were primarily financed by a combination of revenues supplied by the state itself and by local school districts with the state providing forty-two percent and school districts provided fifty percent of total educational costs. School districts derived revenues from local ad valorem property taxes, and the state raised funds from a variety of sources including a sales tax and various severance and excise taxes. The court specifically recognized the existence of "glaring disparities" in the abilities of the local school districts to

raise revenues from property taxes because taxable property wealth varied greatly from district to district. For example, the difference between the per pupil property wealth between the wealthiest and the poorest school district reflected a 700 to 1 disparity ratio. The 300,000 students in the lowest-wealth schools had less than 3% of the state's property wealth to support their education while the 300,000 students in the highest-wealth schools had over 25% of the state's property wealth. The 300,000 students in the wealthiest districts had, therefore, more than eight times the property value to support their education than the 300,000 students in the poorest district. Viewed in another comparison, the average property wealth in the 100 wealthiest districts was more than twenty times greater than the average property wealth in the 100 poorest districts. One of the petitioner school districts in this case, Edgewood Independent School District, had $38,854 in property wealth per student while Alamo Heights Independent School District, located in the same county as Edgewood, had $570,109 in property wealth per student.

The state was recognized as having "tried for many years to lessen the disparities through various efforts to supplement the poorest districts."[188] Through a Foundation School Program, the state attempted to ensure that each district had sufficient funds to provide its students with at least a basic education. Under this program, state aid was distributed to the various districts according to a complex formula which resulted in property-poor districts receiving more state aid than property-rich districts. However, this Foundation School Program did not cover even the cost of meeting the state-mandated minimum requirements and, more importantly, there were no allotments for school facilities or debt services in this program. The basic allotment and the transportation allotment also understated actual costs, and the "career ladder supplement" for teachers was underfunded. For these reasons and more, almost all school districts spent additional local funds with low-wealth districts using a significantly greater proportion of their local funds to pay their debt service on construction bonds while high-wealth districts were able to use their funds to pay for a wide array of enrichment programs.

Because of the disparities in district property wealth, spending per student varied widely, ranging from $2,112 to $19,333. Under the 1985-86 system, an average of $2,000 more per year was spent on each of the 150,000 students in the wealthiest districts than was spent on the 150,000 students in the poorest districts.

The lower expenditures in the property-poor districts was not the result of lack of tax effort. Generally, the property-rich districts would tax low and spend high while the property-poor districts taxed high merely to spend low. In 1985-86, local tax rates ranged from $.09 to $1.55 per $100 valuation. The 100 poorest districts had an average tax rate of 74.5 cents and spent an average of $2,978 per student. The 100 wealthiest districts had an average tax rate of 47 cents and spent an average of $7,233 per student. In Dallas County, Highland Park I.S.D. taxed at 35.16 cents and spent $4,836 per student while Wilmer-Hutchins I.S.D. taxed at $1.05 and spent $3,513 per student. In Harris County, Deer Park I.S.D. taxed at 64.37 cents and spent $4,846 per student while its neighbor North Forest I.S.D. taxed at $1.05 and yet spent only $3,182 per student. A person owning an $80,000 home with no homestead exemption would pay $1,206 in taxes in the east Texas low-wealth district of Leveretts Chapel, but would pay only $59 in the west Texas high-wealth district of Iraan-Sheffield. Many districts had thus become "tax havens." The funding system permitted "budget balanced districts" which, at minimal tax rates, could still spend above the statewide average; if forced to tax at just average tax rates, these districts would generate additional revenues of more than $200,000,000 annually for public education.

In the unanimous opinion of the Texas Supreme Court, this situation was viewed from the perspective that:

> Property-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves. Because of their inadequate tax base, they must tax at significantly higher rates in order to meet minimum requirements for accreditation; yet their educational programs are typically inferior. The location of new industry and development is strongly influenced by tax rates and the quality of local schools. Thus, the property-poor districts with their high tax rates and inferior schools are unable to attract new industry or development and so have little opportunity to improve their tax base.
>
> 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.[189]

In the courts view, the differences in the "quality of educational programs" offered was considered "dramatic." For example, San Elizario I.S.D. offered no foreign language, no pre-kindergarten program, no chemistry, no physics, no calculus, and no college preparatory or honors program. It also offered virtually no extra-curricular activities such as band, debate, or football. At the time of trial in this case, one-third of Texas school districts did not even meet the state-mandated standards for maximum class size. The great majority of these were low-wealth districts. In many instances, wealthy and poor districts were also found contiguous to one another within the same county.

The court of appeals declined to address the school district petitioners' challenge under Article VII, Section I of the Texas Constitution and concluded instead that its interpretation was a "political question." Said this court:

> That provision does, of course, require that the school system be "efficient," but the provision provides no guidance as to how this or any other court may arrive at a determination of what is efficient or inefficient. Given the enormous complexity of a school system educating three million children, this Court concludes that which is, or is not, "efficient" is essentially a political question not suitable for judicial review.[190]

The supreme court however stated:

> We disagree. This is not an area in which the constitution vests exclusive discretion in the legislature; rather the language of article VII, section 1, imposes on the legislature an affirmative duty to establish and provide for the public free schools. This duty is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make "suitable" provision for an "efficient" system for the "essential" purpose of a "general diffusion of knowledge." While these are admittedly not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions. We do not undertake this responsibility lightly and we begin with a presumption of constitutionality... If the system is not "efficient" or not "suitable", the legislature has not discharged its constitutional duty and it is our duty to say so. (Emphasis in original)[191]

Like many other cases challenging the constitutionality of a states school finance system, this court also analyzed the intent of the language contained in the Texas Constitution. Because of the difficulties inherent in determining the intent over a century later, the court relied heavily on a "literal text" of the constitutional language since the constitution "was ratified as an organic document to govern society and institutions as they evolve through time."[192]

The State argued that, as used in article VII, section 1, the word "efficient" was intended to suggest a simple and inexpensive system. Under the Reconstruction Constitution of 1869, the people had been subjected to a militaristic school system with the state exercising absolute authority over the training of children. Thus, the State contended that delegates to the 1875 Constitutional Convention deliberately inserted into this provision the word "efficient" in order to prevent the establishment of another Reconstruction-style, highly centralized school system.

In rejecting this historical perspective, while recognizing that there was some evidence that many of the early delegates wanted an economical school system, the court did not find any persuasive evidence that these delegates used the term "efficient" to achieve that end. The court stressed the view that the Constitution required an "efficient," "not an economical," "inexpensive," or "cheap" system. Adopting the assumption that the language of the Constitution was "carefully selected," the court concluded that, since the framers had used the term "economical" elsewhere with respect to tax levies, they could have used the term "economical" rather than "efficient" in the education section if they had intended to do so. The court found, therefore, that there was no reason to think that "efficient" meant anything different to the framers in 1875 than it now means. To the court, "efficient" conveyed the meaning of "effective or productive of results" and connoted the use of resources in order to "produce results with little waste," and the court believed that this meaning, as contained in a 1976 dictionary and a 1864 dictionary used by the framers, did not appear to have changed over the past century.

Considering the "general spirit" of the times and the "prevailing sentiments" of the people, from the historical record, it was apparent to the Texas Supreme Court that those who drafted and ratified article VII, section 1, never contemplated the possibility that the present gross inequalities could exist within an "efficient" system.[193] At the Constitutional Convention of 1875, delegates spoke at length on the "importance of education for all the people of this state, rich and poor alike."[194] (Emphasis in original.) The chair of the education committee, speaking on behalf of the majority of the committee, declared:

> [Education] must be classed among the abstract rights, based on apparent natural justice, which we individually concede to the State, for the general welfare, when we enter into a great compact as a commonwealth. I boldly assert that it is for the general welfare of all, rich and poor, male and female, that the means of a common school education should, if possible, be placed within the reach of every child in the State.[195]

Other delegates recognized the importance of a diffusion of knowledge among the masses not only for the preservation of democracy, but for the prevention of crime and for the growth of the economy.

Historically, Constitutional Convention Delegate Henry Cline, who first proposed the term "efficient," urged the convention to ensure that sufficient funds would be provided to those districts most in need. He noted that those with some wealth were already making "extravagant provisions" for the schooling of their own children and described a public school system in which those funds that had "selfishly been used by the wealthy would be made available for the education of all the children of the state."[196]

In addition to such specific comments in the constitutional debates, the structure of school finance at that time indicated to the court that such gross disparities were not contemplated. Apart from cities, there was no district structure for schools nor any authority to tax locally for school purposes under the Constitution of 1876. The 1876 Constitution provided a structure whereby the burdens of school taxation fell equally and uniformly across the state, and each student in the state was entitled to exactly the same distribution of funds. The state's school fund was initially apportioned strictly on a per capita basis. Also, a poll tax of one dollar per voter was levied across the state for school purposes. These per capita methods of taxation and of revenue distribution "seem simplistic compared to today's system"; however, they did indicate to the court that the people were contemplating that the tax burden would be shared uniformly and that the state's resources would be distributed on an even, equitable basis.

