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INTRODUCTION

Virginia Journal

THIS PUBLICATION CELEBRATES the scholarship of the University of Virginia School of Law. Each year, the *Virginia Journal* presents in-depth intellectual profiles of three scholars, plus a survey of recent publications by the entire faculty. The tradition began in 1998, with an inaugural issue honoring Ken Abraham, Mike Klarman, and Elizabeth Scott. In subsequent issues, the *Virginia Journal* has profiled Lillian BeVier, Anne Coughlin, Barry Cushman, John Harrison, David Martin, John Monahan, Daniel Ortiz, Paul Stephan, George Triantis, G.E. White, Ann Woolhandler, and George Yin. Last year's volume was special festschrift issue that included seven essays honored the contributions of Charles Goetz and Robert E. Scott to our understanding of contract law.

These choices reflect a wide variety of interests, perspectives, opinions, and methodologies, but a consistent dedication to excellence. Our goal is to maintain an intellectual community where the broadest range of opinion and debate flourish within a framework of common purpose. Every person honored by the *Virginia Journal* has contributed to that goal, not only by his or her published work, but also by constructive participation in our community of scholars.

This year's *Virginia Journal* presents three additional members of our faculty:

Mildred Robinson is a mainstay of our tax faculty and of our community. In general, her interests lie at the intersection of tax and public policy. More specifically, she bridges the gap between the tax literature, which is concerned primarily with how best to generate revenue, and the public policy literature, which is concerned primarily with how best to spend public funds. Mildred links these concerns by first defining the objective, then analyzing how the power to generate revenue can most effectively be deployed to realize that objective. In exploring this linkage, Mildred's scholarship promotes a deeper understanding of public finance.

Jim Ryan, who has recently become Academic Associate Dean of the Law School, is the nation's leading scholar of education law. Indeed, to a remarkable degree, his work defines the field. Of course, education issues have always attracted attention, in law as elsewhere. But few legal scholars have seen education as a coherent organizing principle for approaching the array of constitutional and non-constitutional law that governs such issues. Jim Ryan's ambition, which he has already largely realized, is to establish "law and education" as a compelling field of legal scholarship and study.

Larry Walker is among the nation's most creative scholars of procedure. He has never limited his interest or understanding to the legal rules. Instead, he has argued that fair and efficient procedure should be founded on social experience. His prodigious scholarship employs a variety of social-science theories and methodologies, including social psychology, economics, political science, statistics, and history. All are deployed with the objective of connecting legal process to social life. Fortunately, this interest flows naturally from scholarship to the classroom, where Larry delights in showing students that the allegedly dry subject of procedure provides a window on our national values, as well as the essential foundation for an effective lawyer.



John C. Jeffries, Jr.

DEAN



MILDRED ROBINSON 

Advancing the Legacy of *Brown*

MILDRED ROBINSON'S SCHOLARSHIP views tax law as a central element of social policy rather than as a technocratic solution to the government's budget problem. This approach is influenced, among other things, by an aphorism attributed to Justice Holmes: "taxes are what we pay for civilized society."

Holmes' quotation has added meaning for Robinson. As an African-American growing up in the segregated South, "civilized society" seemed a distant goal rather than a benefit to be taken for granted. As the 50th anniversary of *Brown v. Board of Education* approached, Robinson took a scholarly detour to describe and analyze the educational experiences of "the *Brown* generation," —Americans of all races who attended segregated elementary or secondary schools at the time of the *Brown* decision. As Robinson recalls, "I remember 17 May, 1954, and, in spite of all of the sound and fury surrounding that decision, my educational experience remained unaffected." A conversation with her colleague Richard Bonnie, who attended an all-white school in Norfolk at the same time, led to the *Voices of the Brown Generation* project.

Robinson and Bonnie surveyed 4,800 legal academics born between 1937 and 1954 about their educational experiences and received almost 1,000 responses. From this group, a follow-up

sample of 50 academics (of whom 10 are African-American) contributed essays about *Brown's* impact on their own education. Robinson and Bonnie are in the process of publishing the essays together with an analysis of the survey results and commentary. Part of the project's uniqueness stems from its recognition that *Brown* had a strong emotional and cultural effect, if not always an immediate practical one, on white as well as African-American children. As Robinson notes, "it appears that little or no attention has ever been paid to the experiences or reactions of white children who were a part of efforts to desegregate schools."

Robinson has been invited to speak about the project at a number of academic and legal organizations, including a keynote address at the Washburn Law School in Topeka, Kansas, the city whose board of education was the named defendant in *Brown*. She has also delivered keynote addresses at symposia on *Brown* at Marquette Law School and the University of Kentucky and participated in a symposium at the University of Arkansas at Little Rock. The Marquette address will be published under the title "*Brown: Why We Must Remember*," 87 *Marq. L. Rev.* (forthcoming 2004). The article extends the oral history approach of the larger project, comparing the observations of Robinson's contemporaries with those of students affected by a Milwaukee desegregation effort from the mid-1970s and those attending an integrated Washington, D.C. school.

Robinson's primary scholarly interest, however, has been in the area of federal and state taxation. Her scholarship has often focused on important issues in public finance. In "Empowerment Zones/Enterprise Communities Under the Omnibus Budget and Reconciliation Act of 1993: A Promising Concept with Some Modifications," 11 *Va. J. L. & Pol.* 345 (1995), Robinson asked whether enterprise (or "empowerment") zones created pursuant to the Omnibus Budget and Reconciliation Act of 1993 ("OBRA") would be likely to remediate the economic distress so pervasive in designated areas. The article noted that prior state laws had often provided tax relief to businesses located in designated enterprise zones. However, an entrepreneur's more pressing need is capital, without which the business may not generate any taxable profits or capital gains. The federal

approach is preferable in that it gives the targeted businesses access to tax-advantaged financing.

