Financing Adequate Educational Opportunity

Mildred Wigfall Robinson†

By any measure, public elementary and secondary education in the United States is a very big business. As of September, 1997, there were approximately 46,353,000 children enrolled in 86,221 public schools.¹ These children were being taught by 2,682,000 teachers.² Notably, roughly 85% of all children enrolled in elementary and secondary schools were in public schools and 84% of all teachers were employed in public school systems. Total public school expenditures were expected to exceed $265,000,000,000.³ Ninety percent of these funds were to be provided from state and local revenues in roughly equal measure.⁴

¹ Professor of Law, University of Virginia. I thank Derrick Bell, Patricia Biller, John Monahan, James Ryan, George Yin and the participants in the Faculty Workshop at the Washington and Lee University School of Law for their valuable observations and suggestions. Overstatements and mistakes are solely my responsibility. I also thank the Journal of Law and Politics, the Journal of Law and Social Policy and BLSA for extending the invitation to participate in the symposium. Finally, I thank Kelly Makins and Frederick Bower for their invaluable support as research assistants.


³ Comparatively, 23,093 private schools enrolled approximately 5,869,000 children and 8,352 Catholic schools enrolled approximately 2,491,100 children. Id.

⁴ Private schools employed 390,000 teachers and Catholic schools employed 132,240 teachers. Id.

⁵ The total figure is extrapolated from 1993-1994 current expenditures and is a composite of spending in the following categories: instruction, student services, food services, enterprise operations, capital outlay, interest on school debt and other current expenditures. Id. Information reporting total school expenditures for private and Catholic schools is not available.

⁶ Nationally, state sources provided 45.2% of total funding of public education for the 1997-98 school year; local revenues provided 45.1%. Of the remainder, 7.0% is provided by the federal government and 2.7% comes from private sources. Of interest, and perhaps of increasing importance, state lottery funding provided 2.7% of state education budgets. Id.

States, of course, differ in the allocation of this burden. For example, during the 1995-96 academic year, New Hampshire contributed only 7% of the cost of providing public education; local school districts provided 90%. For the same
The sheer magnitude of and support for this enterprise is not surprising. After all, public education has historically been deemed a matter of paramount national importance. The United States Supreme Court in Brown v. Board of Education may have best captured this sentiment when it stated that "education is perhaps the most important function of state and local governments." The opinion goes on to say that:

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

The Brown opinion is both an eloquent expression of the importance of education and an unreserved reaffirmation of the

---

period Hawaii, a full funding state, provided 89.5% of this cost with local districts assuming only 2% of this expense. Kendra A. Hovey & Harold A. Hovey, CONGRESSIONAL QUARTERLY'S STATE FACT FINDER: RANKINGS ACROSS AMERICA 1998, 661 tbl. H-17 (1998) [hereinafter Hovey & Hovey]. Note that the allocation in New Hampshire will almost certainly change in the near term because reliance on local property taxes to fund public education was declared unconstitutional in Brigham v. State, 692 A.2d 384, 397 (Vt. 1997).

The federal government has played a significant role in funding certain programs in public education. However, because of relatively minor financial role overall in funding elementary and secondary education, the role of federal resources will not be considered in this paper.


6 Id. The recognition of education's centrality to the maintenance of American society is not new. Thomas Jefferson saw improving the education of common people as the most effective means to prevent tyranny and safeguard freedom. See Dumas Malone, JEFFERSON THE VIRGINIAN (1948).
state's commitment to providing all children equal educational opportunity. However, in retrospect the issue in Brown was deceptively simple. A unanimous court answered "no" to the question of whether an education provided in public schools segregated by race was "equal," and characterized such segregated education as "inherently unequal." In spite of this straightforward invalidation of overt racial barriers, however, demonstrable financial disparities persisted. Did Brown's "equality" language also extend to the allocation of financial resources? And if so, how can such a mandate be interpreted reasonably?

In Part I of the paper, I will briefly trace the development of the present system of financing public education and explore the continuing financial disparity in that system. In Part II, I will review various courts' reactions to the argument that disparate financial support unconstitutionally infringes upon the right to equal educational opportunity. I will highlight the dichotomy between the U. S. Supreme Court's refusal to extend the Fourteenth Amendment to this issue and the mixed results in the state courts. I will then argue that the current trend toward recasting the question in terms of adequacy rather than equality of funding helpfully informs debate and assists in the effort both to properly frame the issue and to craft an appropriately responsive remedy. Part III will trace state legislative success (or lack thereof) in attempts to resolve issues of disparate school finance. I will note current questions in the debates about the appropriate state role and level of financial involvement. Part IV will sketch the case for continuing the effort to resolve the question of finance in favor of adequacy of funding. I will briefly examine data that establish that identifiable subgroups of American students are being ill-served by the present education system. I will also explore the link between resource allocation and student performance. Finally, in Part V, I will identify demographic changes, in both the community served and the

---

4 Brown, 347 U.S. at 495.

6 Writing in 1969, Prof. Michelman made the following observation: "[T]he scandalously unequal distribution of school expenditures among local districts within the several states has been widely known and discussed for some years.... It is a condition which arises largely out of economic segregation - self-segregation by the rich often attended, it seems, by forced segregation of the poor." Frank I. Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 48 (1968) [hereinafter Michelman].
local community traditionally looked to for support, that raise the financing stakes even higher. I will argue that these recent demographic changes present additional and pressing financial challenges to the system of publicly supported education and justify acceleration of the shift to state financing of what has historically been viewed as a "local good." I will conclude by arguing that, within the existing framework, an increased financial role for the state is imperative in facilitating appropriate financial and political responses to the crisis in public education.

I. UNDERSTANDING THE GENESIS OF THE PROBLEM – THE HISTORIC ROLE OF THE AD VALOREM PROPERTY TAX

The concern for disparities in available financial resources flows logically and naturally from the realities of school finance. While the importance of education has been acknowledged at the highest levels of government, elementary and secondary education traditionally has been thought of as a "local good" and, as such, has been financed through the property tax on the local level.\(^9\) As a result, there were and continue to be quantifiable differences in the level of funding available to individual school districts.\(^10\)

---

\(^9\) Characterizing public education as a local good is surprising in light of the fact that education’s value is simultaneously intensely personal and broadly societally beneficial. There are obviously spillovers (positive externalities) resulting from this investment that redound far beyond the providing localities’ borders.

Government at the lowest level has historically had direct control over decisions affecting education. This control is seen to fulfill the parental need to control decisions integral to the children’s education as well as to assure continued public support of the schools. See George Strayer & Robert Haig, THE FINANCING OF EDUCATION IN THE STATE OF NEW YORK (Macmillan Co. 1923).

Political control carries with it the onus of local financial responsibility. Of necessity, this responsibility has been and continues to be primarily discharged through reliance on the property tax. During the 1920s, state governments shifted from property taxes to income and sales taxes as sources of revenue, leaving the property tax alone exclusively available to local governments. Thus, since that period the property tax has been the major revenue source for local government. See John F. Due & John L. Mikesell, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION (Urban Institute Press 2d ed. 1994) [hereinafter Due & Mikesell]; Dick Netzer, ECONOMICS OF THE PROPERTY TAX (1966).

\(^10\) Nationally, in 1995-96, average spending per pupil (with all resources considered) ranged from a high of $10,156 per pupil in Alaska to a low of $3,909
The genesis of what can be very substantial financial disparities can be shown through a simple example. Assume two school districts: A and B. Both rely on the property tax to fund the service—public education—provided. Assume further that levies by school districts within the state cannot exceed 1% of taxable properties' fair market value.\textsuperscript{11} School district A has in Utah. National Education Association, ESTIMATES OF SCHOOL STATISTICS, 48 tbl.10 (1997) [hereinafter National Education Association].

While state resources provide approximately 45% of public funding, supra note 1, the level of support varies from state to state. For example, spending for education constituted 42.7% of general spending during the 1994 fiscal year for the state of Utah placing it first among the fifty states on a percentage basis. See Hovey & Hovey, supra note 4, at 661 tbl. H-14. In contrast, spending for this purpose constituted 22% of general spending for the same period for the state of Hawaii ranking 50th (data for the District of Columbia was not included in this survey). \textit{Id}. In this case, although Hawaii ranks 50th out of the 50 states in spending for education, it is one of only a handful of states that bears total responsibility for public school funding. This level of support is, no doubt, attributable in part to Hawaii's relative position as a high-income state; as of fiscal year 1996, Hawaii ranked third in state government general revenue. \textit{Id}. at tbl. G-9.

That intrastate variations persist is demonstrated in stark terms by the record in \textit{Brigham}, 692 A.2d at 388. (In fiscal year 1995, the Town of Eden spent $2979 per student, compared with the Town of Winhall, which spent $7726. . . . In December 1994, the top 5% of school districts spent from $5812 to $7803 per student, while the bottom 5% spent from $2720 to $3608.)

\textsuperscript{11} The property tax has long been subject to vociferous criticism. The continued unhappiness with the tax has resulted in numerous reforms intended to blunt the tax's burden on taxpayers. Limitations have affected both the tax base (including such tactics as creating categories of exempt or partially-exempt property) as well as the tax rate itself (with tax rate limitation being a frequently employed device). In other instances, tax relief has been tailored for particular groups of taxpayers such as low-income property owners or farmers. Such relief has been the result of both legislative action and taxpayer initiative. Because of the reduced yield from the tax, local government's ability to provide public goods and services is obviously compromised. Education, as a major source of local expense, is at particular financial risk when such reforms are instituted. \textit{See generally} Henry J. Aaron, \textit{WHO PAYS THE PROPERTY TAX?: A NEW VIEW} (1975).

One dramatic example of "taxpayer self-help" is California's Proposition 13. This taxpayer initiative, a grass-roots response to a spiraling tax burden, amended the California constitution in 1975 to require the use of acquisition value as the base for property tax purposes instead of fair market value. \textit{See} Sheila M. Flaherty, Note, \textit{Property Tax Limitations: Do We Need a New Approach for the 1990s}, 45 TAX LAW. 827, 828 (1992).