Recognizing that the state's population had not grown at the same rate in each school district, and that the taxable wealth had not grown at the same rate in each district, the court speculated that efficiency could probably have been maintained within the structure of the current school finance system if such growth would have been equal among all school districts. This, of course, did not happen and wealth, in its many forms, had not appeared with "geographic symmetry" Both the economic growth of the state and the growth of cities had not been uniform leading the court to conclude that:

> Formulas that once fit have been knocked askew. Although local conditions vary, the constitutionally imposed state responsibility for an efficient education system is the same for all citizens regardless of where they live.
>
> We conclude that, in mandating "efficiency," the constitutional framers and ratifiers did not intend a system with such vast disparities as now exist. Instead, they stated clearly that the purpose of an efficient system was to provide for a "general diffusion of knowledge." The present system, by contrast, provides not for a diffusion that is general, but for one that is limited and unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency. (Emphasis in original)[197]

The State argued that the 1883 constitutional amendment of article VII, section 3, expressly authorized the present financing system. However, the court concluded that this provision was intended not to preclude an efficient system but to serve as a vehicle for injecting more money into an efficient system. James E. Hill, a legislator and supporter of the 1883 amendment, argued:

> If (article VII, section 1) means anything, and is to be enforced, then additional power must be granted to obtain the means "to support and maintain" an efficient system of public free schools. What is such a system, then? is the question. I have examined the laws of the older States of this Union, especially those noted for efficient free schools, and not one is supported alone by State aid, but that aid is supplemented always by local taxation... When a man tells me he favors an efficient system of free schools, but is opposed to local taxation by districts or communities to supplement State aid, he shows that he ignores the successful systems of other States, or he is misleading in what he says.[198]

The court specifically recognized that attempts had been made to correct this situation. In 1929, the Texas Legislature enacted a Rural Aid Appropriations Act with the expressed purpose of equalizing the educational opportunities afforded by the State. In creating the Gilmer-Aikin Committee to study school finance, the legislature again indicated an awareness of this obligation when it referred to the "foresight and evident intention of the founders of our State and the framers of our State Constitution to provide equal educational advantages for

all."[199] Even the Texas Education Code expressed the state's policy that "a thorough and efficient system be provided...so that each student...shall have access to programs and services...that are substantially equal to those available to any similar student, notwithstanding varying economic factors."[200] With respect to such prior state efforts, the court observed that:

> By statutory directives, the legislature has attempted through the years to reduce disparities and improve the system. There have been good faith efforts on the part of many public officials, and some progress has been made. However, as the undisputed facts of this case make painfully clear, the reality is that the constitutional mandate has not been met.
>
> The legislature's recent efforts have focused primarily on increasing the state's contributions. More money allocated under the present system would reduce some of the existing disparities between districts but would at best only postpone the reform that is necessary to make the system efficient. A band-aid will not suffice; the system itself must be changed.[201]

The Texas Supreme Court thus concluded that the state's public school finance system was neither financially efficient nor efficient in the sense of providing for a "general diffusion of knowledge" statewide, and, therefore, it violated article VII, section 1, of the Texas Constitution. The court continued by stating:

> Efficiency does not require a per capita distribution, but it also does not allow concentrations of resources in property-rich school districts that are taxing low when property-poor districts that are taxing high cannot generate sufficient revenues to meet even minimum standards. There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds. Certainly, this much is required if the state is to educate its populace efficiently and provide for a general diffusion of knowledge statewide.
>
> Under article VII, section 1, the obligation is the legislature's to provide for an efficient system. In setting appropriations, the legislature must establish priorities according to constitutional mandate; equalizing educational opportunity cannot be relegated to an "if funds are left over" basis. We recognize that there are and always will be strong public interests competing for available state funds. However, the legislature's responsibility to support public education is different because it is constitutionally imposed. Whether the legislature acts directly or enlists local government to help meet its obligation, the end product must still be what the constitution commands--i.e. and efficient system of public free schools throughout the state. This does not mean that the state may not recognize differences in area costs or in costs associated with providing an equalized educational opportunity to atypical students or disadvantaged students. Nor does it mean that local communities would be precluded from supplementing an efficient system established by the legislature; however any local enrichment must derive solely from local tax effort.[202]

Turning to the issue of a possible elimination of local control which had been raised in other state cases both upholding and overturning school finance systems, this court concluded that such an argument "has no merit" since an efficient system "does not preclude the ability of communities to exercise local control over the education of their children."[203] Since an

efficient system requires only that the funds available for education be distributed equitably and evenly, an efficient system, in the courts view, would actually allow for more local control, not less. Such a system would provide property-poor districts with economic alternatives that were not available to them under the present system. The court also opined that only if alternatives are indeed available can a community "exercise the control of making choices."

Inasmuch as the court decided that the Texas school finance system violated the "efficiency" mandate of the Constitution, the court did not decide the other petitioner school district's constitutional claims such as the equal protection claim. The court also allowed the petitioner's to recover their attorney fees in this case against the state.

In its final comments, the court recognized that the correction of the unconstitutional school finance system was the responsibility of the legislature and not the court by stating:

> Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes. The legislature has primary responsibility to decide how best to achieve an efficient system. We decide only the nature of the constitutional mandate and whether that mandate has been met. Because we hold that the mandate of efficiency has not been met, we reverse the judgment of the court of appeals. The legislature is duty-bound to provide for an efficient system of education, and only if the legislature fulfills that duty can we launch this great state into a strong economic future with educational opportunity for all.
>
> Because of the enormity of the task now facing the legislature and because we want to avoid any sudden disruption in the educational processes, we modify the trial court's judgment so as to stay the effect of its injunction until May 1, 1990. However, let there be no misunderstanding. A remedy is long overdue. The legislature must take immediate action.[204]

CHAPTER III

SUMMARY AND IMPLICATIONS FOR ILLINOIS

Since the first Serrano decision, 26 states have experienced legal challenges to their school finance systems at the appellate court level. Each of these state court cases basically represent the "Serrano situation", i.e.: the wealth available to support the education of public school students was highly dependent on the student's residency and not on the wealth of the state as a whole. As these cases have been pressed by plaintiff-challengers, two fundamental questions have evolved for courts to consider. First and foremost, "Is education a fundamental right/interest mandated by the education clause of the state constitution?" Second, "Does/how does the equal protection clause impact the education clause?"

To date, what has evolved in the 14 cases in which a state's school finance system was upheld, as well as in the 12 cases in which a state's school finance system was overturned, is a clear trend that the decisions pivot primarily on the questions: "What is the educational mandate, if any, in that state's constitution?" and, "How does the equal protection clause impact that mandate?"

Exhibit 1 presents the 14 states in which "Serrano-situation" judicial challenges in state courts resulted in school finance systems being upheld as constitutional and Exhibit 2 presents the 12 states which have found such systems to be unconstitutional. It may be noted from these exhibits that the specific language of state education clauses' does not significantly differ. The significant difference is to be found in the court's application of the equal protection clause to the education clause. In the 14 cases upholding school finance systems as being constitutional, courts have found that education was not a fundamental right in a similar vein as decided in Rodrigues. Without the fundamental right constitutional status, the courts, in applying a state's equal protection clause, adopt a "minimal standard" or "rational relationship" level of judicial analysis. In this analysis, the court basically considers whether a school finance system is reasonably related to a legitimate state interest or purpose or is reasonable and not arbitrary. As a general finding in these cases, the courts viewed the state created school finance system, with a heavy reliance on local district wealth to determine the fiscal resources per pupil, as rationally and reasonably related to the state's interest in maintaining local control of public school districts.

In the 12 cases in Exhibit 2, the state courts viewed the language or intent of the education clause as establishing education as a fundamental right/interest subject to equal protection guarantees. In the first eight cases the courts applied a "strict scrutiny" test of equal protection. This test basically requires a state to defend its' school finance scheme by showing that the system is justified by a compelling state's interest rather than a simple rational interest. In this analysis the state bears the burden of proof to show that a fiscally inequitable system is constitutional due to a compelling state's interest in retaining such a system. None of these eight school finance system cases were found to be defensible as supporting a compelling state interest and were ruled unconstitutional.

In the three latest cases, Montana, Kentucky and Texas, the minimal standard v. strict scrutiny test of equal protection was basically bypassed by each state's supreme court finding that the language of the respective education clauses, and the intent of the framers of the constitution's containing these clauses, unequivocally established education as a fundamental right. As such, the fiscal inequities in the school finance system in Montana were found to violate a fundamental right,[205] the inadequate funding system in Kentucky was found to violate

a fundamental right,[206] and the inefficient funding system in Texas was found to violate a fundamental right.[207]

While each of the 26 state level challenges have demonstrated varying degrees of school funding inequities, with the fiscal resources available to support a public school student's educational program being highly dependent on the taxable wealth of the student's district of residency, the Kentucky and Texas decisions incorporated new adequacy and efficiency issues in school finance litigation. With respect to the issue of efficiency, the majority opinion in the Kentucky Supreme Court decision bluntly stated:

> ...it is crystal clear that the General Assembly has fallen short of its duty to enact legislation to provide for an efficient system of common schools throughout the state. In a word, the present system of common schools in Kentucky is not an 'efficient' one...[208]

This court identified nine "essential" characteristics of an efficient system of common schools as guidance for the Kentucky General Assembly in its attempt to design a constitutional system. Three of these were school finance related and indicated that equal educational opportunities must be provided to all children regardless of their place of residence or economic circumstances, that all children have a constitutional right to an adequate education, and that the General Assembly is responsible to provide school funding which is sufficient to provide each child with an adequate education. This court also stipulated, with regard to the adequacy of school funding, that the children of the poor and of the rich, the children who live in property poor and in property rich school districts, must be given the same opportunity and access to an adequate education.