Robinson noted, however, that OBRA is pervasively vague in describing the criteria for selecting among competing urban areas for enterprise-zone definition and for establishing the "strategic plan" that would guide investment in a selected zone. The latter form of vagueness is particularly troubling because OBRA's monitoring and accountability provisions threaten the loss of tax-privileged status if the zone fails to comply with its strategic plan. The article also noted the risk that bonds issued to finance multi-state enterprise zones would count against the Internal Revenue Code's "cap" on private activity bonds for the relevant states. Robinson argued that the statute would go much farther toward its goal of urban redevelopment if adjusted to remove that threat.

Robinson turned from federal to state fiscal and tax policy in "Financing Adequate Educational Opportunity," 14 *Va. J. L. & Pol.* 483 (1998). In particular, she considered whether continued reliance on local property taxes to support public elementary and secondary education could provide adequate educational opportunities for all students. Robinson noted two structural features of school finance that have the potential to create a funding gap. First is the growing number of non-English-speaking students and the growing demands on school districts to educate students with special needs. Second is the aging of the population. As homeowners pass child-rearing age, their willingness to pay additional property taxes to support public schools may decline. Robinson argued that it would become necessary for states to take on some of the financial burden of public education through broad-based income or sales taxes.

Robinson examined the political dynamics of state fiscal policy in a 2002 article, "Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point," 35 *U. Mich. J. L. Reform* 511. She noted that the California tax revolt that led to Proposition 13 in 1978 had several unanticipated consequences—many of them not limited to California. One was a general trend in other states to reduce direct taxes to head off a similar taxpayer revolt. A second was a fragmentation of the rev-

enue-generating systems of many states as governments faced reduced property- and income-tax revenues but a constant or growing demand for services. As a consequence, governments began to rely more on excise taxes and user fees and charges. Robinson argued that this development replaced progressive with regressive forms of taxation. More generally, Robinson argued that state fiscal policy had become increasingly incoherent because legislatures bound by supermajority requirements, revenue caps, or other voter-imposed constraints could not respond optimally to voters' demands for services.

Robinson analyzed another controversial issue in "Public Finance of Professional Sports Stadia: Controversial but Permissible... Time for Federal Tax Relief for State and Local Taxpayers," 1 *Va. Sports & Ent. L.J.* 135 (2002). Local governments routinely use tax-exempt bonds to finance professional-sports stadia. However, a 1984 amendment to the Internal Revenue Code made it impermissible to use revenues generated by these facilities to repay the debt on them. Thus, stadium-finance bonds are often secured by various state and local tax revenues, a result Robinson sharply criticizes. The inability to use facility revenues exacerbates the gap between those who use and benefit from sports facilities and those who pay for them. Moreover, Robinson observes, the federal standard eliminates the states' ability to experiment with different ways of making such facilities more nearly self-financing.

Robinson's most recent article, "Fulfilling *Brown's* Legacy: Bearing the Costs of Realizing Equality," 43 *Washburn L.J.* (forthcoming 2004), brings her scholarship full circle by tying together *Brown* and school finance. It begins with a description of the *Voices of the Brown Generation* project and its account of how those directly affected view *Brown* and subsequent developments, including the Civil Rights Act of 1964. The article then turns to the phenomenon of residential (and educational) resegregation. It notes that even schools that are formally desegregated are often effectively segregated at the classroom level because of tracking, programs for the gifted, special-education programs and programs for non-English speakers. Robinson then discusses the additional financial demands that students who are less well prepared for school—whether by virtue of

poverty, disability, or language background—generate for public schools. Because of stagnating or declining urban populations, property tax revenues have not kept pace with these funding requirements, and state governments have often filled the gap with ad hoc packages of revenues from other taxes and user fees. Robinson argues that governments need to replace this ad hoc approach—which can result in an effectively regressive tax burden occasioned by the needs of public schools—with a systematic approach that considers the full package of taxes used to finance schools. This, Robinson argues, is consistent with the lessons that her generation found in the *Brown* decision. It is also consistent with Robinson's longstanding scholarly focus. As she puts it, referring back to Justice Holmes' quote, "who are the 'we,' what are 'we' buying with our tax dollars, and why is this 'we' rather than another paying for it?" ❖

EXCERPT FROM:

Virginia Journal

Fulfilling *Brown's* Legacy: Bearing the Costs of Realizing Equality

Washburn Law Journal (2004)

FORTHCOMING

WHATEVER THE PEDAGOGICAL CHALLENGES faced by schools, financial support must be provided. Through our taxing systems, we generate the money necessary to meet all the financial challenges inherent in providing the most effective public school education possible to all American children. We of course understand that, in the words of Justice Stone, “[t]axation ...is ...a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens.”¹ How does this work in the narrow context of public school education?

Public education has historically been financially supported primarily by local government through the property tax. The property tax is generally viewed as having a regressive effect.³ Briefly, to characterize a tax or system of charges as regressive is to say that the levy exacts more, relatively speaking, from those having less from which to pay the tax. A simple example may be helpful. Assume that we have two individual taxpayers. Taxpayers A and B are both domiciled in the State of Bliss. Both are required to pay 10 percent of incomes received during the calendar year to the State of Bliss. Taxpayer A has \$10,000 in taxable income from which to pay the tax and taxpayer B has \$45,000. Taxpayer A's tax bill of \$1,000 imposes a much greater real cost to A than will be true for Taxpayer B whose \$4500 liability is higher but who also has more disposable resources from

which to pay the levy.