It is also important to note that, even in the absence of any limitation, there could come a point when the taxpayer would simply be unable to pay the levy. This is, after all, a tax imposed on the estimated market value of property quite independently of individual current economic transactions. \textit{Id}.
within its jurisdiction aggregate taxable property having a fair market value of $50,000,000. If it uses its taxing power to the maximum extent permissible, it will raise $500,000 through this levy for use by its schools. School district B has aggregate taxable property of $100,000,000. It will be able to raise twice the school district A amount — or $1,000,000 — with the same tax effort.

Because of limitations imposed on the permissible tax rate and differences in the tax base, school district A would never be able to match the amount raised in school district B. Further, when this financial disadvantage characterized the financial situation of a school district with a high enrollment of less affluent minority children, the difference arguably became a concern of constitutional dimensions. In school district A, the monies raised are literally insufficient to provide an education equal to that received by the children enrolled in district B.

However, the question of financial equality presents a very difficult issue in no small part because it is, by its nature, imprecise. Assessing the constitutionality of de jure racial discrimination is quite easy: either it exists or it does not. The constitutional assessment of financial resources, however, cannot be resolved by utilizing a binary formulation. The level of funding by school districts within any given state very likely stretches along a continuum from relatively poor school districts on one end of this spectrum to relatively affluent ones at the other extreme. At what point does constitutionally invalid inequality begin? Within any school district there is likely to be a mix of more and less affluent households. What criteria is to be used to define affected classes? And how is the adversely affected "class" to be identified? Finally, resident preference has accounted to some degree for differing levels of financial support. To what extent should local preference be permitted to determine an acceptable level of funding? For that matter, financial disparity may not be an issue at all if there is no demonstrable harm to children enrolled in district schools. For example, the children may show no evidence of educational deprivation when

---

12 In 1986-87, there were 15,740 school districts nationally. By 1996, through consolidations, the total number of school districts had declined to 14,905. National Education Association, supra note 10, at 12.

In 1992, the number of independent school districts by state ranged from 3 in Rhode Island to 1100 in Texas. U.S. Bureau of the Census, 1992 CENSUS OF GOVERNMENTS: GOVERNMENT ORGANIZATION tbl.3 (1994). This number does not include "dependent" school systems through which states, cities or counties may provide public education.
relevant skills are measured through validated instruments of assessment. Consider the converse: spending per student is quantitatively equal across the state but statistically significant disparities in interdistrict educational attainment exist. Is there financial inequality in this instance?

The fact is that there has been neither consensus on how the issue of allocation of financial resources should be framed nor a common response to the issue when courts and legislatures have attempted to grapple with it. Moreover, even delineating the context for the issue has proven to be an illusive task. As a result, it has been impossible to develop an accord either nationally or on a state-by-state basis on how to achieve "equal educational opportunity." 

II. COMPARISON OF STATE COURTS' RESPONSES TO CHALLENGES TO PROPERTY TAX RELIANCE AND THE RESULTANT FINANCIAL DISPARITIES

The legal sojourn of the shift in emphasis from successfully challenging race-based discrimination to ultimate failure in challenging wealth-based discrimination under the Fourteenth Amendment has been well documented. The strategic attack on financial inequalities that seemed to evolve logically in light of persistent demonstrable intrastate school district financial disparities ran afoul of the Supreme Court's refusal either to find unconstitutional wealth-based discrimination or to recognize the violation of a constitutional right to a publicly financed elementary and secondary education. What had been a federally-

---


San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17-18, 93 S. Ct. 1278, 1284 (1973) ("We must decide whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitutions . . . .

HeinOnline -- 14 J.L. & Pol. 489 1998
based challenge to a system of financing state public school education that shared a common characteristic – reliance on the property tax – fragmented.\textsuperscript{16} Thus, after \textit{Rodriguez}, challenges to financial inequalities, when they were undertaken, were grounded in the language of individual state constitutions, the vast majority of which spoke of the states’ commitment to public education in some manner.\textsuperscript{17} Unfortunately, while individual state commitment to public education was practically universally embraced, there was no common constitutional formulation.

A brief comparative survey of the treatment of this issue in state courts demonstrates beyond question the extent to which this lack of common language appears to have dogged efforts to establish a constitutional right on a state by state basis.\textsuperscript{18} Most state constitutions contain both an equal protection clause and an education clause in some form. However, the comparative language in education provisions varies in what can appear to be

\begin{quote}
\text{\textquote{W}e find neither the suspect-classification nor the fundamental-interest analysis persuasive\textquote{.}}
\end{quote}

\textsuperscript{16} One commentator aptly observed that the effect of this decentralization was a loss of efficiency. \textit{See} Heise, \textit{supra} note 14, at 1157.

\textsuperscript{17} When \textit{Rodriguez} was litigated, 48 of the 50 state constitutions contained such language. The exceptions were Mississippi and South Carolina. 411 U.S. at 53 n.69 (Marshall, J., dissenting). As of this date, all 50 state constitutions once again speak to the state responsibility for education in some manner. \textit{See} Enrich, \textit{supra} note 13, at 105.


\textit{Serrano v. Priest}, 96 Cal. Rptr. 601, 625 (Sup. Ct. 1971), one of the earliest cases on point, is not a clear fit in this set of cases since it was partially grounded in the Fourteenth Amendment. While the suit alleged violations of the California state constitution, the court rejected the state claim treating the federal constitutional language as dispositive in finding a constitutional violation. Nevertheless, it is an appropriate inclusion in this paper in light of recent scholarship suggesting that the \textit{Serrano} decision contributed directly to the taxpayer disaffection that resulted in the passage of California’s Proposition 13. \textit{See} discussion \textit{infra} note 111.
significant ways. As a result, state court opinions differ dramatically both in the response to the basic question — "is there a state guarantee of an equal education" — and, assuming an affirmative response to that question, in crafting an appropriate remedy where such a right has been found and a violation of that right is deemed to have taken place.

This lack of consensus has been the subject of extensive commentary by scholars, many of whom confess themselves no more able to identify common themes than the several courts have been. Perhaps as a result, much of this literature has focused first upon pigeonholing differences and then upon predicting judicial outcomes on the basis of these differing constitutional formulations. However, analysis turning solely on phraseology is unconvincing because differences in constitutional language are often driven by happenstance. Indeed, courts in different states have reached opposite decisions by construing language that appears to be identical. Especially in light of that fact,

---

19 See, e.g., William E. Thro, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation, 75 VA. L. REV. 1639, 1661-70 (1989) [hereinafter Thro]. (Divides state education provisions into four categories: minimal educational obligation (e.g., system of free public schools), minimum standard of quality (e.g., "thorough and efficient" system of education), language importing a higher quality standard ("stronger and more specific education mandate"), and education as important right ("fundamental," "primary," "paramount"). See also sources cited in Enrich, supra note 13, at 106 n.18.

20 Id.

21 Histories of state constitutions do not reflect universal, careful, deliberate consideration of language pertaining to the right to an education on a systematic basis. See Thro, supra note 19, at 1658-60.

A recent exception to this general observation may be drawn from the experience of South Carolina and Mississippi during the 1950s. After the U. S. Supreme Court decision in Brown outlawing de jure segregation, these two states deliberated over such language primarily to avoid the school desegregation mandated by the U. S. Supreme Court in that decision. As Justice Marshall noted in Rodriguez, "South Carolina repealed its constitutional provision, and Mississippi made its constitutional provision discretionary with the state legislature." 411 U.S. at 53 n.69 (Marshall, J., dissenting).

22 See, for example, the following four decisions. In each instance the highest state court considered the effect of language speaking to a "thorough and efficient" school system: (1) Hornbeck v. Somerset County Bd. of Ed., 458 A.2d 758, 786-89 (Md. 1983) (school financing system upheld against arguments grounded in part on state's "thorough and efficient" education clause); (2) Robinson v. Cahill, 303 A.2d 273, 294-95 (N.J. 1973) ("Robinson I") (school finance system violates "thorough and efficient" education clause (3) DeRolph, 677 N.E.2d at 740 (Ohio's
limiting the right to an education to mere basic access as a matter of constitutional interpretation cannot easily be defended. 23

Is the nature of states' responsibility, indeed, so widely variable or is there a common obligation obscured by language-based variations in framing the issue? This is a critical question, for if we are to make national progress toward providing across-the-board access to meaningful educational opportunity, that determination must be free of constraints and conflicting

school system violates Ohio constitution's mandate of a "thorough and efficient school system); (4) Danson v. Casey, 399 A.2d 360, 366-67 (Pa. 1979) (school financing system upheld against arguments grounded in part on state's "thorough and efficient" education clause).

23 A court's interpretation is, of course, one way of giving meaning to constitutional language. That a given interpretation may change as deemed appropriate by a court is reflected by recent opinions of a number of the highest state courts grappling with this issue. See supra notes 18, 22. However, as has also been shown, a number of courts have found that the absence of explicit constitutional language precludes finding a right greater than minimal access. Id. In the latter case, changing the nature of the state commitment to education ultimately would be dependent upon a fundamental change in the underlying constitutional language itself, requiring an amendment quite likely difficult to accomplish.

In fact, constitutional amendment is a deliberately difficult process. Amendment of a state constitution can be accomplished in three ways: (1) legislative action by a two-thirds majority of both houses followed by majority voter approval through referendum, (2) recommendations from Constitutional Commissions or conventions followed by majority voter approval through referendum, or (3) citizen initiative providing for ballot placement through petition. See Tip H. Allen, Jr. & Coleman B. Ransome, Jr., CONSTITUTIONAL REVISION IN THEORY AND PRACTICE 4-20 (1962); Michel J. Beville, Jr. & Lance G. Beshore, COLORADO, CONSTITUTIONALISM AND CONTEMPORARY METHODS OF STATE CONSTITUTIONAL REVISION (1978). In contrast, in most instances statutes may be modified, amended or repealed through simple majority vote of the appropriate legislative bodies.