In the unanimous Texas decision, the Supreme Court, recognizing that the legislature was "duty-bound" to provide for an efficient system of education, specified that school districts, regardless of the taxable property wealth located in a district, must have "substantially equal access" to similar revenue per pupil at similar levels of tax effort. As stated by this court:

> The amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered the 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.[209]

While varying degrees of fiscal inequities, inadequacies and/or inefficiencies may be found in the school finance evidence introduced in the cases from 26 states, at least two common characteristics join the 14 cases in which the school finance system was upheld and the 12 states in which it was overturned. These are: (1) every case had the standard Serrano scenario; that is, high reliance on local property tax, higher tax effort in the low-wealth districts, higher expenditures per pupil based upon district wealth, differences in pupil-teacher ratios between poor districts and wealthy districts; and, (2) demonstrable differences in teacher salaries, access to educational support personnel, incidence of special needs students, the state of the physical plant, etc.

Even though, in the first ten cases listed in Exhibit 2, the courts used the strict scrutiny standard, in the Kentucky and Texas cases the courts simply did not go into the equal protection clause. On its face, the educational clauses in Kentucky and Texas supported the plaintiffs' claims that the systems did not meet constitutional standards. In addition to the above

characteristics, four criteria emerge which illustrate what must likely be met in order to successfully challenge a state's school finance system.[210]

First, the 26 cases lead us to believe that education must be determined by the courts to be a fundamental interest or fundamental right guaranteed by a state constitution. The 26 prior cases do not demonstrate significant differences in the constitutional language of the states in which the system was upheld and the language of the states where the system was overturned. Nor does there appear to be a significant difference between the language in those cases and the language in the Illinois Constitution.

Second, the educational article must require qualitative demands and an affirmative duty on the part of the legislature to do something about the violation of "education as a fundamental right." The General Assembly must be recognized as having a duty to correct the present inequities in the school finance system.

Third, the strict scrutiny level of constitutional analysis must be used by the court and/or a suspect class must be found under the state's equal protection of the law guarantee. If not a suspect class, at least an individual. (Remember, Serrano began with one man and two students in California, and started the modern movement of litigation in this area.)

Finally, the general level of funding in the state must be found to be inadequate or, at the very least, the level of funding in a plaintiff's district. If you assume that there may be a class action, which is only one option, then the level of funding in multiple districts must be found to be inadequate.

One of the changes that has occurred recently is that the first 24 cases were all based on equity. Using only these cases as models, one would go into court and argue equity principals. For example, going away from reliance on local wealth and going into wealth neutrality, you would argue that the wealth of the state is all that matters and not the wealth of a local school district.

Kentucky provides us with a possible new legal approach. Kentucky simply said the system was "inadequate." This is one new line of legal reasoning in a case that has been won which might be utilized in Illinois. Arguing for "efficiency," Texas has provided us with a second new line of reasoningand the term "efficiency" is in the Illinois Constitution.

Any attempt to apply the lessons learned from these 26 states must be predicated on the questions: Does the present system of public school finance in Illinois meet constitutional standards? The Illinois Constitution provides:

Article X: Education

A fundamental goal of the people of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public education institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.

Article I: Bill of Rights

Section 2. Due Process and Equal Protection

No person shall be deprived of life, liberty, or property without due process or be denied the equal protection of the laws.

Applying the above four characteristics which have emerged in 26 other states, it would seem likely that a successful challenge to the present system in Illinois must successfully argue that Article X guarantees, in some degree, education to be a fundamental right/interest, the legislature does have an affirmative duty to correct any violation of such a right, the judicial standard of strict scrutiny is the appropriate level of analysis which would make Article I, Section 2, applicable, and that, at least for the plaintiff(s), the present school finance system is inequitable, inadequate and/or inefficient.

Although litigation has been attempted in Illinois directed toward the fiscal inequities in our school finance system, these cases were primarily based upon the Equal Protection Clause of the Fourteenth Amendment and were not pursued after the Rodrigues decision in 1973. Only one case has been the subject of an Illinois Supreme Court decision dealing with state-wide school finance under Article X, Section I, of the 1970 Illinois Constitution.[211] In Blase, 1973, the court ruled that the statement, "The state has the primary responsibility for financing the system of public education," did not mandate the state to provide at least 50% or more of the cost of educating children in Illinois public schools. Based upon the record of the Education Committee of the Illinois Constitution Convention, the court found that this provision was not a specific command to the state; it was viewed as "hortatory"; it was a "goal" toward which the state should be working rather than a constitutional mandate. The evidence suggests, however, that the state has done a very poor job of working to achieve this "goal." When the 1970 Constitution became effective, the state was providing approximately $.48 out of every dollar spent per pupil in the state. Presently the state is providing less than $.38. In roughly 18 years, there has been a chronic decline in the amount of assistance received by public school districts in terms of expenditures per pupil resulting in an ever increasing reliance on local district property wealth and tax effort. In a comparative sense, Illinois ranked seventh in the nation in per capita expenditures for K-12 education, with expenditures adjusted for inflation by the McMahon Index, in FY 1977-78. In FY 1987-88, Illinois had dropped 37 ranks to 44th in the nation. This data suggests that the state has established an abysmal record in meeting this "goal."[212]

It should also be noted that Illinois is not alone in considering judicial intervention in order to change a system of public school finance. Litigation is currently pending or in progress in Alaska, Connecticut, Indiana, Kansas, Massachusetts, Minnesota, New Jersey, North Dakota, Oregon and Tennessee. From what is known of the issues involved in these cases, it appears that the fundamental argument from Serrano has not changed--the financial resources available to purchase the goods and services to support education in a public school should not be dependent upon the wealth of a local district but on the wealth of the state. The avowed goal is to achieve wealth neutrality. To this end a constitutional challenge to the present system of financing education for the children in Illinois public schools is to be expected in Illinois in the near future.

SELECTED REFERENCES

Journals, Periodicals, Monographs and Unpublished Material

Alexander, Kern. "Equitable Financing, Local Control, and Self-Interest." in The Impact of Litigation and Legislation on Public School Finance: Adequacy, Equity, and Excellence. (Tenth Annual Yearbook of the American Education Finance Association) Julie K. Underwood and Deborah A. Verstegen, eds. (N.Y.: Harper & Row, 1990): 293-309.

Brazer, Harvey E. and Theresa A. McCarty. "Municipal Overburden: A Fact in School Finance Litigation?" Journal of Law and Education 4 (Fall 1989): 547-566.

Camp, William E. and David C. Thompson. "School Finance Litigation: Legal Issues and Politics of Reform." Journal of Education Finance 14 (Fall 1988): 221-238.

Cohn, Elchanan and Melinda S. Smith. "A Decade of Improvement in Wealth Neutrality: A Study of School Finance Equity in South Carolina." Journal of Education Finance 14 (Winter 1989): 380-389.

Connelly, Mary Jane and Jack McGee. "School Finance Litigation in the 1980s." Journal of Education Finance 12 (Spring 1987): 578-591.

Frank, Lawrence E. "New Dimensions of Equity and Efficiency in Illinois School Finance." Unpublished doctoral dissertation, Illinois State University, Normal, IL.

Franklin, David L. "Constitutional Challenges to Educational Funding Systems." Remarks at the Voice of the Prairie Conference. (Oct. 28, 1989) (Available from Coalition for Educational Rights Under the Constitution, Normal, IL, 61761.)

Franklin, David L. et al. The Constitutionality of the K-12 Funding System in Illinois - Volume I: Legal Issues. MacArthur/Spencer Series Number 3, Center for the Study of Educational Finance, Illinois State University, Normal, IL, May, 1987.

Franklin, David L. and G. Alan Hickrod. "National Perspectives on School Finance Equity: The Courts Intervene." North Central Regional Education Laboratory Policy Briefs No. 6 & 7, 1990.

Freeland, T. H. III, T. H. Freedland IV and Tim F. Wilson. "Seeking Educational Funding Equity in Mississippi: 'I Asked For Water, You Gave Me Gasoline'." Mississippi Law Journal 58 (Fall 1988): 247-274.

Goldschmidt, Neil. "Financing Oregon's Public Schools." Willamette Law Review 24 (Spring 1988): 193-201.

Hartman, William. "District Spending Disparities: What Do Dollars Buy?" Journal of Education Finance 13 (Fall 1988): 436-459.

Henke, Joseph T. "Financing Public Schools in California: The Aftermath of Serrano v. Priest and Proposition 13." University of San Francisco Law Review 21 (Fall 1986): 1-39.

Hickrod, G. Alan and Lawrence E. Frank. "The Forgotten Illinois." Remarks at the Voice of the Prairie Conference. (Oct. 28, 1989) (Available from Coalition for Educational Rights Under the Constitution, Normal, IL, 61761.)

Hickrod, G. Alan and James Gordon Ward. Two Essays on the Political and Normative Aspects of American School Finance: An Historical Perspective. MacArthur/Spencer Series Number 1, Center for the Study of Educational Finance, Illinois State University, Normal, IL, March, 1987.

Hickrod, G. Alan et al. A Brief History of K-12 Finance in Illinois or 162 Years in Search of the Perfect Formula. MacArthur/Spencer Series Number 2, Center for the Study of Educational Finance, Illinois State University, Normal, IL, April, 1987.