In recent years, two major factors have undermined the economic viability of the property tax and thus contributed to the financial woes of urban school districts in particular. The first factor is the erosion of the tax base itself. The erosion has occurred as residents and jobs depart cities for suburban locations, making diminished collections from the property tax inevitable.⁶ The eroding tax base and correspondingly diminished collections potentially widen the achievement gap between more and less affluent school districts. The second factor relates to the recent dynamics of the tax-making process itself. Legislative debate on the use of the state and local taxing power in the last three decades has all too often had at its heart one question: how can taxes be cut?⁸ A frequent target for taxpayer relief has been the property tax.⁹ Thus, the productivity of the tax has been limited even as school districts face new and potentially more expensive demands.

As “property tax relief” has been provided and collections from the property tax have stagnated or declined, school districts have turned to the states for financial assistance. States have responded; the percentage of support to public education provided by states has increased in recent years.

Most states rely upon either the retail sales tax or individual income tax or some combination thereof for a significant share of revenue generated.¹³ A variety of targeted taxes, fees and user charges are also in place and have been of increasing importance in recent years.¹⁴ The last group of items is quite regressive in effect. These levies are either explicitly excise taxes or are the functional equivalent thereof. The hallmark of an excise tax (or user charge or fee) is its imposition on a transactional basis. Every transaction is an independent event for purposes of the levy. Because it also is an excise tax, the retail sales tax, too, is regressive though exemptions may ease the tax's regressive effect. Even if legislative bodies elect not to build exemptions into the retail sales tax, it is still more broadly borne than a property tax would be. By its nature, every participant in a transaction reached by this tax becomes a taxpayer. Individual income taxes have the greatest potential for progressive effect.

Tax specialists believe that in apportioning public costs, tax-

Mildred Robinson

payers must be treated as fairly as possible. This is generally seen to require that to the extent possible a tax be equitable, efficient and neutral. Further, modern notions of the contours of “equity” deem it appropriate where possible to accommodate ability to pay in determining liability.

To this point, on the state level when questions of fairness are raised with regard to the allocation of tax burden, the debate has generally focused solely on the tax being debated. In defraying the infrastructure and operational costs attendant to providing an adequate education for all children, state lawmakers should take care to avoid using the taxing power in a manner demanding relatively more from those who are least financially able to bear such costs. This can best be done by striving for equity across the sources of revenue.

In this context, I believe that as a normative matter funding packages for financing education should be structured so as to treat taxpayers across the income continuum as equitably as possible. Thus, for example, a preferred funding package would be one that combines property tax proceeds with the proceeds of either an income tax or a state retail sales tax. The tendency toward regression in the property tax would be corrected somewhat by the progression in an income tax or by more broadly spreading cost through a retail sales tax. In either case, this strategy is likely to apportion more fairly taxpayer individual cost of providing education.

Contrast that outcome with the effect of drawing supplementary funds from some subset of the other excise taxes such as those on cigarettes or alcohol and the complex web of user charges, fees and state-managed gaming proceeds presently in place in many states. As has been noted, each of these latter sources of revenue is decidedly regressive in effect. Reliance on a funding package bearing these characteristics would, in short, exaggerate rather than mitigate overall regressive effect. Thus, if this latter strategy is adopted—property tax plus “other” revenues—the potential exists for a relatively higher tax burden on less affluent taxpayers. It would be ironic to have in place a system that guarantees only that all will bear the burden of paying for public education—indeed possibly a disproportionate share of that burden—with no assurance that their children will

receive the intended benefit – meaningful access to an adequate education. State fiscal policy should be sensitive to the cumulative tax burden imposed by its chosen financial strategies. ❖

FOOTNOTES

- ¹ *Welch v. Henry*, 305 U.S. at 146-147.
- ³ Opinions differ. . . . The consensus view is likely best captured by Richard A. Musgrave & Peggy B. Musgrave in *Public Finance in Theory and Practice* 268 (3d ed. 1980) (property tax is mildly regressive).
- ⁶ See e.g., Howard Chernick and Andrew Reschovsky, *Lost in the Balance: How State Policies Affect the Fiscal Health of Cities*, The Brookings Institution Center on Urban and Metropolitan Policy, <www.brookings.edu/urban> (last visited September 8, 2004). The paper “examines the factors that have led to fiscal distress in central cities” in three states: California, New York and Wisconsin. The authors identify four factors contributing to the fiscal maladies of cities: “(1) relatively low revenue-raising capacities in many cities, due to both population shifts and relative property values and income levels, (2) growing service responsibilities, (3) higher uncontrollable costs in cities relative to their suburbs, and (4) policies of higher level governments.” *Id.* at 5-6.
- ⁸ See e.g., Steven Hayward, “The Tax Revolt Turns 20,” *Pol’y Rev.*, July-August 1998, at 9 (“Within two years of [the adoption of California’s Proposition 13], 43 states implemented some kind of property-tax limitation or relief, 15 states lowered their income-tax rates, and 10 states indexed their state income taxes for inflation.”) In recent years, the pace of tax cutting has slowed as most states, feeling the economic effects of the sluggish national economy, grappled with budgetary shortfalls.
- ⁹ Empirical evidence suggests that, ironically, this relief does not accrue to the benefit of the least affluent in a given locale. See Richard A. Musgrave & Peggy B. Musgrave, *Public Finance in Theory and Practice* 268 (3d ed. 1980) (explaining that property tax distribution is “mildly regressive” assuming that renter’s tax is allocated according to rental payments, and business property tax is allocated half to consumption and half to capital income.) Allocation for rental property may vary from this norm to the detriment of renters. Thus, for renters, (likely to be a significant presence in urban centers) the tax’s regressive effect continues unabated.
- ¹³ The sales tax and individual income tax provide the majority of state tax collections. In fiscal year 2002, general sales taxes provided 33.5 percent of all collections and individual income taxes provided 34.7 percent. See <<http://www.taxfoundation.org/statefinance.html>> (last visited August 30, 2004).
- ¹⁴ Included here are levies such as amusement sales taxes, parimutuel sales, documentary and stock transfer taxes, gasoline taxes, and sin taxes (on alcohol and tobacco) in addition to a wide variety of user fees and charges. Substantial revenue is being collected from these sources. These sources presently provide approximately roughly 33 percent of all revenues collected. See *State Government Tax Collections by Type of Tax, Fiscal years 1991-2002*. <<http://www.taxfoundation.org/collectionsbytype10years.html>> (as of August 30, 2004).