The effect of the difference is obvious. Constitutional language tends to protect interests entrenched when the language in question was formulated. Even where such protection was not explicitly intended (as is arguably the case with education), interpreting the language in the context of its era of enactment may impose constraints not actually considered. Legislative bodies, on the other hand, may respond with much more immediacy to current issues. If greater flexibility in responding to the present-day demands of providing adequate education is deemed, as it should, to be of paramount importance, the preferred construct would (1) have constitutional language understood to impose that responsibility for adequacy upon the state; and (2) recognize legislative prerogative to implement enactments appropriate to that end. My argument is that this construct presently exists in all states without the necessity for constitutional amendment.
opinions flowing solely from incidentally differing formulations. Education is too important an undertaking to have its provision held captive to language not intended to undermine its ultimate objective – the maintenance of a literate populace able to participate effectively in American life.24

That “access to education” has failed to produce and maintain a literate populace is undeniable.25 This dissonance, more than any other factor, best explains the shift from equality to adequacy recently embraced by several courts26 and espoused by a number of commentators as the desirable and appropriate norm in school funding.27 This shift in emphasis from “equality” to “adequacy”

24 In writing for the majority in Rodriguez, Justice Powell noted “complete agreement” with the observation of the “grave significance of education both to the individual and to society.” 411 U.S. at 30. While recognizing the power of the argument that there exists a “nexus between speech and education,” Justice Powell rejected the argument that this nexus made education an implicit constitutional right. Id. at 35.

25 See discussion infra note 99.

26 Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989), began the adequacy wave in earnest. That case required that Kentucky reestablish its school system. Id. at 212. The result was an increased allocation of resources to schools totaling over one billion dollars and an increase in school districts’ revenues by 8-25%. See Kern Alexander, The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case, 28 Harv. J. on Legis. 341, 343 (1991). For more recent decisions holding an adequacy guarantee to exist, see, e.g., DeRolph, 677 N.E.2d at 746 (holding that the state constitutional “thorough and efficient” requirement does not require that the financing system provide equal educational opportunities for all); Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997) (holding that a “sound basic education,” not equal educational opportunity, is guaranteed by the North Carolina constitution. This equates to a “qualitatively adequate education”); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1360 (N.H. 1997) (holding that the state did not fulfill its constitutional duty to provide adequate education due to insufficient funding); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 665 (N.Y. 1995) (acknowledging that the education clause of the New York constitution establishes a constitutional floor with respect to educational adequacy); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1185 (Kan. 1994) (interpreting state constitution’s requirement of a “suitable provision” for education to be similar to “adequacy” requirements in other states).

There have, however, also been a number of recent cases holding that no adequacy guarantee is judicially enforceable. See, e.g., Coalition for Adequacy and Fairness in Sch. Funding v. Chiles, 680 So.2d 400, 408 (Fla. 1996); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1189 (Ill. 1996); City of Pawtucket v. Sundlun, 662 A.2d 40, 55-62 (R.I. 1995).

merits careful attention. "Equality" has the aura of precision and quantifiability. As such, even in a financial context, equality appears to lend itself to the same binary inquiry as that employed for testing the constitutionality of de jure segregation: either the schools are "equal" – i.e., desegregated – or they are not. However, efforts to use this kind of precision in the financial sphere without a clear sense of the underlying objective may cause the inquirer to miss the mark. Resulting irreconcilable state decisions are likely to be the norm, as indeed they have been. Thus, a court could conclude that financial equality is not compelled and deny any relief at all. Alternatively, equalization of financing could be decreed with no clear means of achieving compliance with that judicial mandate. Another possibility is the equalization of per-pupil expenditures, or facilities. Yet another alternative could be to mandate outcome comparisons. In any of these cases, the mandate could be issued in the absence


Prof. Enrich makes the point as follows: "The same arithmetical calculations that, in the apportionment cases, showed the dilution of voting power due to differences in district population could be deployed in the education funding context to show the dilution of education spending power due to differences in district property wealth." Enrich, supra note 13, at 120. In addition, he states that "equality offers the promise of a clear standard, measurable by straightforward, quantitative comparisons." Id. at 143.

See cases cited supra note 18 (noting states in which the current method of funding education has survived constitutional challenges).


See, e.g., Campbell County Sch. Dist. v. State, 907 P.2d 1258, 1279 (Wyo. 1995) (holding that "educational goods and services available . . . must be nearly identical").

of evidence relating to comparative levels of educational attainment and without any clear means of assessing compliance. In short, as long as "equality" of inputs per se is the conceptual underpinning for school finance arguments, the universal nature of the underlying right to an adequate education could remain unrecognized. Correspondingly, the risk of unresponsive remedy continues to loom large.

On the other hand, the shift to adequacy as a conceptual underpinning avoids the seductive trap of quantified precision. Adequacy arguments are concerned with the quality of services delivered to children rather than differences in resources. As has been noted, there are at least four benefits of an adequacy approach: (1) the approach is less complex than an equity approach; (2) the threat to local control is less immediate; (3) the approach poses fewer problems for urban school districts that are already spending above their state’s average but face difficult challenges nonetheless; and finally, (4) adequacy coheres with the standards movement.

Further, a compelling argument can be made that the adequacy-based formulation better accords with the popular view of the right to an education. As a body politic, we would respond with something close to unanimity if asked whether illiteracy were acceptable in this country. The answer would be a resounding "no." In fact, illiteracy – the inability to read or write – has now been largely eradicated from the American landscape.

---

54 See Enrich, supra note 13, at 109 ("Adequacy arguments, instead of asking comparative questions about the differences in the resources or opportunities available to children in different districts, look directly at the quality of the education services delivered to children in disadvantaged districts and ask evaluative questions about whether those services are sufficient to satisfy the state’s constitutional obligations."); see also Heise, supra note 14, at 1153.

55 See Heise, supra note 14, at 1174-75 (commenting that constitutional language is more accessible and problems of proof less daunting).

56 See id. (speaking primarily of loss of financial control as perceived loss of political control).

57 Id.

58 Id. See also Molly McClusic, The Use of Education Clauses in School Finance Reform Litigation, 38 Harv. J. on Legis. 507, 526-333 (1991) (highlighting roughly the same points as advantages of standards claims though in the context of a minimum standards argument rather than an adequacy argument).

59 Earlier surveys of illiteracy examining basic levels of reading and writing show that by 1979, less than 1 percent of persons 14 years and over could be
Indeed, none of the cases attacking funding disparities have alleged that children are in danger of illiteracy, per se. "Access to education"\textsuperscript{40} has been an easy threshold for school districts to meet.\textsuperscript{41}

Focusing on illiteracy as mere access to education arguably is not only simplistic, it is misleading. Minimal education – i.e., mere access – passes constitutional muster as enough to combat illiteracy. However, minimal education is not enough in today’s world. Instead, contemporary societal effort must assure all children of an adequate education; the effort must be to provide the resources necessary to achieve functional literacy.\textsuperscript{42} Focusing on literacy much more appropriately links functional literacy – "the issue of whether a person's educational level is sufficient to function in a modern society" – to educational adequacy and compels an examination of the extent to which this has been attained.\textsuperscript{43} This is a determination that should be made on the basis of articulated standards intended to measure the efficacy of the educational effort.

\textsuperscript{40} The Court observed in Rodriguez that the "lack of personal resources has not occasioned an absolute deprivation of the desired benefit. . . . [R]ather [the argument] is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth." 411 U.S. at 23 (emphasis added). The opinion continues by saying that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." Id. at 24

\textsuperscript{41} A notable exception to this general observation is the period of "massive resistance" to integration when public schools in several Southern states (including Virginia) were closed in order to avoid conforming with the Supreme Court imperative. This also ignores, for the moment, the "mainstreaming" of differently-abled children and those of other language backgrounds for whom public school attendance may have been effectively foreclosed because of physical or language barriers.

\textsuperscript{42} See, e.g., Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979) (holding that the West Virginia Constitution required a school system that "develops, as best the state of education expertise allows, the minds, bodies, and social morality of its charges to prepare them for useful and happy occupations, recreation, and citizenship"). See also Rose, 790 S.W.2d at 212; McDuffy v. Secretary of Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993).

The reliance on standards as a measure for performance is a 
leap not yet routinely taken by litigators. "Inequality" has been 
asserted on the basis of differences in "inputs," such as bricks, 
mortar and dollars, rather than "outputs." Increasingly, this 
question is being couched in terms of adequacy, which 
accomplishes consideration of varying levels of educational need. 
Another iteration is appropriate: the adequate educational 
attainment of district students.\textsuperscript{44} To what extent does equality of 
inputs relate to an adequate education, a process that should 
culminate in the attainment of functional literacy? This is a 
critical question for, in the words of one commentator, "courts 
repeatedly note the absence of any claims relating to the adequacy 
of the available educational services (emphasis added)."\textsuperscript{45} With 
outcome-focused "adequacy" linked to functional literacy as the 
intellectual underpinning for responsibility, whether the state 
duty is articulated as being to provide "a system of common 
schools" or to provide an education that is "thorough and 
efficient," "equal," or "adequate," the common underlying 
objective will be understood and the school district's performance 
more readily assessed.\textsuperscript{46}

Today's society demands a functionally literate citizenry. A 
state that fails to provide to all of its school children through its 
several school districts an education meeting this standard 
operates schools that contravene its own constitutional 
impervious. That state's children are being denied the 
constitutional right to an adequate publicly-supported education 
regardless of the way in which the right itself is phrased. Crafting

\textsuperscript{44} See generally Underwood, supra note 27.

\textsuperscript{45} Enrich, supra note 13, at 140 (emphasis added). See also Rodriguez, 411 U.S. 
at 24 ("The State [of Texas] repeatedly asserted in its briefs in this Court that it 
has [through its Minimum Foundation Program] fulfilled this desire [for an 
adequate program of education] and that it now assures 'every child in every 
school district an adequate education.' No proof was offered at trial persuasively 
discrediting or refuting the State's assertion." (emphasis added). At that time, Texas 
provided minimum Foundation grants that were to be supplemented through 
local school districts' ad valorem property tax. Because of differences in the 
respective tax bases, spending disparities between school districts in the San 
Antonio area ranged upwards of three to one. Id. at 44-55.

\textsuperscript{46} See generally Martha I. Morgan, et al., Establishing Education Program 
an integrated approach linking input and output standards from both state and 
national sources in the effort to establish constitutional inadequacy of a public 
school system).
the appropriate remedy for that denial becomes a more definable goal when the objective is understood and a standard of measurement is available.