Hickrod, G. Alan et al. Documenting a Disaster: Equity and Adequacy in Illinois School Finance, 1973 Through 1988. MacArthur/Spencer Series Number 4, Center for the Study of Educational Finance, Illinois State University, Normal, IL, December, 1987.

Hickrod, G. Alan et al. Guilty Governments: The Problem of Inadequate Educational Funding in Illinois and Other States. MacArthur/Spencer Series Number 8, Center for the Study of Educational Finance, Illinois State University, Normal, IL, 1989.

Hubsch, Allen W. "Education and Self-Government: The Right to Education Under State Constitutional Law." Journal of Law & Education 18 (Winter 1989): 93-140.

Jankowski, Shari M. "Vermont's Public School Finance System: A Constitutional Analysis." Vermont Law Review 12 (Spring 1987): 238-281.

Kearney, C. Philip and Li-Ju Chen. "Measuring Equity in Michigan School Finance." Journal of Education Finance 14 (Winter 1989): 319-367.

Klemens, Michael D. "State Funding of Public Schools: The Poor Get Poorer." Illinois Issues (May 1988): 14-15.

LaMorte, Michael W. "Courts Continue to Address the Wealth Disparity Issue." Educational Evaluation and Policy Analysis 11 (Spring 1989): 3-15.

MacPhail-Wilcox, Bettye and Richard A. King. "Resource Allocation Studies: Implications for School Improvement and School Finance Research." Journal of Education Finance 11 (Spring 1986): 416-432.

McKeige, Douglas. "Inequality in Louisiana Public School Finance: Should Educational Quality Depend on a Student's School District Residency?" Tulane Law Review 60 (Je 1986): 1296-1306.

Menacker, Julius. "Poverty as a Suspect Class in Public Equal Protection Suits." West's Education Law Reporter September 28, 1989, Vol. 54, No. 4.

Nowlan, James D. A New Game Plan for Illinois. Chicago: Nelter House, 1989.

Rice, Elizabeth M. "Constitutional Issues in Property Tax Based Public School Financing Systems." Boston College Third World Law Journal 8 (Winter, 1988): 121-135.

Rossmiller, Richard A. "Achieving Equity and Effectiveness in Schooling." Journal of Education Finance 12 (Spring 1987): 561-577.

Salvage, Andrew L. "Florida's School Finance Program: Does It Satisfy the Educational Mandate of Florida's Constitution?" Florida Bar Journal 61 (November 1987): 37-40.

Smith, Margaret D. and Perry A. Zirkel. "School Finance and Facilities in West Virginia." Journal of Education Finance 13 (Fall 1989): 264-273.

Sparkman, William E. "School Finance Challenges in State Courts" in The Impact of Litigation and Legislation on Public School Finance: Adequacy, Equity, and Excellence. (Tenth Annual Yearbook of the American Education Finance Association) Julie K. Underwood and Deborah A. Verstegen, eds. (N.Y.: Harper & Row, 1990): 193-224.

Thro, William E. "To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation." Virginia Law Review 75 (November, 1989): 1639-1679.

Underwood, Julie K. "Changing Equal Protection Analysis in Finance Equity Litigation." Journal of Education Finance 14 (Winter 1989): 413-425.

Underwood, Julie K. and Deborah A. Verstegen. "School Finance Challenges in Federal Courts: Changing Equal Protection Analysis" in The Impact of Litigation and Legislation on Public School Finance: Adequacy, Equity, and Excellence. (Tenth Annual Yearbook of the American Education Finance Association) Julie K. Underwood and Deborah A. Verstegen, eds. (N.Y.: Harper & Row, 1990): 177-191.

Wagar, Linda. "When Education Isn't Equal." State Government News August, 1989: 6-9.

Walker, Billy D. and John David Thompson. "Special Report: Edgewood I.S.D. v. Kirby." Journal of Education Finance 14 (Winter 1989): 426-434.

Ward, James Gordon. "In Pursuit of Equity and Adequacy: Reforming School Finance in Illinois." Journal of Education Finance 12 (Summer 1987): 107-120.

Webb, L. Dean. "New Revenue for Education at the State Level" in The Impacts of Litigation and Legislation on Public School Finance: Adequacy, Equity, and Excellence. (Tenth Annual Yearbook of the American Education Finance Association), Julie K. Underwood and Deborah A. Verstegen, eds. (N.Y.: Harper & Row, 1990): 27-58.

Wise, Arthur E. and Tamar Gendler. "Rich Schools, Poor Schools: The Persistence of Unequal Education." The College Board Review 151 (Spring 1989): 12-17, 36-37.

Wood, R. Craig. "New Revenues for Education at the Local Level" in The Impacts of Litigation and Legislation on Public School Finance: Adequacy, Equity, and Excellence. (Tenth Annual Yearbook of the American Education Association) Julie K. Underwood and Deborah A. Verstegen, eds. (N.Y.: Harper & Row, 1990): 59-74.

CASE CITATIONS

1. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, rehearing denied, 411 U.S. 959, 93 S.Ct. 1919 (1978).

2. Papasan v. Allain, 265 U.S. 309, 106 S.Ct. 2932 (1986).

3. Id. at 2933.

4. Rodriguez, 411 U.S. 1.

5. Papasan, 106 S.Ct. at 2942.

6. Id. at 2944.

7. Id. at 2944-2945.

8. Id. at 2946.

9. Britt v. North Carolina State Board of Education, 357 S.E.2d 432 (1987).

10. Id. at 432-433.

11. North Carolina Constitution, Article 1, Section 15.

12. Britt, 357 S.E.2d at 436.

13. Id. at 512.

14. Id. at 437.

15. Britt v. North Carolina State Board of Education, 361 S.E.2d 71 (1987).

16. State ex rel. Board of Education of City of Sapula v. State Board of Education, 196 P.2d 859 (1947).

17. Fair School Finance Council of Oklahoma v. State of Oklahoma, 746 P.2d 1135 (1987).

18. Oklahoma Constitution, Article 1, Section 5.

19. Id. Article 13, Section 1.

20. Fair School Finance Council of Oklahoma, 746 P.2d at 1141.

21. Id. at 1148.

22. Id. at 1149.

23. Id. at 1151.

24. Ehert v. School District of Borough of Kulpmont, 5 A.2d 188 1939).

25. Danson v. Casey, 399 A.2d 360 (1979).

26. Ben Salem Township School District v. Commonwealth of Pennsylvania, 524 A.2d 1027 (1987).

27. Id. at 1029-1030.

28. Id. at 1030.

29. Ben Salem Township School District v. Commonwealth of Pennsylvania, 544 A.2d 1318 (1988).

30. Stackhouse v. Floyd, 149 S.W.2d 437 (1966).

31. Richland County v. Campbell, 364 S.W.2d 470 (1988).

32. Id. at 472.

33. Buse v. Smith, 247 N.W.2d 141 (1976).

34. Kukor v. Grover, 436 N.W.2d 568 (1989).

35. Wisconsin Statutes, Section 121-01.

36. Buse, 247 N.W.2d 141.

37. Wisconsin Constitution, Article X, Section 3.

38. Kukor, 436 N.W.2d at 577-578.

39. Wisconsin Constitution, Article I, Section 1.

40. Kukor, 436 N.W.2d at 579.

41. Rodriguez, 411 U.S. 1.

42. Kukor, 436 N.W.2d at 579. 43. Id. 44. Rodriguez, 411 U.S. at 35.

45. Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, rehearing denied, 458 U.S. 1131, 103 S.Ct. 14 (1982).

46. Papasan, 478 U.S. 265. 47. Id. at 284. 48. Id. at 286.

49. Kukor, 436 N.W.2d at 582. 50. Id. at 583. 51. Id. at 585.

52. Id. at 587-588. 53. Id. at 588. 54. Id. at 590.

55. Id. at 591-592.

56. Le Beauf v. State Board of Education of Louisiana, 244 F.Supp. 256 (E.D. La.) (1965).

57. School Board of the Parish of Livingston v. Louisiana State Board of Elementary and Secondary Education, 830 F.2d 563 (5th Cir.) (1987); cert. den. 108 S.Ct. 2884 (1988).

58. Louisiana Constitution, Article 8, Section 13 (B).

59. School Board of the Parish of Livingston, 830 F.2d at 568-69.

60. Id. at 570. 61. Id at 571. 62. Id at 572.

63. Id. 64. Id. at 572-573

65. Louisiana Association of Educators v. Edwards, 521 So.2d 390 (1988).

66. Id. at 394.

67. Serrano v. Priest, 487 P.2d 1241 (1971).

68. Serrano v. Priest, 557 P.2d 929 (1976), cert. den. 432 U.S. 9 07, 97 S.Ct. 2951 (1977).

69. Serrano v. Priest, 226 Cal. Rptr. 584 (1986).

70. Lucia Mar Unified School District v. Honig, 750 P.2d 318 (1988).

71. California Education Code, Section 59300.

72. California Constitution, Article XIII B, Section 6.

73. Lucia Mar Unified School District, 750 P.2d at 323.

74. Id. at 320. 75. Id. at 322-323. 76. Id. at 322-323.

77. Kadamas v. Dickinson Public Schools, 108 S.Ct. 2491 (1988). 78. Id at 2487.

79. Dickinson Public School District v. Sanstead, 425 N.W.2d 906 (1988)

80. North Dakota Constitution, Article I, Section 9.

81. Dickinson, 425 N.W.2d at 910.

82. Board of Education, Levittown Union Free School District v. Nyquist, 439 N.E.2d 359 (1982), appeal dismissed 459 U.S. 1138, 103 S.Ct. 775 (1983).