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Mildred Robinson

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JIM RYAN 

Opening the Schoolhouse Door

JIM RYAN'S INTEREST IN EDUCATION LAW is both intellectual and personal. Neither of his parents attended college, but both recognized the value of education and urged their children to take full advantage of it. As Ryan puts it, "education has transformed my life, and my own experience has made me intensely interested in figuring out ways to allow others disadvantaged by our current educational system to have an experience more like my own."

Law school honed Ryan's interest in law and education. Two Supreme Court cases in particular fascinated him: *San Antonio v. Rodriguez* (1973), which declared that education is not a fundamental right and declined to require equal funding across school districts, and *Milliken v. Bradley* (1974), which held that district courts could not include suburban schools in metropolitan desegregation plans. *Rodriguez* did not end litigation over school finance, but shifted the battle to state courts, where it has raged ever since. Most law schools did not offer courses that looked in depth at school-finance litigation in state courts— despite the fact that such cases are often among the most momentous decided by a state's highest court. Fortunately, however, Ryan got the opportunity to learn about school-finance litigation first hand when he was awarded a prestigious Gibbons Fellowship, which provided the opportunity to work on public-interest liti-

gation at a New Jersey law firm. During the fellowship, Ryan worked on the New Jersey school-finance litigation.

Upon entering teaching in 1998, Ryan turned immediately to law and education and quickly established himself as the top young scholar in the field. His first three publications explored the relationship between school desegregation and school-finance reform, two different ways of attempting to equalize educational opportunities for minority and poor students. In “*Sheff*, School Finance Reform, and School Finance Litigation,” 74 *N.Y.U. L. Rev.* 529 (1999), Ryan used a recent decision by the Connecticut Supreme Court to explore both the limits and possibilities of school-finance reform and began to examine the relationship between school finance and desegregation. He argued that school “finance” litigation need not, and perhaps should not, be solely about money. The Connecticut experience indicated that school-finance reform may not be the most effective strategy for improving education in urban schools. At the same time, the *Sheff* decision demonstrated that the underlying right recognized in school-finance cases—the right to an equal or adequate education—need not be defined solely in financial terms, but could also support alternative remedies like racial and socioeconomic integration and school choice.

In “Schools, Race, and Money,” 109 *Yale L.J.* 249 (1999), Ryan continued to explore the intersections between school finance and desegregation, noting that the current trend in litigation and legislation is away from school desegregation and toward a focus on school-finance reform. He argued against this trend, relying on social-science evidence suggesting that school desegregation—especially along socioeconomic lines—may be more effective than school-finance reform in improving the academic achievement of disadvantaged students. Recognizing that mandatory busing to achieve desegregation is politically implausible at present, the article explored alternative methods to achieve integration along racial and socioeconomic lines, including expanding opportunities for school choice.

In “The Influence of Race on School Finance Reform,” 98 *Mich. L. Rev.* 432 (1999), Ryan asked whether—even assuming that greater funding will boost achievement in predominantly poor and minority school districts—those districts are likely to

receive the necessary resources. To answer that question, Ryan examined the demographics of districts that had been involved in school-finance litigation in the forty or so states where school funding systems had been challenged. He discovered that predominantly minority districts, as plaintiffs, won far fewer school-finance cases than predominantly white districts. In the few cases they won, moreover, minority school districts faced legislative recalcitrance more intense and long-lasting than that faced by their predominantly white, peers. This evidence at least suggests that minority students face an uphill battle in securing additional funding. This, he argued, casts doubt on the notion that school funding, rather than school integration, is the best strategy for equalizing educational opportunities.

Expanding his work on law and educational opportunity, Ryan examined the issue of school choice in an article co-authored with Michael Heise, “The Political Economy of School Choice,” 111 *Yale L.J.* 2043 (2002). The article places school choice within the broader context of education reform. Using school desegregation and school-finance reform as the main examples, it asserts that suburban districts have successfully resisted education reforms that threaten the physical or financial independence of suburban schools. Desegregation was mostly halted at the urban-suburban boundary, and school-finance reform typically leaves suburban districts free to spend more money on their own schools than other districts can afford.

Ryan and Heise argue that the same dynamic will shape choice plans. In their view, suburban homeowners are the most important stakeholders in the school-choice debate, and they have self-interested reasons to oppose most choice plans. Suburban parents are generally satisfied with their schools and desire to keep them operationally and financially independent, especially independent of urban schools. Given this reality, it is unlikely to see robust school choice plans, either public or private, because such plans could threaten suburban autonomy. Thus, Ryan and Heise argue, the landscape will continue to consist principally of small, targeted choice programs, including vouchers and charter schools, mostly confined to urban school districts or failing schools. Contrary to the grand claims of

choice proponents and the dire predictions of choice opponents, school choice will have a limited impact on achievement, competition among schools, and racial and socioeconomic segregation. The article explores ways to make choice more politically attractive, including expanding access to preschool, which is usually not organized on the neighborhood school model. Ryan and Heise hypothesize that allowing more parents to send their young children to a non-neighborhood preschool might make them more willing to endorse school choice for grade school.