III. THE STATE LEGISLATIVE ROLE

Local school districts have not had to bear sole responsibility for funding public education since prior to the turn of the century. State-funded aid to education has long been provided by a number of states.47 The objective of these programs has varied in accordance with their underlying philosophies. Generally, they have fallen into three categories. The first category includes programs predicated upon a "minimum provision" philosophy. Here, the objective has been to provide a floor of support below which no child would be permitted to fall rather than to attempt to cap spending by the individual school districts or to achieve equality through redistribution of locally-generated revenues.48 The second category includes approaches taking an "equal access" philosophy. Here, the emphasis has been upon providing equal access to money for education with control over spending remaining in the school district.49 Finally, the third category includes programs predicated on equal total provision philosophy implicating full-state funding.50

---

47 Professor Enrich notes that "[b]y the late 1960s, many states, including the preponderance of those in which the early lawsuits were brought, had adopted some variant of a foundation approach to the states' participation in school funding." Enrich, supra note 13, at 126.

48 See James W. Guthrie, et al., SCHOOL FINANCE AND EDUCATION POLICY: ENHANCING EDUCATIONAL EFFICIENCY, EQUALITY, AND CHOICE 193-97 (2d ed. 1988) [hereinafter Guthrie]. Two observations: the amount of assistance afforded may prove insufficient for the poorest districts because the program's predicate is "minimal education." Politically, however, this approach does not offend wealthier school districts by "recapturing" excess tax monies. Id. See also Enrich, supra note 13, at 145.

49 Funding assistance provided by plans falling into this category are of three types: percentage equalizing (equalizing expenditures per student on the basis of some predetermined ratio), power equalizing (equalizing the ability of local districts to support schools) and guarantee of a tax base (each district guaranteed the same assessed valuation per student). In fact, in order to provide all districts with some assistance (as well as to avoid the Robin Hood syndrome), the trend in states using this approach has been to set some minimum figure per student or to use a minimum ratio for support. See Guthrie, supra note 48, at 137-41.

50 Two states now have full-state funding: Hawaii and Florida. Id. at 141-42.
Establishment and maintenance of any of these programs seems to be an implicit acceptance of state responsibility to provide no less than a minimal education. And at this point in time, all fifty states have assumed some level of financial responsibility for public education.\textsuperscript{51} However, as discussed below, such programs may do no more than assure minimal access, and that is the crux of the problem.

To what extent has this infusion of additional resources achieved "equality"? Four possible ways of thinking about equality in this context have been noted: (1) equality in property wealth;\textsuperscript{52} (2) equality in actual funding;\textsuperscript{53} (3) equality in caliber of educational services available;\textsuperscript{54} and (4) equality in outcomes.\textsuperscript{55} With the exception of the handful of states that have experimented with "power-equalizing,"\textsuperscript{56} a cursory review of available data evidences general continuing disparity in comparative school district financial resources.\textsuperscript{57} Importantly, these disparities are not incident to adequacy-based spending. Rather, assuming that adequacy is the norm to be achieved, efforts to date are better characterized as sub-optimal responses to

\textsuperscript{51} Of those states not providing full funding for education, percentages of state support range from 7\% (New Hampshire) to 74.3\% (New Mexico). \textit{See} Hovey and Hovey, \textit{supra} note 4, at H-17.

\textsuperscript{52} This turns on disparities in the capacity to fund education. The key factor here is the difference between the abilities of school districts to generate tax revenues. This disparity is remedied by equalizing tax capacity. \textit{See} Enrich, \textit{supra} note 13, at 145.

\textsuperscript{53} The focus here is on comparative differences in interdistrict funding. The response to this question would require equalizing per-pupil expenditures. \textit{Id.} at 147-48.

\textsuperscript{54} This entails a comparison of school facilities, class sizes and teacher qualification, among other factors, in order to get a sense of the actual caliber of available educational service. \textit{Id.} at 149.

\textsuperscript{55} Here, outcomes (comparative levels of educational attainment) are to be analyzed. \textit{Id.} at 151.

\textsuperscript{56} Through this approach, the state seeks to mitigate disparities in the ability to generate revenue through redistribution. \textit{See} John Coons, et al., \textit{PRIVATE WEALTH AND PUBLIC EDUCATION} 201-242 (Harvard University Press 1970). \textit{See also} Enrich, \textit{supra} note 13, at 111. This approach has been extensively debated in literature and has encountered predictable difficulty when a state has sought to redistribute "excess" property tax collections from comparatively property-rich districts to property-poor districts. \textit{See} discussion \textit{infra} notes 109-116.

\textsuperscript{57} \textit{See} discussion \textit{supra} note 10.
historically inadequate financing. In other words, the outcome in fact has served minimal access and nothing more.\textsuperscript{58} Direct measurement of the actual caliber of available educational services has not been uniformly attempted. This critical measurement might be taken indirectly by comparatively assessing student competency. Whenever that approach has been taken, it has quickly become clear that outcomes have not been "equalized."\textsuperscript{59} This ancillary consideration is, in fact, central to the quest for adequacy. Significant across-the-board improvements in basic competency have not been achieved.

Given natural individual differences in innate ability, "outcomes" can never be "equal" (in the sense of parity in the quantum of accumulated individual skills). However, as I shall establish in the next part of this discussion, currently available data very clearly evidence dramatic differences in comparative levels of achievement of identifiable subgroups of children enrolled in the nation's public schools. This is quite distinct from individual differences and intimates the existence of some larger systemic variable. These same studies report successes in combating these comparative disparities in student educational achievement and suggest that the financial resources needed to redress those deficiencies also differ quite dramatically. The need – indeed, the constitutionally recognized responsibility to provide a "thorough," "efficient," or "adequate" education – to effectively address that reality may demand that adequate resources be something other than equal resources. Whether this would mean more or less total spending is, for the moment, unimportant. It is

\textsuperscript{58} Professor Michelman made the following observation: "[T]he demands of minimum protection can, in principle, be satisfied by a state-aid system of 'flat' or 'foundation' grants which assure to each district an acceptable minimum resource per pupil at a tolerable sacrifice level, but leave each district free to repair to its own unequalized tax base for some additional level of funding as long as the competitive-inequality gap does not grow too large. See Michelman, supra note 8, at 57. He continued by saying that the formulation of minimal protection was dependent upon a "justiciable" standard for acceptable inequalities. Id. "Adequacy" underpinned by a requirement for assessment can supply that standard both to limit competitive-inequality gaps and to provide an acceptable standard for minimal responsibility.

\textsuperscript{59} See discussion infra note 65.
important, however, to recognize that "equality" would not necessarily provide an "adequate" education in this global sense.60

There is, however, an encouraging aspect to this picture: any of these legislative approaches can be modified to serve adequacy objectives. This requires three steps: (1) articulating standards for assessment; (2) determining costs of attaining those educational objectives bearing in mind the differential needs of identifiable student population subgroups; and (3) allocating the financial burden of defraying those costs in light of local and state revenue capacity. Legislative bodies have deliberated and acted extensively on the third prong noted above and are increasingly sophisticated in dealing with the second prong. The formulation of standards for assessment remains unexplored, relatively speaking, but is clearly emerging as the next major thrust.61

"Adequacy" as a paradigm eases the legislative task. Adequacy linked to functional literacy would no longer cause indeterminate amounts of money to be thrown at the illusive target called equality. Formulation of standards for measuring performance provides both a mode of measurement and a basis for assessment. The availability of data relating to comparative performances of identifiable subgroups of American children and the emergence of principles for performance being increasingly utilized by state legislatures provide standards against which the efficacy of education provided by school districts can be assessed.

So in the almost 50 years since Brown, the issue of equality in education has become much more complex. Overt racial barriers have disappeared but equal education has certainly not been achieved – a reality demonstrated convincingly when comparative levels of student achievement are used as the measure. Financial considerations have become entangled with persistent issues of racial discrimination and emerging concerns regarding class discrimination. All too frequently, class-driven needs are characterized as racial in origin because of the disproportionate

---

60 Some commentators, however, have made quite specific recommendations for remedy. See, e.g., Accelerated Education, supra note 27; New Answers, supra note 27.

61 See Heise, supra note 14, at 1175 (recognizing that much of the impetus for this effort, which addresses both "outcome" standards and "opportunities to learn," results from the 1983 publication of the Nation at Risk report).
minority representation below the poverty line. Only by disentangling these issues and acknowledging the additional demands placed on public education by special needs, including class-driven needs, can the matter of adequate finance be meaningfully addressed.

IV. THE STAKES ARE HIGH AND MERIT CONTINUED EFFORT

As has been noted, on the most superficial level, it might be argued that significant strides have been made toward "equal educational opportunity" for all. De jure segregation in education was declared unconstitutional in Brown and that remains extant public policy. And the continuously increasing level of fiscal and human investment in this enterprise could be taken as presumptive evidence of ongoing effort. The fact is, however, that a substantial percentage of schoolchildren continue to attend schools segregated de facto by race and significant gaps in the comparative educational achievement of identifiable subgroups continue to exist. These facts in tandem suggest that, while the problem is real, the answer does not lie in increased funding. That point has been a matter of sometimes strident debate.

Two recent reports are instructive. American students tested in a recent IEA International Literacy study performed as well as or better than their counterparts in the majority of other

---

62 In 1970, 9.9% of white persons in the United States were below the poverty level. Comparatively, 33.5% of Black persons were below the poverty level. Figures for Hispanic persons are not available for 1970, but in 1975, 23% of Hispanic persons were below the poverty level. In 1995, the same comparative relationship holds. For white persons, 11.2% are below the poverty level. This contrasts with 29.3% for Black persons and 30.3% for Hispanic persons. See Statistical Abstract of the United States 1997, NATIONAL DATA BOOK (117th ed. Oct. 1997) (Table 736). Percentages for children are even more stark. In 1980 (the first year for which data for Hispanic children is available), 13.4% of white children were below the poverty line. This is in contrast to 42.1% of Black children and 33.0% for Hispanic children. In 1995, 15.5% of white children were below the poverty line as compared to 41.5% of Black children and 39.3% of Hispanic children. Id. (Table 737).