83. Brentwood Union Free School District v. State of New York, 517 N.Y.S.2d 996 (1987).

84. Id. at 997-998. 85. New York Session Laws of 1984, ch. 889. sec.1. 86. Id.

87. Brentwood Union Free School District, 517 N.Y.S.2d at 1001. 88. Id. at 1002.

89. City School District of the City of Peekskill v. State of New York, 518 N.Y.S.2d 748 (1987).

90. New York Session Laws of 1984, ch. 53, sec. 3602, subd.1, par. K.

91. City School District of the City of Peekskill, 518 N.Y.S.2d at 751.

92. Dumain v. Carey, 519 N.Y.S.2d 17 (1987). 93. Id. at 19.

94. Sweetwater County Planning Committee for the Organization of School Districts v. Hinkle, 491 P.2d 1234 (1971).

95. Sweetwater County Planning Committee for the Organization of School Districts v. Hinkle, juris relinquished, 493 P.2d 1050 (1972).

96. Washakie County School District No. One v. Herschler, 606 P.2d 310, cert. den. sub. nom., Hot Springs County School District No. One v. Washakie County School District No. One, 449 U.S. 824, 101 S.Ct. 86 (1980).

97. Id. at 333-334. 98. Id. at 332.

99. Simons v. Laramie County School District No. One, 741 P.2d 1116 (1987).

100. Id. at 1118

101. Wyoming School Laws, ch. 136, sec. 21-13-310(c).

102. Wyoming Constitution, Article 3, Section 3.

103. Id., Article 7, Section 1. 104. Id., Article I, Section 8.

105. Id., Article 7, Section 9. 106. Id., Article 1, Section 23.

107. Simons, 741 P.2d at 1124. 108. Id. at 1124-1125. 109. Id. at 1125.

110. Pauley v. Bailey, 225 S.E.2d 859 (1979).

111. Pauley v. Bailey, 324 S.E.2d 128, 135 (1984).

112. Pauley v. Gainer, 353 S.E.2d 318 (1986).

113. State ex rel. Board of Education for the County of Grant v. Manchin, 366 S.E.2d 743 (1988).

114. West Virginia Code 1985, Article 18A-4-5.

115. West Virginia Constitution, Article XII, Section 1.

116. Manchin, 366 S.E.2d at 749-750.

117. West Virginia Education Association v. Legislature of the State of West Virginia, 369 S.E.2d 454 (1988).

118. Pauley, 255 S.E.2d 859.

119. West Virginia Education Association, 369 S.E.2d at 455.

120. Id. 121. Id. at 456. 122. Id. at 459.

123. Pauley, 255 S.E.2d at 884-885.

124. State ex rel. Boards of Education of the Counties of Upshur v. Chafin, 376 S.E.2d 113 (1988).

125. West Virginia Constitution, Article X, Section 10.

126. Pauley, 255 S.E.2d at 880.

127. Chafin, 376 S.E.2d at 119. 128. Id. at 120. 129. Id. at 121.

130. Woodahl v. Straub, 520 P.2d 776 (1974). 131. Id. at 780.

132. Helena Elementary School District No.1 v. State of Montana, 769 P.2d 684 (1989).

133. Id. at 687. 134. Id. 135. Id. at 689.

136. Montana Constitution, Article X, Section 1.

137. Helena Elementary School District No. 1, 769 P.2d at 689.

138. Id. at 689-690. 139. Id. at 690. 140. Id.

141. Id. at 692. 142. Id. at 691.

143. Board of Education of Louisville v. Board of Education of Jefferson County, 458 S.W.2d 6 (1970).

144. Rose v. Council for Better Education, No. 88-SC-804-TG, S.Ct. Texas, June 8, 1989, modified September 28, 1989.

145. Id. at 7. 146. Id.

147. Kentucky Constitution, Section 183.

148. Rose, No. 88-SC-804-TG at 8. 149. Id. at 9. 150. Id. at 10.

151. Id. at 15. 152. Id. at 20. 153. Id. at 21.

154. Id. at 22. 155. Id. at 24. 156. Id. at 24-25.

157. Id. at 26. 158. Id. at 45-46. 159. Id. at 46.

160. Id. at 47. 161. Id. at 49.

162. Pauley v. Kelly, 255 S.E.2d 859 (1979).

163. Rose, No. 88-SC-804-TG at 57.

164. Id. at 57-58A. 165. Id. at 58B. 166. Id. at 59.

167. Id. at 60. 168. Id. at 63. 169. Id. at 64.

170. Id. at 66-68. 171. Id. at 68. concurring at 2-3.

172. Id., Gant, J. concurring at 5-6. 173. Id., Leibon, J. dissenting at 4-5.

174. Id., Vance, J. dissenting at 1-2. 175. Id. at 6-7. 176. Rodriguez, 411 U.S. 1.

177. Edgewood Independent School District v. Kirby, No. 362, 516, Dist. Ct., Travis City, 1987.

178. Kirby v. Edgewood Independent School District, 761 S.W.2d 859 (1988).

179. Id. at 861-862. 180. Id. at 862.

181. Texas Constitution, Article VII, Section 1.

182. Kirby, 761 S.W.2d at 864.

183. Texas Constitution, Article VII, Section 3.

184. Kirby, 761 S.W.2d at 867. 185. Id. 186. Id.

187. Edgewood Independent School District v. Kirby, 777 S.W.2d 391 (1989).

188. Id. at 392. 189. Id. at 393. 190. Kirby, 761 S.W.2d at 867.

191. Edgewood Independent School District, at 394.

192. Id. 193. Id. at 395. 194. Id. 195. Id. 196. Id.

197. Id. at 396. 198. Id. 199. Id. at 397. 200. Id.

201. Id. 202. Id. at 397-398. 203. Id. at 398. 204. Id. at 399.

205. Helena Elementary School District No. 1 v State of Montana, 769 P.2d 684 (1989).

206. Rose et. al. v. The Council for Better Education, Inc., et. al., Supreme Court of Kentucky, June 8, 1989.

207. Edgewood Independent School District v. Kirby, 777 S.W.2d 391 (1989).

208. Rose et. al., at p. 2.

209. Kirby, 777 S.W.2d at 393.

210. Franklin, David L. et. al. The Constitutionality of the K-12 Funding System in Illinois--Volume I: Legal Issues. MacArthur/ Spencer Series Number 3, Center for the Study of Educational Finance, Illinois State University, Normal, IL, May 1987.

211. Blase v. State of Illinois, 55 Ill.2d 94, 302 N.E.2d 46 (1973).

212. Hickrod, G. Alan et. al. Guilty Governments: The Problem of Inadequate Educational Funding in Illinois and Other States. MacArthur/Spencer Series Number 8, Center for the Study of Educational Finance, Illinois State University, Normal, IL, 1989.

APPENDICES

Appendix A

Exhibit 1. State School Finance Systems Upheld in Judicial Actions

Exhibit 2. State School Finance Systems Overturned in Judicial Actions

Appendix B

Note on Abbot v. Burke

Exhibit 1: STATE SCHOOL FINANCE SYSTEMS UPHELD IN JUDICIAL ACTIONS

State	Original Case Name	State Education Clause	Equal Protection Test
Arizona	Shofstall v. Hollins (1973)	"The legislature shall provide for a system* of common schools by which a free school shall be established and maintained in every school district for at least six months in each year. . ."	*Minimal standard*
Michigan	Milliken v. Green (1973)	"The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law . . ."	*Minimal standard*
Idaho	Thompson v. Egleking (1975)	"It shall be the duty of the legislature of Idaho to establish and maintain a general, uniform and thorough system of public free common schools."	*Minimal standard*
Oregon	Olsen v. Oregon (1979)	"The Legislature Assembly shall provide by law for the establishment of a uniform and system of common schools."	*Minimal standard*
Pennsylvania	Danson v. Casey (1979) & (1987)	"The General Assembly shall provide for the maintenance of a thorough and efficient system of public education to serve the needs of the Commonwealth"	*Minimal standard*
Ohio	Board of Education v. Walter (1979)	"The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state. . ."	*Minimal standard*
Georgia	Thomas v. McDaniels (1981)	"The provision of an adequate education for the citizens shall be a primary obligation of the state of Georgia, the expense of which shall be provided by taxation."	*Minimal standard*
Colorado	Lujan v. State Board of Education (1982)	"The General Assembly shall as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state."	*Minimal standard*
New York	Board of Education v. Nyquist (1982) & (1987)	"The Legislature shall provide for the maintenance and support of a system of free common schools wherein all the children of the state may be educated."	*Minimal standard*

Exhibit 1: STATE SCHOOL FINANCE SYSTEMS UPHELD IN JUDICIAL ACTIONS

State	Original Case Name	State Education Clause	Equal Protection Test
Maryland	Hornbeck v. Somerset County Board of Education (1983)	"The General Assembly. . . shall by Law establish throughout the state a thorough and efficient system of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance."	*Minimal standard*
Oklahoma	Fair School v. State (1987)	"Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all children of the state. . . "	*Minimal standard*
North Carolina	Britt v. State Board (1987)	"The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right. The General Assembly shall provide a general and uniform system of free public schools. . . wherein equal opportunity shall be provided for all students."	*Minimal standard*
Louisiana	School Board v. Louisiana State Board (1987) & (1988)	"The Legislature shall appropriate funds sufficient to insure a minimum foundation program of education . . . The funds appropriated shall be equitably allocated. . . by the State Board . . .and approved by the legislature prior to making the appropriation."	*Minimal standard*
South Carolina	Richland v. Campbell (1988)	"The General Assembly shall provide for the maintenance and support of a system of free public schools . . ."	*Minimal standard*

Plus Repeat Litigation Upholding Systems in California (1986) and Wisconsin (1989).