Ryan explains that three common objectives unify these articles. “First, I have tried to make some sense of what social science research teaches us about effective educational reforms in an effort to understand in which direction, ideally, education reform should be headed. Second, I have tried to pay attention to the practical and political obstacles to expanding educational opportunities and to explore ways to overcome those obstacles. Third, I have tried to ignore the pull of ideology in assessing both the social science evidence and various strategies for reform.” This has put Ryan in the position of advocating strategies—such as voucher programs—typically associated with conservative commentators, to achieve ends—the use of education policy to increase racial and socioeconomic integration—typically associated with more liberal commentators. Ryan notes that this can open a scholar to criticism from all sides: “there is usually something in my work that disappoints or disturbs those who have ideological commitments to one strategy or another.”

Although Ryan’s main focus has been on law and educational opportunity, his writings explore other topics within the broad subject of law and education. In “The Supreme Court and Public Schools,” 86 *Va. L. Rev.* 101 (2000), Ryan tried to make sense of what one might call the Supreme Court’s public schools jurisprudence. Analyzing cases involving student rights, Ryan discovered that sometimes the Court relaxes constitutional protections in order to take account of the special context of public schools. Thus, students’ Fourth Amendment and free speech rights are weaker inside the public schools than they are outside the schoolhouse door. With regard to other rights, however, the Court does not water down the protections available to stu-

dents. Thus, a student’s equal-protection rights and right to be free from the “establishment” of religion are as robust, if not more so, in school than outside it. Ryan argues that one way to make sense of the cases is to recognize that schools perform both academic and social functions, and the Court is more willing to defer to school officials when schools are performing their core academic functions.

In his most recent article, The “Perverse Incentives of the No Child Left Behind Act,” 79 *N.Y.U. L. Rev.* 932 (2004), Ryan takes a hard look at the No Child Left Behind Act, arguably the most important piece of federal education legislation ever. The article argues that the Act creates incentives that conflict with its stated goal of bringing all children rapidly to high levels of academic achievement. In Ryan’s view, the Act creates strong incentives for states to reduce academic standards and increase segregation by race and class. In addition, it increases teachers’ existing incentives to choose schools that are already successful and avoid schools that educate disadvantaged students. Taken together, these perverse incentives may make it harder, not easier, for schools to bring all students to reasonable levels of achievement. The article argues that schools should not be judged based on an absolute level of achievement, thereby confusing school quality with student quality. Instead, they should be judged based on the achievement growth of their students, which would reveal how much value the school has added each year to a student’s knowledge and abilities. Looking to achievement growth rather than absolute achievement levels, Ryan contends, would provide a more accurate picture of school quality and dampen the perverse incentives he identifies.

An article he wrote with Dean John C. Jeffries, Jr., “A Political History of the Establishment Clause,” 100 *Mich. L. Rev.* 279 (2001), brings Ryan’s knowledge of education law to bear on our understanding of the Establishment Clause. The article contends that the Supreme Court’s Establishment Clause jurisprudence is best understood by treating decisions as if they were the products of political contests among various interest groups regarding the proper relation of church and state. It thus sets the political and doctrinal histories of church-state separation side-by-side and asserts that there is a telling correlation between

them. The article devotes considerable attention to the way the Establishment Clause has shaped the government's ability to aid private, religious schools and promote religion within public schools. In particular, Jeffries and Ryan note that the Court's decision in *Brown* helped transform church-state politics in a way that created a favorable environment for the Court's recent, and seemingly unrelated, decision upholding the use of vouchers at religious schools.

Ryan observes that although *Brown* and school desegregation may be the most heavily explored topic in legal theory, the more general topic of law and education remains surprisingly underdeveloped. He therefore describes his scholarly agenda as "writing about any and all issues in law and education that seem important and interesting, both from a historical and contemporary perspective." Ryan's ability to bring careful analysis and an appreciation for social science research to the field have made him, at a stage in his career when many academics are just hitting their stride, the country's leading scholar of education law. ↔

EXCERPT FROM:

Schools, Race, and Money

Jim Ryan

109 Yale L.J. 249 (1999)

IT SEEMS UNFASHIONABLE THESE DAYS, if not atavistic, to talk seriously about ways to increase racial integration. To be sure, one still encounters attempts to spark conversations about improving race relations and promoting integration, but a strong sense of fatigue seems to accompany such attempts. A distinct trend in academic and popular commentary, from the left and the right, is to seek ways to move beyond racial integration as an issue. Conservative critics of racially based policies, especially desegregation and affirmative action, argue that such policies have achieved about as much as they ever will, and that whites and minorities would be better off if the government reentered a period of "benign neglect" regarding issues of race. Critics on the left seem equally ready to abandon integration as a good idea gone bad, as they either promote or excuse racial separatism. The Supreme Court has joined and at times led this trend by ruling that policies benefiting African-Americans are generally as impermissible as policies discriminating against them, and by strongly implying that it is time for federal courts to get out of the business of school desegregation.

School finance litigation fits nicely within this prevailing mood. The goal of school finance litigation, generally speaking, is to increase the amount and equalize the distribution of educational resources and, in so doing, to improve the academic opportunities and performance of students disadvantaged by existing finance schemes. Such litigation is not targeted to assist only minority students, but rather is designed to assist all "poor" students.⁸ School finance litigation is thus often depicted both as a means of moving beyond race as the salient issue in education reform and as an effective way to achieve educational equity and

adequacy for disadvantaged students from all racial and ethnic backgrounds. Concomitantly, from its inception thirty years ago to the present, such litigation has been seen as either a supplement to or a substitute for desegregation litigation.