Financing Adequate Educational Opportunity

1998] countries participating in the study. As that report notes, American students are well-prepared overall to lead the world into the next millennium. However, it was also evident that American students differed in their ability to understand written text well and that the performance of student groups defined along racial and ethnic lines differed substantially from the performances of their cohorts. A separate study examining Office of Education statistics found that for Americans from 21-25 years old, the average prose, document, and quantitative proficiencies were slightly lower in 1992 than they were in 1985. This decline in performance has been attributed in large part to demographic changes in the population and, to a slightly lesser extent, to the continued comparatively lower performance of a disproportionate number of Black individuals. In both cases, the performances of these subgroups was below (sometimes substantially) that of other students.

Taken together, these data show that American schools, while functioning on a comparatively high level from an international perspective, are consistently proving less effective intranationally for statistically significant numbers of students. Because data is increasingly available on a district-by-district basis, persistent patterns of underachievement can be established. Those districts that are comparatively under-funded are those in which patterns of underachievement are most evident. All too frequently those districts also enroll significant percentages of poor or minority children. Further, the performance trend has persisted over

---

64 This 1991 assessment measured the reading achievement of 4th and 9th grade students from 32 countries around the world. Three areas of literacy skill were tested: narrative prose, expository prose and documents. Among the 32 participating countries, Americans in both the 4th grade and 9th grades placed second. In both cases, the American students performed well above the average for children from the countries in the organization for Economic Cooperation and Development. See generally WE CARE 1996 Legislative Conference, Reading Literacy in the United States <http://www.aasa.org/Conferences/Wecare/wc8.htm>.


67 See id. at 5-6. The 1992 group reflected a significant increase in the percentages of Hispanic immigrants for whom English is a second language. See id. at 5.
roughly the last decade and a half. The report observes, "[f]indings that show within-nation differences between student groups raise questions." These are questions of enormous import, and these differences are increasingly a societal problem. Differing levels of educational accomplishment impede the ability of individuals from identifiable subgroups to participate in a meaningful way in the business of everyday life.

What factors might account for these differences? Reading Literacy, in examining the variations in performance of 4th graders, organizes its discussion around two basic sets of influences: (1) family influences on students; and (2) schools and communities as they influence both teachers and students. Family influences embrace a range of considerations including parents' education and socio-economic statuses, racial/ethnic status, and the configuration of the family. While a discussion of sociological factors is beyond the scope of this paper, it is important to note that the report rejects inherent racial or ethnic origin as an explanation for differences in performance. In the words of the report, "[r]acial/ethnic differences are large, but much of it is due to racial/ethnic differences in education and wealth (emphasis added)." In any event, these are factors that will at best be influenced only indirectly by public school financing.

Community and school influences also embrace a number of considerations. These include parent involvement with schools, instructional time and class size. All of these factors appeared to bear some correlation to reading comprehension. In the context of this discussion, examining the results of a comparative study of narrative comprehension is instructive. Narrative comprehension was higher in those schools offering more

---

66 See NCES, supra note 65, at 38.
69 Id. at 39.
70 Id. at 39-46.
71 Id. at 46. The differences in levels of achievement show up most strikingly with Black and Hispanic children but that pattern is not unique to these groups. Rather, the pattern emerges most dramatically because of the disproportionate number of poor Black and Hispanic children. To the extent that family education and wealth influence student performance, poorer children in general will suffer. Id. at 46-49.
72 Id.
instructional time on a weekly basis, and students in relatively smaller classes (16-20 students) appeared to have consistently higher performances within the group of students tested. Further, the study suggests that these successes can be realized irrespective of students' racial or ethnic differences in education or wealth. Indeed, lower-achieving students made comparatively greater gains (i.e., closed the gap to some extent) in this more intensive setting.

These conclusions are consistent with the emerging research consensus that education influences intelligence (and hence achievement). Sophisticated analyses find that education has a strong positive effect on cognitive ability in both whites and Blacks. This research directly refutes earlier research attributing racial differences in performance on intelligence tests to genetic differences.

These findings are significant for this is evidence that schools can "do something" about subgroup differences in functional literacy. Of critical importance in this discussion is that the broad replication of these documented successes has considerable financial implications. Personnel costs constitute approximately one-half of the costs of providing education and the kind of effort described is personnel-intensive. The questions "who pays," "how," and "who benefits" are all part of the hotly-debated, intricately entangled questions of educational finance.

Finally, I must acknowledge the troublesome questions raised by data that fail to establish a link between comparatively greater spending in some urban school districts with corresponding gains in student competency. However, several studies suggest

---

53 Id. at 48.
54 Id. at 49.
56 See NCES, The Digest of Education Statistics 1996, tbl. 87: Public elementary and secondary students, schools, pupil-teacher ratios, and finances, by type of locale: 1993. These data show that expenditures for instruction comprise approximately 50% of total expenditures for all schools. ("Instruction" includes teacher salaries, benefits, supplies, and purchased instructional services.) This ratio holds approximately true whether the school is characterized as large central city (60.3%), mid-size central city (57.1%), urban fringe of a large city (55.2%) or urban fringe of a mid-size city (55%). Id.
that this apparent increased level of spending is driven to significant degrees by cost differentials. Using the concept of “buying power,” recent analyses suggest that districts with the highest percentages of minority students continue to spend the least notwithstanding differentials in absolute dollar amounts apparently favoring such districts.

There are no easy answers to the questions raised by these discrepancies in performance. The drive toward adequacy is still in its infancy, however. I suspect that difficulties that have been decades in the making are unlikely to be reversed by a relatively few years of effort. Necessary experimentation is still in the early stages.

[hereinafter Saffell]. New Jersey now spends more money per pupil than any other state, but scores on tests such as the SAT and ACT remain below the national average. Id. at 205. In fact, the national average score in the United States on the Scholastic Aptitude Test for 1997 was 1016 with 42% of high school graduates tested. 69% of New Jersey graduates were tested; the average score was 1005. The performance of New Jersey students ranked 11th of the 25 states for which scores were available. See Hovey and Hovey, supra note 4, at tbl. H-4. However, having noted these performance data I must also note that this is an improper use for such data. These tests are not now, nor were they ever intended to be, universal tests of basic assessment. There is a vast body of literature on this subject, an examination of which is beyond the scope of this paper. However, the inappropriate nature of this use is widely acknowledged.

78 “Buying power,” a new concept currently under development by the education research community, adjusts actual dollars to reflect differences in the relative costs of providing educational services. This adjustment accounts for differences in the cost of living and educational needs of students. See, e.g., NCES 97-916, Do Rich and Poor Districts Spend Alike (December 1996); NCES 97-917, Do Districts Enrolling High Percentages of Minority Students Spend Less (December 1996).

79 Id.

80 See, e.g., Maria Newman, Court-Ordered Windfall Sends Schools on a Shopping Spree, N.Y. TIMES, Mar. 29, 1998, at H2 (describing the reaction of one of New Jersey’s poorest school districts, Perth Amboy, to receipt of $10.9 million dollars to “bring their spending up to par with the wealthiest districts”). When asked how long would it take to show marked improvement in academic achievement, the Executive Director of the council of the Great City Schools in Washington replied, “To me, it’s not a two-to-three year effort. It’s got to be over a longer period of time, closer to five-to-ten years.” Id. The article also raised questions regarding the extent to which the additional funds were linked to higher standards.
Courts and legislatures struggle to address these challenges in an environment that is itself constantly changing. These new demands and concerns are financial, demographic and political in nature.

In a world of school finance committed to a pursuit of equality, equality has never had a per capita predicate. That is, the goal has not been to achieve an equal expenditure per child throughout the several school districts. Instead, a number of factors have historically been taken into account. For example, school location, educational level, and educational objective are all factors that have played a role in varying degrees in state efforts to set appropriate levels of support.81 Recent significant changes in patterns of public school enrollments will place new and potentially more expensive demands on schools' already strained financial resources. Further, because these demands present different kinds of pedagogical challenges, they further expose the flaw in attempting to use absolute equality as the norm in determining appropriate levels of funding.

The effort to determine appropriate funding in light of differential educational need is becoming ever more complex. The data reflect increasing national cultural diversity.82 This will necessitate training in English for large numbers of children either through classes taught in a child's native language or

81 See, e.g., Guthrie, supra note 48; Heise, supra note 14, at 1168-69.

82 Condition of Education 1997 reports that in the 1993-94 school year, 46% of all public schools had limited-English proficient (LEP) students. The number of such students has increased from 1.25 million in 1979 to 2.44 million in 1995. See U.S. Department of Education, NCES, Schools and Staffing Survey, 1987-88, 1990-91 and 1993-94, at 152 (1997). The impact of this influx was more pronounced in public schools located in central cities and urban fringe/large towns. 75% or more of the public schools in five states had LEP students (Arizona, California, Hawaii, New Mexico and Texas). To improve the English proficiency of these children, public schools provide either bilingual instruction or intensive training in English as a Second Language (ESL). In 1987-88, 20% of public schools provided bilingual programs, a percentage that declined to 17.8% by 1993-94. However, this decline resulted from a shift in emphasis rather than from phase-out of such programs; the percentage of ESL programs increased from 34.4% to 42.7% for the same period. Overall, the percentage of schools offering either bilingual or ESL programs increased from 39.6% to 44.3% during this period. Id.
through increased employment of bi-lingual teachers. Extreme
differences in socio-economic backgrounds show up as differing
levels of “school-readiness.” If these children are to learn
effectively, they must first be provided basic “catch-up” skills.
Finally, school districts must respond effectively to legislative and
judicial mandates to mainstream the differently-abled. Any of
these factors would add significantly to the financial needs of
school districts. In combination, the price tag is likely to be
significant.

Even as the financial ante climbs, public education may be
dependent for local political support upon an increasingly less
powerful interest group. Two factors seem particularly important
in this regard: (1) a generally aging national population
(predominantly female and, statistics suggest, less affluent); and

---

As noted in a recent report, the Individuals with Disabilities Education Act
(IDEA) imposes a mandatory requirement that all children have available to them
a uniquely designed free and appropriate education. (emphasis added). Two points
from that report are particularly striking:

Between 1977 and 1995, the number of students who
participated in federal programs for children with disabilities
increased 47%, while total public school enrollment decreased
by 2%.