*Emphasis added to highlight language contained in the Constitution of Illinois

Exhibit 2. STATE SCHOOL FINANCE SYSTEMS OVERTURNED IN JUDICIAL ACTIONS

State	Original Case Name	State Education Clause	Equal Protection Test
New Jersey	Robinson v. Cahill (1973)	"The legislature shall provide for the maintenance and support of a thorough and efficient system* of free public schools. . ."	*Strict scrutiny*
Kansas	Knowles v. State Board of Education (1976)	"The legislature shall provide for intellectual, educational, vocational, and scientific improvement,by establishing and maintaining public schools. . ."	*Strict scrutiny*
Wisconsin	Buse v. Smith (1976)	"The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition for all children between the ages of four and twenty years. . ."	*Strict scrutiny*
	Note: Upheld in Kukor v. Grover (1989).		
California	Serrano v. Priest (1971) & (1977)	"The legislature shall provide for a system of common schools by which a a free school shall be kept up and supported in each district at least six months in every year. . . "	*Strict scrutiny*
	Note: Upheld in Serrano v. Priest (1986)		
Connecticut	Horton v. Meskill (1977)	"There shall always be free public elementary and secondary schools in the state."	*Strict scrutiny*
Washington	Seattle School-District No. 2 of King County v. State (1978)	"The legislature shall provide for a general and uniform system of public schools."	*Strict scrutiny*
West Virginia	Pauley v. Kelly (1979) & (1988)	"The legislature shall provide by general law, for a thorough and efficient system of free schools."	*Strict scrutiny*
Wyoming	Washakie County School District No. 1 v. Herschler (1980)	"The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kindergarten and grade. . ."	*Strict scrutiny*

Exhibit 2. STATE SCHOOL FINANCE SYSTEMS OVERTURNED IN JUDICIAL ACTIONS

State	Original Case Name	State Education Clause	Equal Protection Test
Arkansas	Dupree v. Alma School District No. 30 (1983)	"Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional or statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law and no other interpretation shall be given to it."	*Rational relationship*
Montana	Helena School District v. State (1989)	". . .goal. . .a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person in the state. . .The legislature shall provide a basic system of free quality public elementary and secondary schools . . .It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system."	*None (Constitutional language and history of Education Article)*
Kentucky	Rose v. The Council (1989)	"The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state."	*None (Constitutional language and history of Education Article)*
Texas	Edgewood v. Kirby (1989)	"A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."	*None (Constitutional language and history of Education Article)*

*Emphasis added to highlight language contained in the Constitution of Illinois

A NOTE ON ABBOTT v. BURKE, SUPREME COURT OF NEW JERSEY, 1990

New Jersey represents, at the present time, the longest running state court action challenging the constitutionality of a K-12 funding system. New Jersey experienced ten legal actions challenging all or part of that state's school finance system between 1971 and 1985.[1] On at least three occasions, the Supreme Court of New Jersey found the school finance system to be in conflict with one or more provisions of the state's constitution and declared the system unconstitutional.[2] On June 5, 1990, the Supreme Court of New Jersey, in a unanimous decision, again overturned the latest system of public school finance in that state.[3]

This 1990 decision was based on the educational provision of the New Jersey Constitution which provides:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.[4]

Unlike the state cases involving similar constitutional language, this action was pressed, not by property poor school districts located throughout the state, but by poor urban districts claiming, in part, that the "thorough and efficient" requirement of the constitution was not being met. Fundamentally, the urban poor districts argued that they must be assured funding at the level of the property-rich suburban districts, that such funding could not be dependent on the ability of local school districts to tax, that such funding must be guaranteed and mandated by the State, and that the level of funding must be adequate to provide for the special educational needs of the poorer urban districts to redress their extreme disadvantages.

The New Jersey public school funding system challenged in this case was based on a "limited equalizing" of the taxing power of school districts. It enabled all school districts to raise funds as if their tax base were at least 134% of the average school district "tax base" with tax base meaning the district's equalized property valuation per pupil. A school district would set its' tax rate as if the real property of the district equaled this guaranteed tax base (GTB). The local revenues generated by the tax from the district's actual tax base were then supplemented by state "equalization aid" in an amount that, when added to the local revenues, would equal what that tax would have produced if applied to the GTB.

This system was established by the Public School Education Act of 1975 and did not require or assume any particular level of educational expenditure in any school district.[5] It was indifferent to whether a district spent $1,500 per pupil or $15,000. As far as equalization aid was concerned, its only effect was to pay a portion of the school budget as determined by the school district. A district could decide to raise $5 million or $2 million. Under this Act, this was a matter solely for each district to decide. Both state equalization aid and the local tax rate would, however, be affected by this decision. Theoretically, there was no limit on a district's ability to tax and spend.

The Act also gave property poor school districts taxing power to raise more money than a school district with an average property valuation and no equalization aid could raise. Equalization aid attempted to obliterate the enormous disparity between property rich and property poor districts for tax purposes by creating, rather than rich and poor districts, two different classes: those districts with a guaranteed tax base--approximately two-thirds of the districts in New Jersey--and districts with a tax base in excess of the guaranteed tax base of $223,100, running from $223,667 to $7.8 million and clustering at $300,000 in 1984-85 figures.

Three limitations of note were associated with this equalization aid. Most important of the three, the amount of equalization aid a district received in a budget year was based on its budget for the prior year. This limitation may be illustrated by utilizing an example district with equalization aid amounting to 80% of the district's budget. If such a district had a $4.2 million budget for the current year, representing a spending increase of $200,000, with a prior years budget of $4 million, for $4 million of the $4.2 million budget, 80% equalization would be forthcoming. The district would have to raise $800,000 locally to secure a total of $4 million. However, to secure the needed $200,000, the district would have to raise that entire amount on its own tax base. This impact on the district's tax rate would be five times as much as it would have been because the State would have paid 80% of the $200,000 but for the prior year's budget equalization aid rule. This failure to provide current year funding affected a district's willingness to add to or enrich their programs in view of what could be a substantial tax impact.

The second limitation was the budget cap law, applicable to all school districts, restricting annual increases in district budgets to a certain percentage over the prior year, but allowing low spending districts to increase their budgets more rapidly than higher spending districts. This limitation affected equalization aid by limiting the total budget on which such aid was based. The budget cap law was not as important to poorer districts who did not ordinarily budget to the cap and because the law permitted the Commissioner of Education to waive the cap limitation.

The third limitation cut off equalization aid to the extent that the district's budget, in terms of expenditures per pupil, exceeded that dollar per pupil amount that was the sixty-fifth percentile of all school districts' budgets. In other words, if a district with a lower tax base per pupil than the guaranteed tax base nevertheless spent more than the statewide average expenditure per pupil, it would receive equalization aid even for the excess expenditure up to the point where the district's per pupil expenditure equaled the sixty-fifth percentile of all districts, i.e., equalization aid would stop as the district's budget per pupil approached that of the State's highest spending districts. This limitation also had only a minor impact on poor districts.

In addition to the above limitations, the Act also provided districts with property valuation above the guaranteed tax base with "minimum aid" keyed to a district's property wealth and categorical aid, which was not based on property wealth, for special education, remedial education, bilingual education, and similar programs. In addition, each district received transportation aid in a manner that had no relationship with district wealth and pension aid. Pension aid was affected by district wealth inasmuch as wealthier districts tended to have more and better paid teachers per pupil than poorer districts. This aid component was, therefore, counter-equalizing.

In addition to the above, each of the school district plaintiff's in this case received federal aid. Its impact on these districts, in 1984-85, was identified as a per pupil increase in funding of $394 in Camden, $166 in East Orange, $471 in Jersey City, $320 in Irvington, $808 in Newark, $480 in Trenton, and $244 in Paterson. These dollars amounted to approximately 5% of the total expenditures in these districts. With such aid included, the level of per pupil funding in these poorer districts was increased and the disparity in such funding compared to richer districts was dramatically decreased. In discounting the inclusion of such federal aid as a consideration in this case, the court specified that such aid, although significant for poorer districts, would not be considered in its decision. Briefly, the court viewed the State's constitutional obligation to provide a thorough and efficient education as not "adequately satisfied" if it was dependent on federal aid with its purposes and substantial fluctuations and as being in violation of federal statutes.