School finance litigation began in the late 1960s, at a time when civil rights advocates were growing disillusioned with the pace and progress of desegregation. Those involved in early school finance cases believed that such litigation could accomplish a goal—improving the educational opportunities available to poor and minority students—that desegregation was only fitfully attaining. Similarly, those who are currently dissatisfied with desegregation—an ecumenical and ever-growing group composed of both liberals and conservatives, blacks and whites—believe that reform efforts should be directed solely at improving the education that minority students receive, regardless of whether those students are in integrated or segregated schools. More and more, one hears calls from courts, advocates, and academics alike that desegregation is not the answer, that the NAACP may have erred in pushing for integration rather than for equalization of facilities and programs, and that poor, urban, minority schools would succeed if only reform *x*, *y*, or *z* were adopted.¹³ Most of these reforms require funding, often funding above and beyond current levels, which naturally increases the importance of school finance schemes. School finance litigation, meanwhile, continues apace. Nearly twenty state supreme courts have declared their states' systems of school financing unconstitutional, with five of these decisions issued within the last two years. Indeed, while desegregation is entering its twilight phase, school finance litigation shows no signs of abating.

It thus seems an appropriate time to consider school finance litigation and desegregation in tandem and to compare, before we turn our backs completely on desegregation, the relative benefits of school finance reform and desegregation. Surprisingly, such an examination has rarely occurred: Very little scholarly attention has been devoted to the relationship between school finance and desegregation or to the role that race plays in school finance reform. This relative lack of attention is odd not only because each topic has separately received intense scrutiny, but both

academic and popular, but because the two reform efforts share a long, interwoven history as well as the overlapping goal of improving the educational opportunities and achievement of poor minority students. They also share the failure to realize fully that goal and thus shoulder some of the responsibility for the continued existence of numerous schools in metropolitan areas that are both separate and unequal. To understand why such schools exist in something of a pre-*Plessy* world, one must pay attention to both school finance litigation and school desegregation.

This article is part of a larger project that seeks to do just that: to pay attention to and explore the relationship between school finance litigation and school desegregation. I hope to show that one cannot fully understand the dynamics and limitations of school finance reform without considering the dynamics of race in general and school desegregation in particular. Indeed, the central contention of this article is that, far from moving beyond race, school finance reform has been and will continue to be hamstrung by the obstacles created by poor race relations and the Court's desegregation jurisprudence.

Specifically, I describe how residential segregation and the limited reach of school desegregation have helped to create and maintain schools that are isolated not simply by race but also by socioeconomic status. The effects of racial and socioeconomic isolation, this article suggests, cannot be adequately addressed by school finance reform, because students in schools with high concentrations of poverty need more than increased funding to improve their achievement. Increasing expenditures in racially isolated schools, moreover, cannot replicate the social benefits of racially integrated schools. By helping to isolate not simply minority students, but poor minority students, race has played a critical role in creating and maintaining schools that appear to be beyond the reach of school finance reform.

To put the argument simply: Although it is possible that school finance reform could have been a helpful supplement to desegregation, it is a poor substitute. Despite the hopes of early school finance advocates, we should not expect school finance reform to solve the problems created by the failure to desegregate many urban schools. Indeed, this article suggests not only

that school finance reform has done little to improve the academic performance of students in predominantly minority districts, but also that it may be a costly distraction from the more productive policy of racial and socioeconomic integration. ❖

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Jim Ryan



W. LAURENS WALKER 

Improving Legal Procedures Through Social Science

LAURENS WALKER'S TEACHING AND SCHOLARSHIP are animated by the belief that legal procedure is of primary importance in resolving disputes effectively. Additionally, procedure strongly influences the perceived fairness of the substantive result of litigation. Walker's view of the central significance of procedure reflects years of empirical study of the perceptions of parties whose conflicts are resolved under differing procedural regimes. This research began before Walker joined the Virginia faculty in 1978 (after visiting for one year) and continued during his early years in Charlottesville.

Walker's project involved a fruitful partnership with a distinguished social psychologist, John W. Thibaut of the University of North Carolina, where Walker began his teaching career. For nearly a decade, Walker and Thibaut carried out a series of laboratory experiments, first creating conflicts among volunteers and then resolving those conflicts by a variety of procedures. While the study was wide-ranging, the comparison that proved most interesting was between an "adversarial" model styled on the Anglo-American legal tradition and an "inquisitorial" model styled on the French and related continental traditions.

Walker and Thibaut concluded that the adversarial model and its feature of party (and attorney) control were clearly preferred. “The disputants’ freedom to control the statement of their claims constitutes the best assurance that they will subsequently believe that justice has been done regardless of the verdict,” Walker says in summarizing the pair’s findings. The results of the Walker-Thibaut collaboration were reported in a number of articles and summarized in their book *Procedural Justice: A Psychological Analysis* (1975).

Further investigation revealed that process can shape the parties’ beliefs about the distributive (and not merely procedural) fairness of the outcome. This insight was reported by Walker, Alan Lind, and John Thibaut in “The Relation between Procedural and Distributive Justice,” 65 *Va. L. Rev.* 1401 (1979). The experiments reported in the article showed that parties’ preference for an adversarial procedure influenced their perceptions of substantive fairness, even for participants disappointed in the outcome. According to Walker and his colleagues, “[A]t least with respect to perceptions, ‘ends’ (distributive justice) cannot justify ‘means’ (procedural justice), but ‘means’ can indeed justify ‘ends’ to the extent that for participants, the perception of procedural justice partially determines the perception of distributive justice.”