In 1995, children with disabilities receiving services in
federally supported programs comprised 12% of all students
enrolled in public schools (grades K-12), up from 8% in 1977.

See id. at 154-55. These data also show that an increasing percentage of these
children are being taught in a regular class/resource room combination in the
regular school building rather than in a separate class within the regular school
building. Id. at 212-13.

In 1980, there were 25,549,000 persons aged 65 and over in the American
population. By 1996, this number had increased to 33,861,000. By the year 2000,
34,709,000 Americans are expected to fall into this group. Statistical Abstract of

Further, this group is predominantly female. For 1980, the comparative
figures are 10,305,000 males to 15,245,000 females. In 1996, there were 13,881,000
males and 19,980,000 females. The projection for the year 2000 reflects continued
female dominance: 14,346,000 males vs. 20,364,000 females. Id.

Finally, while the overall poverty rate for this group is declining (15.2% below
poverty level in 1980 vs. 10.5% in 1996), the percentage of females below the
poverty level exceeds that of males: 1980 - 11.1% vs. 17.9% and 1996 - 6.2% vs.
13.6%. Id. (Table 48). This last set of comparative figures is significant because
females, as a group, tend to be poorer. Thus, the larger percentage of poor
(2) the fact that for the first time, households with school-age children constitute a minority of households nationally. 86

The aging population is a factor because public choice theory suggests that public spending preferences are shaped by the kinds of services deemed to be most desirable by the affected taxpayers. An aging population is likely to be less concerned about schools and more concerned about public goods that are important to them. Recent research as well as public perception bear this out. There are empirical data establishing the link between age and public spending preferences, 87 and recent news articles highlight the inevitable tensions that arise when older taxpayers feel compelled to choose between local goods most relevant to their current needs and public education. 88 In this environment, education is likely to lose out. 89 Moreover, the effect of this self-interest is further exacerbated if an important factor for the older, child-free taxpayer is fiscal conservatism necessarily imposed by relatively restricted financial resources.

The declining prevalence of households with school-age children is also likely to be quite significant. The political reality is that, all other things being equal, this characteristic would ordinarily foster the emergence of a natural political interest group. This is important to the existence of an interest group

86 In 1970, 55.9% of all families included one or more children under the age of 18 (49.6% married-couple families, 0.7% other family, male householder, 5.6% other family, female householder). In 1980, 52% of all families included at least one child. By 1990, the overall percentage had dropped further to 48.8% and, in 1994, had risen slightly to 49.7% overall. Significantly, during this period, the percent of "other family, male householders" increased to 1.9% and the percent of "other family, female householder" increased to 11.2%. See Digest of Educ. Statistics, supra note 76, at 25, tbl. 17.

87 Susan A. MacManus, Taxing and Spending Politics: A Generational Perspective, 57 JOURNAL OF POLITICS 607, 629 (1995) (examining the taxing and spending preferences of different age groups, using data from public opinion surveys, and finding that generational preferences are explained by an individual's stage in the life cycle).

88 See, e.g., Sue Anne Pressley, School Fight is a Gray Area: Retirees in a Phoenix Suburb Resist Taxation for Education, WASH. POST, Jan. 15, 1998, at A1 (noting that bond referendums and budget overrides have been defeated in the local Arizona school district "largely by older voters").

89 Id.
capable of demanding close attention to matters of educational opportunity.\textsuperscript{90}

Students of social dynamics know the effect of fragmenting an interest group: the smaller and more splintered the group, the less the likelihood of political success. The recent demographic changes described may exact a further toll on the political effectiveness of those committed to support of education in several different ways. First, an increase in the number of taxpayers who are likely to be relatively disinterested in spending for education (older, child-free taxpayers) decreases absolutely the potential number of those committed to protection of this good. Second, while the percentage of families with children has increased slightly recently, most of this growth is attributable to less-affluent single parents, a potentially less politically powerful group. Third, the influx of children having additional and special needs potentially spreads even more thinly the available financial resources. All things considered, the potential for the existence (and maintenance) of an effective interest group is likely to be seriously undermined in a large number of school districts. The effect of these factors suggests that effective political intervention on the local level is not universally assured to either insure adequate financial resources or effective and responsive allocation of those resources. It will be driven by the fortuitous existence of an effective interest group capable of holding elected and school officials accountable in a meaningful way.

The likely insularity of this increasingly factionalized interest group on the local level is important for an additional reason. Here we have an unpopular tax\textsuperscript{80} serving as an important financial mainstay for a local good of declining personal importance to a significant number of taxpayers. The effect of this combination of characteristics on the possible formation of effective political coalitions cannot be ignored, for the implications of this

\textsuperscript{90} This is not to suggest either that a numerical majority is inherently desirable or that social benefit is inevitably realized. Rather, that the organizational advantage of such a group is clear. This group can dominate political decision-making without the onus of accountability to numerical minorities. The same advantage can accrue to coalitions of numerical minorities or to a numerical minority that "obtains special access to a particular decisionmaker." See Clayton P. Gillette, Expropriation and Institutional Design in State and Local Government Law, 80 VA. L. REV. 625, 628-629 (1994) [hereinafter Gillette].

\textsuperscript{91} See discussion infra note 108.
declining power are significant. Recent studies suggest that effective political activity for interest groups not in the numerical majority is dependent in large part upon the ability to form strong political coalitions. That process is influenced heavily by the ability to provide quid pro quo – to give support for the receipt of support.\footnote{Essentially, this is political “log-rolling.” Professor Gillette has defined logrolling as the exchange of votes in a decisionmaking body. Logrolling assumes that the advocates of a given position are otherwise insufficiently powerful to secure passage of desired legislation without gaining support from non-interested legislators, hence the exchange of votes. See Gillette, supra note 90, at 635-642.} Quite simply, it is very likely that opportunities to form such coalitions will be relatively limited, if not non-existent, for local interest groups most interested in a realistically financed and effective education. If effective political action for interest groups in the numerical minority is indeed most heavily influenced by the ability to trade influence, such groups possess little in the way of venture capital.

Ironically, erosion of political support is likely to be most pronounced where the quality of education is already perceived to be most troubling – in urban centers and in poor rural districts. These are areas also most likely to be beset by difficulties stemming from inadequate revenue generated by levying against a stagnant or declining property tax base. In other words, there is likely to be a high correlation between the existence of an effective political coalition supporting public education and the provision of adequate financial support, with or without significant assistance from the state. Those districts that have a reputation for effective public schools are likely to attract residents for whom that is important.\footnote{This is consistent with the Tiebout hypothesis that one factor importantly influencing the choice of residence is the quality and quantity of available public services. See Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Polit. Econ. 416, 424 (1956). This may be particularly true when the quality of available public education is a consideration. See, e.g. Daniel Akst, Why Liberals Should Love School Choice, WALL ST. J., Apr 6, 1998, at A14. ("Like most middle-class parents, my wife and I plan to exercise school choice... but we'll exercise choice the way the rest of the middle class does. We'll move."). Along with white flight generally, middle-class flight across racial and ethnic lines are also possible factors. Id. However, enrollments in private and parochial schools have remained quite stable for the past several decades, suggesting that departure from public education will not be a factor with an additional pronounced effect in the immediate future.} On the other hand, school districts most in need of financial help are likely to be those in which the relevant interest group proves least able to use
political clout locally to force a reallocation of available resources, a reallocation that may be a critical component for the future success of the educational system. Additionally, that group may not have the presumed degree of pedagogical influence.

The reality is that much of the recently increased spending for education stems from increasing state involvement in this effort. However, in light of what may be a fairly dramatic increase in financial need for education based on an adequacy measure of effective performance, it is entirely appropriate out of fairness to give close consideration to the possibility that further revenue might be generated on the local level. After all, the property tax continues to be an important source of revenue. Though total collections have declined percentage-wise over the last two decades, actual dollars collected have increased quite dramatically. The tax remains a financial mainstay for local government.94 There is no obvious, easy replacement for this source of revenue.

It is arguably possible to increase the amount collected through the ad valorem property tax within individual school districts. The capacity to produce more revenue is quite likely present. The tax has proven to be more elastic than economists thought it to be earlier in the century. In an expanding economy, property values will keep pace with the general growth rate with one important caveat. Because of the way in which the base is determined, which relies on assessment of value by a governmental official, any appreciation in fair market value would be reflected in the tax base more slowly than the actual rate of increase.95 Irrespective of whether this appreciation is tapped

---

94 For example, in 1970 nationally, $32,963,000,000 or 37% of local revenues were derived from the property tax. By 1991, total national collections had increased to $161,772,000,000. This startling amount constituted only 26.4% of local revenues. Facts & Figures on Government Finance 233-34, Tbs. F-11, F-12 (Chris R. Edwards ed., 29th ed. 1994).

95 Compare, e.g., Caroline E. Mayer, Home Sales Bloom Across Region, WASH. POST, Apr. 6, 1998, at A1 (explaining that a brisk market in home sales reflects appreciation in prices for the first time in the 1990s) with Dan Eggen and Jackie Spinner, Home Values Stagnant Despite Good Economy, WASH. POST, Apr. 6, 1998, at B1 ("Tax assessments on residential property have edged up only slightly in the Washington area, leaving the average [assessed] value of houses, townhouses and condominiums lagging behind inflation and defying the region's booming economy," . . . and "[T]ax assessors say that [the surge in home sales and recent price increases] didn't happen in 1997.").

Sales and income taxes, in contrast, tend to be much more responsive to an expanding economy. An increase in taxable income or an increase in sales will
in order to realize increased collections, the tax could be administratively streamlined, such as through the state's assumption of administrative responsibility\textsuperscript{96} or by lifting limitations imposed by law on the way in which the tax is utilized.\textsuperscript{97}

However, even assuming that a school district has the capacity to increase the amount collected through the ad valorem property tax, this would not necessarily be a desirable outcome. The property tax is arguably a regressive tax.\textsuperscript{98} It logically follows that, from a policy perspective, it would be undesirable to increase reliance on a regressive tax if alternatives not bearing this characteristic are reasonably available. Regressivity, however, is not an attribute unique to the property tax. The same criticism holds true for the taxes most utilized on the state level: income and sales taxes. These taxes may also prove to be regressive.\textsuperscript{99} Thus, the property tax's regressivity is not in and of itself a disqualifying concern.