With respect to the spending disparities in New Jersey's school districts, the court recognized that such disparities had increased over the time this issue was before New Jersey courts. For example, in 1971-72, the spending disparity between the lowest and highest spending

districts was $800, or from $700 to $1,500 per pupil. In 1984-85, districts at the fifth percentile spent $2,687, while districts at the ninety-fifth percentile spent $4,755, a disparity of $2,068 per pupil. The impact of this disparity, solely in dollar terms, was that on average, in 1984-85, a group of richer districts with 189,484 students spent 40% more per pupil than a group of poorer districts with 355,612 students; one providing an education worth $4,029 per pupil and the other, $2,861. From such disparities, the court concluded that disadvantages in expenditures per pupil was "clearly related" to all of the other aspects of poverty that defined poorer urban districts and their students. Therefore, the court concluded that the poorer the district--measured by equalized valuation per pupil or other indicators of poverty--the less the per pupil expenditures; the poorer and more urban the district, the heavier its municipal property tax, the greater the school tax burden; whatever the measure of disadvantage, need, and poverty--the greater it was, the less there was to spend. As concluded by the court:

> ...we do not believe a thorough and efficient education in the poorer urban districts "can realistically be met" by reliance on the system now in place. While local taxation no longer has the same impact, it is still significant. More than that, however, we believe that because of the complex factors leading to a failure of thorough and efficient in the poorer urban districts, including disparity of expenditures, we are no more likely ever to achieve thorough and efficient than we believed we could by relying on local taxation... Combined with these disparities of wealth and expenditure are the much more serious disparities of educational need, students in the poorer urban districts [are] dramatically disadvantaged compared to their peers in the affluent suburbs. These intractable differences of wealth and need between the poorer and the richer, and the "discordant correlations" within a poorer district between its students' educational needs and its ability to spend, are more than the present funding system can overcome. The failure has gone on too long; the factors are ingrained; the remedy must be systemic. The present scheme cannot cure it.[6]

Turning to the issue of the quality of education in the poorer urban districts, the court concluded that a thorough and efficient system did not exist in such districts. By comparing the quality of education in poorer urban districts with that offered in richer districts, the education offered in the former was found to be "significantly inferior." While recognizing that the characteristics of a substantive education are difficult to prove, the court did consider such indicators as course offerings, experience and education of the staff, pupil/staff ratios and expenditures per pupil. Applying such indicators, the court found the level of education offered to students in some of the State's poorer urban districts to be "tragically inadequate" when compared to the opportunities offered to students in richer suburban districts. For example, using exposure to computers as one needed skill to ultimately compete in the workplace, the court noted that in the wealthy South Orange/Maplewood school districts, kindergartners were introduced to computers, word processing in elementary school, beginning computer programming in middle school, and advanced courses in several programming languages or project-oriented independent studies in high school. By contrast, many poorer urban districts could not offer such variety of computer science courses. While Princeton had one computer per eight children, East Orange had one computer per 43 children. Camden offered formal computer instruction to only 3.4% of its students. In many of the poorer urban districts, computers were purchased with federal or state categorical funds for use in remedial education programs. In addition, deficiencies were recognized in physical facilities and numerous programs such as science education, including laboratories and equipment, foreign language, music, art, industrial arts and physical education between urban poor and richer suburban districts. With respect to the significance of these differences, the court observed:

Thorough and efficient means more than teaching the skills needed to compete in the labor market, as critically important as that may be. It means being able to fulfill one's role as a citizen, a role that encompasses far more than merely registering to vote. It means the ability to participate fully in society, in the life of one's community, the ability to appreciate music, art, and literature, and the ability to share all of that with friends. As plaintiffs point out in so many ways, and tellingly, if these courses are not integral to a thorough and efficient education, why do the richer districts invariably offer them? The disparity is dramatic. Alongside these basic-skills districts are school systems offering the broadest range of courses, instruction in numerous languages, sophisticated mathematics, arts, and sciences at a high level, fully equipped laboratories, hands-on computer experience, everything parents seriously concerned for their children's future would want, and everything a child needs. In these richer districts, most of which have some disadvantaged students, one will also find the kind of special attention and educational help so badly needed in poorer urban districts that offer only basic-skills training. If absolute equality were the constitutional mandate, and "basic skills" sufficient to achieve that mandate, there would be little short of a revolution in the suburban districts when parents learned that basic skills is what their children were entitled to, limited to, and no more.

The State contends that the education currently offered in these poorer urban districts is tailored to the students' present need, that these students simply cannot now benefit from the kind of vastly superior course offerings found in the richer districts. No one claims here, however, that students unable to attain a level of reading, writing, or expression even approaching the expectations of their grade, pupils who, according to plaintiffs, are two years behind others on the first day they enter school, would be able to take full advantage of the richness of course offerings found in the wealthier suburbs. The State's conclusion is that basic skills are what they need first, intensive training in basic skills. We note, however, that these poorer districts offer curricula denuded not only of advanced academic courses but of virtually every subject that ties a child, particularly a child with academic problems, to school--of art, music, drama, athletics, even, to a very substantial degree, of science and social studies. The result violates not only our sense of what constitutes a thorough and efficient education, but the statute as well, which requires "[a] breadth of program offerings designed to develop the individual talents and abilities of students." N.J.S.A. 18A:7A-5d. However articulated, such a requirement must encompass more than "instruction...in the basic communications and computational skills," which the statute cites as another major element in education. N.J.S.A. 18:7A-5c.

In saying this we disparage neither these districts' decision to focus on remedial training, nor the State testing requirements that may have prompted this focus. But constitutionally, these districts should not be limited to such choices. However desperately a child may need remediation in basic skills, he or she also needs at least a modicum of variety and a chance to excel.

Equally, if not more important, the State's argument ignores the substantial number of children in these districts, from the average to the gifted, who can benefit from more advanced academic offerings. Since little else is available in these districts, they too are limited to basic skills.[7]

Turning to the quality of students' needs in the poorer urban districts, the record showed that the educational needs of students in poorer urban districts "vastly exceed" those of richer districts and that this difference was "monumental" no matter how it was measured such as by

high school proficiency test results, basic skills attainment, failure rates and dropout rates. With reference to such "monumental" student needs, the court stated:

> It is clear to us that in order to achieve the constitutional standard for the student from these poorer urban districts -- the ability to function in that society entered by their relatively advantaged peers -- the totality of the districts' educational offering must contain elements over and above those found in the affluent suburban district. If the educational fare of the seriously disadvantaged student is the same as the "regular education" given to the advantaged student, those serious disadvantages will not be addressed, and students in the poorer urban districts will simply not be able to compete. A thorough and efficient education requires such level of education as will enable all students to function as citizens and workers in the same society, and that necessarily means that in poorer urban districts something more must be added to the regular education in order to achieve the command of the Constitution. Such added help is in theory afforded now through categorical aid, consisting of additional funds to address special needs, aid for such things as compensatory education, bilingual education, education for students who are developmentally disabled, or visually handicapped. The problem, however, is that this categorical aid is added to a budget that is already significantly less than the comparable budgets of richer districts. When added to that regular budget of the poorer urban district, it fails to bring even equality of expenditure dollars between districts, and certainly does not provide the help needed to address these students' disadvantages.
>
> We realize our remedy here may fail to achieve the constitutional object, that no amount of money may be able to erase the impact of the socioeconomic factors that define and cause these pupils' disadvantages. We realize that perhaps nothing short of substantial social and economic change affecting housing, employment, child care, taxation, welfare will make the difference for these students; and that this kind of change is far beyond the power or responsibility of school districts. We have concluded, however, that even if not a cure, money will help, and that these students are constitutionally entitled to that help.
>
> If the claim is that additional funding will not enable the poorer urban districts to satisfy the thorough and efficient test, the constitutional answer is that they are entitled to pass or fail with at least the same amount of money as their competitors.
>
> 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. It does not tell them they will get the minimum, because that is all they can benefit from. Like other states, we undoubtedly have some "uneducable" students, but in New Jersey there is no such thing as an uneducable district, not under our Constitution.
>
> All of the money that supports education is public money, local money no less than state money. It is authorized and controlled, in terms of source, amount, distribution, and use, by the State. The students of Newark and Trenton are no less citizens than their friends in Millburn and Princeton. They are entitled to be treated equally, to begin at the same starting line. Today the disadvantaged are doubly mistreated: first, by the accident of their environment and, second, by the disadvantage added by an inadequate education. The State has compounded the wrong and must right it.[8]

The court also specifically considered the impact of the level of funding on the quality of education and addressed the defendants contention that statistical evidence had failed to prove a significant relationship between education expenditures and property wealth; or, that money is not a critical factor in determining the quality of education. While recognizing that this issue is filled with controversy, the court accepted the position that money is one of the elements involved in educational quality. In the courts view, however, the children in the poorer urban districts were entitled to "a fair chance" in the form of greater equality of funding in order to gain the same level of opportunity available in wealthier suburban districts. In short, the court accepted the assumption that what money buys does affect the quality of education. The court did not mean, however, that money alone would guarantee a thorough and efficient education, nor that a lower spending district might have a more effective educational program than a higher spending district. Equality of funding would, however, allow such schools to start on an equal basis. The minimum aid formula in New Jersey, however, counter-equalized funding. It was distributed only to districts whose tax base exceeded the Act's guaranteed tax base, in other words, only to relatively richer districts. Its sole function was to enable richer districts to spend even more, thereby increasing the disparity of educational funding between richer and poorer districts. Minimum aid, for instance, in 1984-85 went to richer districts such as Englewood Cliffs, which received $135 per pupil although it had an equalized evaluation per pupil of $1.24 million, and Saddle River Borough, which received $177 per pupil with an equalized valuation per pupil of $1.23 million. During the same year Camden, East Orange, Newark, and Trenton, for example, received none. This factor was critically viewed by the courts statement that:

> Disparity of funding is relevant to our constitutional conclusion. That conclusion is based not only on our finding of a substantive lack in the quality of education in these poorer urban districts but also on the significant disparity of spending between them and the richer districts. That disparity strongly supports and is a necessary element of our conclusion that the education provided these students from poorer urban districts will not enable them to compete with their suburban colleagues or to function effectively as citizens in the same society. Given the history of the role of disparate funding and the denial of a thorough and efficient education, and the difficulty experienced by the Legislature in providing full funding in accordance with the Act, continuation of minimum aid in its present form threatens the Legislature's effectuation of the remedy provided herein, the attainment of its constitutional goal, and the future maintenance of a thorough and efficient education both in poorer urban districts and elsewhere.
>
> We therefore hold such minimum aid provisions of the present Act unconstitutional, effective commencing with the school year 1991-92. If, however, the Legislature enacts a new funding system and provides for a phase-in of the new system along with a phase-out of the old, the Act's minimum aid may be eliminated in accordance with that timetable.
>
> In effect, we hold that under the present funding scheme state aid that is counter-equalizing, that increases funding disparities, and that has no arguable educational or administrative justification, is unconstitutional. Categorical aid, although not as equalizing as equalization aid, is not counter-equalizing: it goes to all districts, and in fact more of it goes to the poorer districts. Furthermore, it has clear educational justification: it helps meet the cost of educating students with special needs, who reside in all districts, richer and poorer...
>
> We stress that it is state aid only that we are discussing here. The fundamental inequality of local funding through the property tax and the funding disparities it produces are asserted to have a justification in its assurance of local control and its encouragement of citizens' participation in their local school system. Without in

any way commenting on that assertion, there is no such justification when state aid is concerned. Minimum aid may facilitate the compromises needed to secure passage of important legislation of this kind. We express no judgment on that process or the undoubted difficulties that accompany it. Despite this important role, however, minimum aid in the present funding scheme has no policy justification. Given its actual and potential adverse impact on today's remedy and on the future achievement of a thorough and efficient education, we declare it unconstitutional.[9]

From basically this background, the Supreme Court of New Jersey found that the present system compelled the conclusion that the poorer the district, the greater its need, the less money available, the worse the education which provided an education that was neither thorough nor efficient. The system was, therefore, found to be unconstitutional as applied to poorer urban school districts. The court concluded that the school funding system must be amended to assure funding of education in poorer urban school districts at the level of property-rich districts; that such funding could not be dependent on the ability of local school district to tax; that such funding must be guaranteed and mandated by the State; and that the level of funding must also be adequate to provide for the special educational needs of the poorer urban districts in order to "redress their extreme disadvantages."

The court noted, however, that funding alone would not achieve the constitutional mandate of an equal education in the poorer urban districts; that without educational reform, the money may accomplish nothing; and that in poorer urban districts, substantial, far-reaching change in education was absolutely essential to success. Money was viewed as one element that could effect a difference if effectively used since it could provide such district's students with an equal educational opportunity, a chance to succeed. As viewed by this court, such students were "constitutionally entitled" to such a chance. In other words, students in poorer urban districts had the right to the same educational opportunity that money buys for students in richer suburban districts. As stated in the findings by the court:

> From this record we find that certain poorer urban districts do not provide a thorough and efficient education to their students. The Constitution is being violated. These students in poorer urban districts have not been able to participate fully as citizens and workers in our society. They have not been able to achieve any level of equality in that society with their peers from the affluent suburban districts. We find the constitutional failure clear, severe, extensive, and of long duration. We cannot find on this record, however, that there is any constitutional violation in the other districts.
>
> We find that in order to provide a thorough and efficient education in these poorer urban districts, the State must assure that their educational expenditures per pupil are substantially equivalent to those of the more affluent suburban districts, and that, in addition, their special disadvantages must be addressed.
>
> We find that the constitutional deficiency is a product of the Act as applied to these poorer urban districts; that the Board and the Commissioner cannot, even at full funding, achieve a thorough and efficient education in these districts under the present Act.
>
> We find that the changes in the Act proposed by the Board and the Commissioner, and the new regulations adopted, will not achieve a thorough and efficient education in the foreseeable future in these poorer urban districts. We find that the minimum aid provision of the Act is unconstitutional.[10]

With respect to ordering a remedy, the court specified that:

The Act must be amended, or new legislation passed, so as to assure that poorer urban districts' educational funding is substantially equal to that of property-rich districts. "Assure" means that such funding cannot depend on the budgeting and taxing decisions of local school boards. Funding must be certain, every year. The level of funding must also be adequate to provide for the special educational needs of these poorer urban districts and address their extreme disadvantages.

We leave it to the Legislature, the Board, and the Commissioner to determine which districts are "poorer urban districts." It appears to us that twenty-eight of the twenty-nine school districts designated by the Comissioner as "urban districts"...should qualify...Perhaps more should qualify, perhaps fewer. The assured funding per pupil should be substantially equivalent to that spent in those districts providing the kind of education these students need... In addition, provision will be made, presumably similar to categorical aid, for the special educational needs of these districts in order to redress their disadvantages. Such provision will necessarily depend upon the legislative judgment, informed by the Board and Commissioner...

The funding mechanism is for the Legislature to decide. However, it cannot depend on how much a poorer urban school district is willing to tax.

This judicially imposed remedy draws a sharp line and leaves districts of some similarity, like urban districts ... on different sides of that line. We do not claim that this is the ideal solution, but given the fundamental limits on judicial power, on this record we cannot justify a sliding scale that attempts to tailor the remedy to the varying conditions of the many districts. The record convinces us of a failure of a thorough and efficient education only in the poorer urban districts. We have no right to extend the remedy any further, nor to legislatively smooth out the remedy because of considerations of fairness unrelated to the constitutional command. Moreover, we note that there appear to be significant differences in the level of need suffered by urban districts...

We realize there will undoubtedly be concern on the part of those districts that share similar characteristics but do not fit within our definition and that therefore will not receive the aid provided for. We suggest that in most cases such districts will also prove to have advantages over those we are targeting. Thus, where such districts find that their expenditures per pupil are lower than those of the poorer urban districts, they will likely find that their socioeconomic status is significantly higher. Nevertheless, given the limitation of judicial power, we recognize that the kind of equity that can be done in this area by the Legislature cannot be accomplished by judicial order.

The Legislature may devise any remedy, including one that completely revamps the present system, in terms of funding, organization, and management, so long as it achieves a thorough and efficient education as defined herein for poorer urban districts. It may phase in that new system and phase out the old. It may choose, for instance, to equalize expenditures per pupil for all districts in the state at any level that it believes will achieve a thorough and efficient education, and that level need not necessarily be today's average of the affluent suburban districts. The most significant aspect of that average today is not its absolute level, but its disparity with the average of the twenty-eight poorer urban districts. It may determine the division between state aid and local funding and allow school districts

such leeway as is consistent with the constitutional obligation, or it may mandate the local share; however, funding in poorer urban districts cannot depend on the budgeting and taxing decision of local school boards. We assume the design of any new funding plan will consider the problem of municipal overburden in these poorer urban districts.

Whatever the legislative remedy, however, it must assure that these poorer urban districts have a budget per pupil that is approximately equal to the average of the richer suburban districts, whatever the average may be, and be sufficient to address their special needs...

We have not attempted to address disparity of spending as such. To the extent that the State allows the richer suburban districts to continue to increase that disparity, it will, by our remedy, be required to increase the funding of the poorer urban districts. We limit our remedy at this point to increasing funding where we find a deficiency. We do not require equalized funding statewide. We are satisfied, however, that whatever degree of statewide equality the Legislature may wish to achieve, or may find it feasible to achieve, it cannot constitutionally do so for these poorer urban districts simply by raising the guaranteed tax base under the present formula. These districts, even assuming the most generous GTB increase, will not be willing or able to fund what is required for a thorough and efficient education. Their need to conserve their tax dollars, their need not to increase their total tax rate, will inevitable persuade them not to spend more but to tax less.

We recognize that the factors that determine our decision can change. The only constant is the definition of a thorough and efficient education--one that will equip all of the students of this state to perform their roles as citizens and competitors in the same society.

The increased funding ordered here for poorer urban districts may be more than they can efficiently absorb immediately. We are also aware of the fact that the increased funding may constitute a heavy burden for the State to adjust to. We therefore rule that while the new funding mechanism must be in place legislatively so as to take effect in the school year 1991-92, it need not be fully implemented immediately, but may be phased in...

CITATIONS

1. Franklin, David L. et. al. The Constitutionality of the K-12 Funding System in Illinois, Volume I: Legal Issues. MacArthur/Spencer Series Number 3, Center for the Study of Educational Finance, Illinois State University, Normal, IL, May 1987, pp. 85-93.

2. Robinson v. Cahill, 303 A.2d 273, cert. den. 414 U.S. 976, 94 S.Ct. 292 (1973); 339 A.2d 193 (1975); 358 A.2d 475 (1976).

3. Abbott v. Burke, S.Ct. N.J., A-63, June 5, 1990.

4. N.J. Const., Art. VIII, Sec. 4, para. 1.

5. N.J.S.A., L. 1975, c. 212, sec. 18A:7A-1 to -52.

6. Abbott v. Burke, at pp.69-70.

7. Id., at pp. 109-113.

8. Id., at pp. 125-127.

9. Id., at pp. 138-141.

10. Id., at pp. 141-142.

11. Id., at pp. 142-149.