At Virginia, Walker formed a new research partnership with John Monahan, a member of the Law School’s faculty and a clinical psychologist thoroughly experienced in litigation. Walker and Monahan observed that litigants were increasingly introducing social science research into trials and that courts found it difficult to determine when and how such research was relevant and probative. Walker and Monahan therefore set out to define a comprehensive set of principles to manage courts’ use of social science research. The result was a series of three articles: “Social Authority: Obtaining, Evaluating and Establishing Social Science in Law,” 134 *U. Penn. L. Rev.* 477 (1986); “Social Framework: A New Use of Social Science in Law,” 73 *Va. L. Rev.* 559 (1987); and “Social Facts: Scientific Methodology as Legal Precedent,” 76 *Cal. L. Rev.* 877 (1988).

Walker and Monahan’s core idea was that the process for using social science research in court should be carefully tuned

to the function of the evidence in particular cases. First, they identified three separate purposes for which social science research is introduced, defining them as “authority,” “fact,” and “framework” use. Authority use invokes research results to make law. Fact use invokes research results to determine case-specific facts. The identification of “social framework” use was novel. They noted that courts sometimes admitted social science research to provide a context or “framework” for the task of deciding case-specific facts. For example, courts had admitted general research findings about eyewitness identification to help juries (or judges) decide whether a specific identification was probably correct. The framework concept identified by Walker and Monahan has now become the standard description for the continuing trial practice.

Next, Walker and Monahan described suitable procedures for each of the three uses. They argued that for authority use, courts should treat social science materials just as legal precedents are treated under the common law. They wrote, “From a theory that posits social science as a source of authority in the law flow two corollary propositions regarding how a court should obtain empirical research: the parties should present empirical research to the court in briefs rather than by testimony; and the court may locate social science studies through its own research.” On the other hand, they argued that social research used to prove case-specific facts should be managed under the general rubric of relevance that determines the admissibility of other kinds case-specific evidence. The same can, of course, be said for most ordinary evidence. The framework condition, Walker and Monahan wrote, falls somewhere between the authority and fact function and hence calls for a blended treatment, partly like legal precedent and partly like case-specific fact. They suggested that if a trial judge decided a framework would be helpful, “the applicable research should be communicated to the jury in the same manner that the court’s evaluation of the applicable statutes and case law is communicated to the jury, that is, by instruction.” Thus a legal technique—jury instruction—was suggested to assist the jury in performing a fact-finding role.

Three years after completing their initial series, Walker and

Monahan treated the “null case” condition, the problem of questions lacking social-research answers. In “Empirical Questions without Empirical Answers,” 1991 *Wis. L. Rev.* 569 (1991), Monahan and Walker suggested a pragmatic treatment—reliance on plausible assumptions with careful attention to assigned responsibilities for proof. Most importantly, they called on courts to leave the door open for future social research which might be helpful in later cases.

Walker and Monahan incorporated and illustrated their proposed structure in a casebook, *Social Science In Law: Cases and Materials*, now in its fifth edition (2002). According to the preface, the book’s purpose is “to apprise the reader of the actual and potential uses of social science in the American legal process and how those uses might be evaluated.” Walker and Monahan explain, “we here view social science as an analytic tool in the law, familiarity with which will heighten the lawyer’s professional effectiveness and sharpen the legal scholar’s insights.” Since initial publication, *Social Science in Law* has been used in dozens of American and foreign law schools and is a standard fixture in judicial education programs as well as a reference for scholars.

Walker’s third set of interests is traditional in name, federal civil procedure, but in substance his work has been strikingly unconventional. In “Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments,” 51 *Law & Contemp. Probs.* 67 (1988), Walker called for controlled field tests of proposed rule changes, a version of the method used earlier in the procedural-justice investigations. Otherwise, he argued, rule changes would remain unpredictable yet significant in effect. Walker broadened this view in “A Comprehensive Reform for Federal Civil Rulemaking,” 61 *Geo. Wash. U. L. Rev.* 455 (1993), calling on federal civil rulemakers to adopt a policy of refusing rule-change proposals not supported by valid impact analysis. He argued that federal rulemakers function as a small administrative agency and should establish standards for official action, much the same as administrative agencies function according to regulations. Later, in “Avoiding Surprise from Federal Civil Rulemaking,” 23 *J. Legal Stud.* 569 (1994), he discussed the potential use of economic theory to predict the impact of civil

rule changes. Walker also discussed the political history of federal procedure in “The End of the New Deal and the Federal Rules of Civil Procedure,” 82 *Iowa L. Rev.* 269 (1997).

Walker continues to emphasize the importance of process through his teaching and research in complex civil litigation. He was among the first law professors to offer a course in Complex Civil Litigation, and this teaching has generated a number of scholarly projects. Not surprisingly, his research combines an interest in procedure with an appreciation of social-science methods. Again in partnership with John Monahan, Walker has focused on the class-action device and the problem of trial in cases with thousands, sometime millions, of litigants. Walker and Monahan advocate using statistical sampling to reduce litigation costs in complex cases. Sampling, the random collection of data from less than all potential data sources, is widely used in the social and natural sciences. Sampling can radically reduce the cost of collecting information and in many cases can produce more accurate results than universal data collection.

Walker and Monahan’s article, “Sampling Damages,” 83 *Iowa L. Rev.* 545 (1998) carefully reviewed scattered judicial efforts to use sampling and suggested a more efficient technique which might routinely permit the determination of damage awards. They followed with “Sampling Liability,” 85 *Va. L. Rev.* 329 (1999), which made the then-novel argument that sampling could reduce the cost of adjudicating liability as well as damages.