\textsuperscript{96} The property tax is notorious for its inept administration. Inaccurate assessment has been endemic, has compromised tax yield locally, and has perverted allocative decisions on both the state and national levels. See generally J. Richard Aronson & John L. Hilley, FINANCING STATE AND LOCAL GOVERNMENTS, (The Brookings Institution 4th ed. 1986) (Chapter 7).

\textsuperscript{97} The tax base has been steadily eroded through a vast array of exemptions and tax yield has been artificially restrained through a variety of limitations, both statutory and constitutional in origin. Tax yield could be increased either by reducing the classes of exempt property, reducing the upper limits of exemption or by lifting limits imposed on the extent to which the tax may be used. \textit{Id}. Either set of reforms is unlikely given the realities of the present political climate. The issue is further complicated for those limitations having constitutional status.

\textsuperscript{98} See Richard A. Musgrave \& Peggy B. Musgrave, PUBLIC FINANCE IN THEORY AND PRACTICE 268 (McGraw-Hill Book Co. 3d ed. 1980) (explaining that property tax distribution is "mildly regressive," assuming that the homeowners' tax is allocated according to ownership, renters' tax according to rental payments, and businesses' property tax is allocated half to consumption and half to capital income). When the property tax is seen as a tax on housing, its regressivity is more pronounced. \textit{Id} at 485-486.

\textsuperscript{99} See Due \& Mikesell, supra note 9, at 8-12; THE FUTURE OF STATE TAXATION 192 (David Brunori ed., Urban Institute Press 1998).
However, of greater importance is that the property tax has a relatively limited redistributive effect. As has been noted, local government's reliance on the property tax flows in part from the states' preemption of other revenue possibilities. In fact, the property tax is particularly well-suited for use by governmental units of limited geographical area. Real property is immovable and thus impossible to place beyond the reach of the tax collector. But it is this very immobility that establishes that firm linkage to political pressures: consumers, the taxpayers, will pay for only what they deem appropriate; they expect to receive value for tax dollars paid. And, further, it is this linkage that may contribute to resistance to spending that is perceived to be redistributive in nature. In fact, substantial increases in individual property tax burdens have a more immediate effect on taxpayer psyches and have generally not been well tolerated by those subject to the tax. Taxpayers can and will "vote-with-their-feet" when faced with increases perceived to be intolerable. They will simply move into a jurisdiction with either a lower tax burden or a higher level of desired services. Indeed, it has been

---

100 See Paul E. Peterson, THE PRICE OF FEDERALISM 17 (The Brookings Institution 1995) [hereinafter Peterson]. Professor Peterson divides governmental responsibility into two spheres: developmental (physical and social infrastructure) and redistributive (relocation of governmental resources from "haves" to "have-nots"). He asserts that local government appropriately bears developmental responsibility because "their decisions are disciplined by market forces as well as by political pressures." On the other hand, developmental responsibility is best borne by state or national government because "developmental policies are best coordinated across a substantial geographical area." Id. at 24.

101 See discussion supra note 9.

102 See Peterson, supra note 100, at 78.

103 See Changing Public Attitudes on Governments and Taxes: 1991, 20-21 (Advisory Commission on Intergovernmental Relations, S-20) [hereinafter ACIR]. In its 20th commissioned survey on public attitudes toward governments and taxes, the Advisory Commission on Intergovernmental Relations found that the highest percentage of those polled, 30%, deemed the property tax the least fair tax. In the same survey, 31% of those polled identified local government as giving the best value for each tax dollar paid (followed by the federal government (26%) and state government (22%).) Id. This mixed message may result from taxpayer unhappiness with the method of property tax collection on the one hand and approval of revenue allocation on the other – the consumer element. See discussion infra note 116.

104 See Peterson, supra note 100.
suggested that property taxes are kept flat, in part, to keep wealthy residents especially from leaving the area.\footnote{Id.}

The most eloquent expression of pervasive resistance can be drawn from the taxpayer revolts that have been news so often in the last decade.\footnote{See, e.g., Sheila Flaherty, Note, Property Tax Limitations: Do We Need a New Approach for the 1990s?, 45 Tax L. Rev. 827 (1992).} Taxpayers unhappy with property tax increases have amended the constitutional language enabling the tax in order to limit the burden that would otherwise be imposed.\footnote{The two most widely publicized examples of taxpayers' angst during the late 1970s and early 1980 were Proposition 13 in California and Proposition 2 1/2 in Massachusetts, both of which amended the respective state constitutions by imposing significant property tax limitations. Id.} This public discontent with the property tax constitutes an additional destabilizer because a restive taxpaying public has repeatedly demonstrated its depth of unhappiness with this tax and an increased willingness to act affirmatively to alleviate that unhappiness. In fact, politicians taking their cues from the taxpaying public have been all too happy to provide “property tax relief” whenever the opportunity seems to have presented itself.\footnote{For example, in 1993 Michigan’s legislature abolished the school property tax entirely without providing initially for replacement revenues. The local system was ultimately replaced by the combination of a 2% increase in the state sales tax and state take-over of the property tax. See Michael F. Addonizio, et al., Blowing Up the System: Some Fiscal and Legal Perspectives on Michigan’s School Finance Reform, 107 Ed. L. Rep. 15 (Apr. 1996). A quite recent example of a political response to this anti-tax sentiment is the election of James Gilmore as governor of Virginia following a successful campaign premised largely on a promise to repeal the state’s personal property tax. See Spencer S. Hsu & Ellen Nakashima, Gilmore Leads GOP to Victory in Virginia: Race for Governor Powers Sweep of Statewide Offices, WASH. POST, Nov. 5, 1997, at A1.} Finally, even if increases in local tax burdens are tolerated, any attempt to redistribute property tax revenues from more to less affluent school districts is, as a realistic matter, doomed to ultimate failure either through legislative reversal,\footnote{See, e.g., Mark G. Yudof, School Finance Reform in Texas: The Edgewood Saga, 28 Harv. J. on Legis. 499 (1991) (describing the difficulties encountered by the Texas legislature as the possible enactment of “power equalizing” was being considered).} judicial intervention\footnote{See, e.g., Buse v. Smith, 247 N.W.2d 141 (1976) (holding that negative-aid provision of school district financing statutes requiring that a portion of property tax revenues of property-rich districts be paid into a state fund for redistribution} or taxpayer self-help.\footnote{The resistance of property-}
rich districts in general to this kind of reallocation has been well documented.\footnote{Several fascinating recent articles have suggested that \textit{Serrano} was the underlying reason for California's Proposition 13. Property taxpayers faced with the prospect of having locally-collected property taxes reallocated to other school districts simply limited potential liability by constitutional amendment thus significantly limiting the redistributive potential of the property tax. \textit{See}, e.g., William Fischel, \textit{Serrano after 25 Years: Are America's Schools Better and Property Taxes Fairer?} 327 (1996 Proceedings of the 89th National Tax Association Conference on Taxation); William N. Evans, et al., \textit{State Education Finance Policy After Court-Mandated Reform: The Legacy of Serrano} 366 (1996 Proceedings of the 89th National Tax Association Conference on Taxation).}

The shift to increased state financial support obviously calls into question the characterization of public education as a "local good."\footnote{\textit{See} Enrich, \textit{supra} note 13, at 156. Vermont is emerging as the newest battleground in the ongoing effort to determine how best to utilize property taxes as a source of funding. Following the invalidation of the local districts' historic reliance on the property tax, the state legislature centralized control of property taxation and implemented a system incorporating an annual flat grant/child with some latitude for appropriate adjustments. Small comfort can be drawn from some reported citizen response to this legislative action. Commenting specifically on the state's proposed takeover of the property tax, the mayor of Rutland, Vermont reportedly characterized the plan as "class warfare" and the plan's supporters as "pathological redistributionists." John Irving wrote the president of the Vermont senate stating that he and his wife had chosen to come to Vermont "because of the schools" and expressing the fear that [with the enactment of the new financing package] the schools would be "decimated." \textit{See} Amity Shlaes, \textit{Vermont Levels Its Schools}, WALL ST. J., Apr. 22, 1998, at A22.} However, the present level of demonstrable consumer (student) need demands both redistribution and infrastructure investment. The simple fact is that without increased levels of funding through redistribution, the relative worth of the product to this group at greatest educational risk will be significantly diminished. In sum, it seems appropriate at the very least to view public education as a hybrid presenting characteristics of both local good and developmental activity. As such, it is entirely appropriate to fund this undertaking through a local-state partnership.

All of these factors taken together suggest that significant additional revenues cannot or should not be realized through manipulation of the property tax. Thus, access to sources of
funding in addition to or instead of the property tax is clearly a critical concern. The financial demands likely to be imposed by efforts to provide an adequate education will almost certainly outstrip the capacity of especially the poorer school districts to meet those demands.

These increased state contributions will likely continue to be funded through some combination of revenues derived from income and sales taxes.\textsuperscript{114} In so doing, an important tax policy issue inherent in this shift will be addressed. Income and sales taxes have greater redistributive power than does the property tax.\textsuperscript{115} As such, increases, where necessary, are likely to be less politically disruptive on the state level than similar increases in the property tax on the local level.\textsuperscript{116}

\textsuperscript{114} 45 of the 50 states were using the general sales tax in some form in 1995. The five states that have not implemented some form of this tax are Alaska (which makes substantial use of the sales tax at the local level), Delaware, Montana, New Hampshire, and Oregon. All states, however, collect tax revenue from some form of "selective" sales tax. Statistical Abstract of the United States 1997, The National Data Book 311 (117th ed. Oct. 1997) (Table 493).