Walker discussed sampling in a broader context in “A Model Plan for Resolving Federal Class Action Cases by Jury Trial,” 88 *Va. L. Rev.* 405 (2002), a response to current controversies over settlements in large class actions. He noted that the frequency of settlement is a response to litigation costs, but argued that reducing those costs through sampling and related techniques may better serve the parties. Walker’s proposals incorporate division of issues for trial, sampling inclusion of future claims, and the use of trusts for distribution. He defended the proposals as favoring neither plaintiffs nor defendants, but making jury trial of major federal class actions possible on a routine basis. While these elements diverge from the traditional model

of litigation, the alternatives may be a collusive settlement or a simple failure to adjudicate legal claims. This position takes Walker full circle, to the notion that the parties' participation in framing and resolving their disputes is fundamental to the perceived fairness of the legal system. ❖

EXCERPT FROM:

A Model Plan to Resolve Federal Class Action Cases by Jury Trial

Laurens Walker

88 Va. L. Rev. 405 (2002):

I. THE MODEL PLAN

The Model Plan consists of four simple and effective elements combined in a single trial plan. I address in order (1) polyfurcation, (2) sampling, (3) deciding future claims, and (4) distribution trusts. These are the disparate techniques developed in recent years by federal judges that, in combination, would open the door to federal class action cases. The serial trial of decisive issues with sampled evidence, awards distributed by trustee, and absolute closure of all known and future claims would allow for the determination of all the significant legal issues in a complex class action suit before a single jury.



A. Polyfurcation

The generic term “polyfurcation” describes the practice of dividing for trial one or more elements of the cause of action, defenses, or damages.³¹ The more specific term “bifurcation” is typically used to describe the division of the trial of liability from damages. The term “trifurcation” indicates a three-part division for trial—usually causation, other elements of liability, and damages. The addition of the adjective “reverse” means that one of the separated matters is tried out of the usual order.~ The reason for separation (and reversal) is practical: In some situations trial of one part of a case may prove decisive, saving the cost of

trying the rest of the case. For example, the separation and initial trial of an affirmative defense would, if the verdict were for defendant, end the case. In a complex civil case this practice might save months of trial. The process, however, is controversial. The common law tradition prescribed a unified trial to correct error even if the error was limited to a single aspect of the case.



B. Sampling

“Sampling” is the process of collecting information from fewer than all potential sources.⁴⁸ Typically, the sources selected for investigation are chosen randomly from among all potential sources to enhance the probability that the sampled sources are representative of the whole. Sampling is a fundamental aspect of scientific methodology and a standard response to the problem of prohibitive cost in data collection. In civil litigation, sampling has been used in essentially the same way as it has been used in scientific research—to collect representative information and avoid prohibitive costs. However, like polyfurcation, this powerful device has also proved to be controversial.



C. Deciding Future Claims

The term “future claims” in fact describes three significantly different types of civil claims, usually involving product liability.⁷⁸ First, there are claims that involve exposure to the product and injury, but which have not been filed. Second, there are claims that involve exposure to the product but no current injury. Finally, there are claims from future exposure to the product. The first and second categories are the most important in product liability suits, because withdrawal of the allegedly dangerous product from the market can usually eliminate liability under the third category. Defendants almost always prefer a result that determines future claims in the first two categories and thus provides closure. The obvious rationale for this preference is the elimination of contingent liabilities and an enhance-

ment of stock value.



D. Distribution Trust

The distribution trust is a novel version of the traditional trust format. A trust is created by the transfer of property by one person to another person to hold for the benefit of some third person in order to achieve a variety of goals. In the distribution trust, a defendant in a civil case transfers property to a non-party to hold for the benefit of claimants in order to provide an independent mechanism for tailoring individual payments over time. Thus far, the distribution trust has only been used in bankruptcies, but very similar distribution techniques have been used in class actions.



E. The Elements Combined

These four elements offer complementary devices that can surely resolve the significant issues raised by the trial of a federal class action case before a single jury. Although they are not without controversy, these elements, combined in the Model Plan, offer a method to use jury trials for the resolution of federal class actions. Polyfurcation (with reversed order of elements, as appropriate) may bring the matter to an early end. This element divides issues for trial and brings potentially decisive issues forward for early decision. If a longer trial is necessary, sampling would limit evidentiary costs by collecting information from fewer than all potential sources, and deciding future claims would provide closure by ensuring that present costs constitute total costs. Distribution by trust adds a desirable element of precision to the remedy stage and to the entire Plan by permitting a good fit between verdict and reward. ❧

FOOTNOTES

³¹ See Albert P. Bedecarré, “Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases,” 17 *B.C. Envtl. Aff. L. Rev.* 123, 138 (1989).

⁴⁸ See John Monahan & Laurens Walker, *Social Science in Law: Cases and Materials* (5th ed. 2002) (containing cases and materials describing the advent of the use of sampling methodology to determine damages); Shari Seidman Diamond, “Reference Guide on Survey Research,” in *Reference Manual on Scientific Evidence* 229 (Federal Judicial Center ed., 2d ed. 2000) (describing the sample survey technique); Laurens Walker & John Monahan, “Sampling Damages,” 83 *Iowa L. Rev.* 545 (1998) (suggesting that sampling be used to solve the “numbers problem” associated with determining damages in mass tort litigation involving thousands, or even millions, of claimants); Laurens Walker & John Monahan, “Sampling Liability,” 85 *Va. L. Rev.* 329 (1999) (proposing a model for adjudicating liability elements in complex civil cases via sampling).

⁷⁸ See Richard L. Marcus, “They Can’t Do That, Can They? Tort Reform Via Rule 23,” 80 *Cornell L. Rev.* 858, 882 (1995) (discussing the authority of courts to adjudicate future claims in a class action).

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