Income taxes on the state level have similarly been widely implemented. 43 states tax individual income; the seven exceptions are Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming. All 43 of these states also impose a tax on corporate income. Of the seven states not taxing individual income, Alaska, Florida and South Dakota tax corporate income. \textit{Id.}

Note that after the New Jersey Supreme Court ruled in \textit{Robinson I} that the funding of the state's public schools through the property tax unconstitutional in 1973, then Governor Byrne proposed a statewide income tax to largely replace the property tax. This tax was passed after considerable wrangling in 1976. All revenue from that tax is dedicated to relief of local property taxes and approximately 80% of the proceeds are used to aid local school districts. \textit{See} Timothy J. Goodspeed, \textit{The Relationship Between State Income Taxes and Local Property Taxes: Education Finance in New Jersey}, 51 NAT'L TAX J. 219, 220 (1998). Similarly, after the repeal of the property tax in Michigan in 1998, Michigan voters implemented a system of finance using a combined increase in the general sales and cigarette taxes. \textit{See} Saffell, \textit{supra} note 77. Interestingly, in 1993 Oregon voters rejected a proposed sales tax which would have funded education and enabled the repeal of the property tax on homeowners. \textit{See} Due & Mikesell, \textit{supra} note 9, at 4.

\textsuperscript{115} Professor Peterson notes that states (and ultimately the federal government) are better able to redistribute than local governments because the former two units operate under fewer market-like constraints. Territorial reach is broader and labor and capital are comparatively less mobile in these broader arenas. \textit{See} Peterson, \textit{supra} note 100.

\textsuperscript{116} The ACIR survey found that only 19% of those polled deemed the state sales tax "the least fair" and 12% chose the state income tax. In the same poll, the lowest percentage of those polled, 22%, thought that state government was the
To a significantly lesser extent, revenues may also be provided from the proceeds of state-run lotteries. Support of education represents a use to which such collections have been put.\textsuperscript{117} The increased proliferation of gaming could well lead to further reliance on this source.\textsuperscript{118} The use of these revenues in this way is less desirable overall than reliance on income and sales taxes. The limited empirical data available suggest that lotteries tend to be even more regressive than the major revenue systems discussed.\textsuperscript{119} In addition, lottery revenues vary occasionally for no

level of government from which the taxpayer received the most for taxes paid. See ACIR, supra note 103.

Several commentators have offered explanations for this pattern of taxpayer preference. See, e.g., Edward J. McCaffery, \textit{Cognitive Theory and Tax} 41 U.C.L.A. L. REV. 1861, 1904 (1994) ("[T]axpayers seem to evaluate certain taxes, such as sales and property taxes, more on the basis of self-interest, and other taxes, such as income taxes, more on the basis of impersonal notions of fairness or justice."). See also Alan Schenk, \textit{Value Added Tax: Does This Consumption Tax Have A Place in the Federal Tax System?} 7 VA. TAX REV. 207, 282 (1987) ("[T]axpayers apparently view as fair the pay-as-you-consume retail sales tax levied on all consumers of taxed goods . . . and) may prefer a sales tax paid in small increments to an income tax withheld in large amounts. [Further,] [s]ome favor the sales because it is perceived as a tax paid by everyone. [Finally] taxpayers do not seem to prefer state sales taxes over state income taxes, even though, between the two, the average taxpayer bears a heavier state income tax burden.").

\textsuperscript{117}Lotteries are a comparatively small but increasingly important source of states' revenue. From 1980 to 1996, proceeds from lottery sales increased from $2,393,000,000 to $34,031,000,000. From 1964 to 1995, $52,061,000,000 of $92,922,000,000 or 56% of the profits from the total ticket sales was allocated to education. Statistical Abstract of the United States 1997, NATIONAL DATA BOOK 317 (117th ed. Oct. 1997) (Table 499).

\textsuperscript{118}As of 1995, all but four states had enacted legislation permitting pari-mutuel wagering or lotteries in some form. The four exceptions were: Hawaii, North Carolina, Tennessee and Utah. Id. at 317 (Table 498). "Gaming" is the industry term of choice.

\textsuperscript{119}A lottery is not literally a tax in the sense that it has no underlying economic predicate (i.e., receipt of income or ownership of property). Rather, these are games of chance in which participation is wholly voluntary, though perhaps in partial response to a sustained advertising effort. Though there is no analysis establishing irrefutably that lottery participants tend to be those lowest on the socio-economic scale, an earlier work concluded that "lottery play falls with formal education." The authors continued by saying that in terms of income groups, "the highest expenditures [on lottery games] are recorded at the under $10,000 level." Charles T. Clotfelder & Philip J. Cook, \textit{Selling Hope: State Lotteries in America} 97, 103 (1989) (hereinafter Clotfelder & Cook). For a more recent article reaching the same general conclusions, see Harriett Stranahan & Mary O'Malley Borg, \textit{Horizontal Equity Implications of the Lottery Tax}, 51 NAT'L TAX J. (1998) (noting that minority groups and individuals with the lowest educational
easily discernible reason. This volatility may complicate long-term projections and planning.

All things considered, the benefits of an increased financial role of the state outweigh the possible detriment of that shift. And this remains the case especially if the financial resource tapped is the relatively more stable income or sales tax rather than lottery proceeds.

Further, through increased state legislative involvement, school districts (or rather the consumers of that service) may be able to regain some of the financial political leverage that has been lost. This could occur as the result of the coalescence of several factors. First, consumers may be more able to form statewide coalitions notwithstanding the continued fact of numerical minority. A significant barrier to unity has been the interest of the more affluent districts in receiving some level of state support and being assured that locally generated revenues would be spent locally even if such amounts were in excess of state-established amounts. If states continue to assure some level of support to each child in that state's system and require a local effort within an acceptable range of locally-imposed tax-rates while permitting additional effort at local option, both of these concerns will have

attainment in general, and African Americans in particular, bear a significantly higher lottery tax burden and appear most susceptible to lottery advertising.


Finally, I note that a number of commentators have suggested that lottery revenues be used to finance programs that directly help the poor. See Alan J. Karcher, LOTTERIES (Transaction Publishers 1989); Clotfelder & Cook, supra note 119. But see Ronald J. Rychlack, Lotteries, Revenue and Social Costs: A Historical Evaluation of State-Sponsored Gambling, 54 B.C. L. REV. 11, 51 (1992) ([P]ograms benefiting lower income people . . . could be funded through less regressive revenue-generating devices. . . . [T]he regressive nature of lotteries is a serious concern.


See Enrich, supra note 13, at 155-158. He also mentions concern for loss of competitive advantage (by children residing in property-rich districts) for post-school opportunities. Id.
been addressed. Second, the tie to the highly unpopular property tax ceases to be a factor on this level because adequate funding is not inexorably tied to increased property tax liability. Further, the state-wide coalition could allow weaker school districts to tap into the political strength of stronger districts. Thus, the declining political strength of some local interest groups would be offset. Finally, public education continues to have committed advocates on the state level and these advocates could well prove to be particularly reliable allies in this larger arena. Hence, this revitalized interest group could be well-poised to bargain effectively for political trade-offs on an equal footing with other interest groups.

Finally, the prior and possibly accelerating shift to reliance on state revenues for significant support raises anew old concerns over loss of local pedagogical control over education. This is an issue that has been articulated in a number of cases from *Rodriguez* to, most recently, *Matanuska-Susitna Borough Sch. Dist. v. Alaska*.

---

122 Range of tax rates insures continuing local effort while providing protection to local taxpayers. Range also means that more affluent district can continue to generate "extra" monies for that effort without being penalized by the state.

123 This last point is, of course, conjectural, and scant comfort can be drawn from recent events in New York. See Bob Herbert, *Ganging Up on the Schools*, N.Y. TIMES, Apr. 30, 1998, at A37. Using the line item veto, Mr. Pataki eliminated $500 million in school construction and repair money ($200 million of which was intended for New York city schools) and money that was intended to help raise teacher salaries in the city. *Id.*

124 As Professor Gillette points out, "trades among politicians do not necessarily promote public welfare." This objection could be raised to "logrolling" in this context as a matter of general principle since, although there is no personal benefit to the actors *per se*, social costs in the form of increased taxes could be imposed on nonmembers of the coalition. However, the undeniably positive social benefit (positive externalities) accruing from an adequately educated citizenry where the direct benefit accrues to children not otherwise able to vote clearly gives logrolling in this context an acceptable cast. See Gillette, *supra* note 90, at 635-642.

125 *See Rodriguez*, 411 U.S. at 49-56 (holding that local taxation system rationally furthered the legitimate state purpose of local control of school districts).

126 931 P.2d 391, 400 n.15 (1997). The state argued that "paying the remaining sixty-five percent of basic need in the wealthiest districts furthers the goal of state authority and control over public education since, 'as a practical matter' this aid gives the State leverage over districts, allowing the State to have a greater say in setting standards." *Id.*
The courts' stated concern for the effect of greater state financial assistance on local autonomy may be misplaced for two reasons. First, I have argued that there is, in fact, the real prospect of a deteriorating political consensus on the local level. Consumers may be increasingly incapable of bringing sufficient political influence to bear in the continuing quest to assure funding sufficient to maintain or improve available public education. To the extent that this is true, local officials — or rather local consumers — are not, in fact, exercising the political influence implicit in expressed concern for erosion of control. Second, loss of local pedagogical control need not inexorably follow greater state financial involvement. The latter concern can be addressed through a careful delineation of respective arenas of responsibility and recognition of the need to have some flexibility on the local level even as adherence to standards broadly defined by the state become the norm. Indeed, adequacy as the norm accommodates local control as mandated equality cannot. Once a school district satisfies the requirements of adequacy, it should be free to supplement the education offered — or not — as it wishes. This strikes an acceptable balance between constitutional guarantee and consumer spending preference.

In sum, the concern for respecting local autonomy may detract attention from the critical state of local political realities. The issue of the actual degree of influence of this local interest group must be confronted and examined in the context of current demographic changes. If the effect of this eroding influence is not recognized and dealt with, the result will surely be an accelerating decline in the quality of public education.

CONCLUSION

The present-day picture of American public education all too often reflects an elementary and secondary public education system crippled by inadequate resources, a declining local consensus, and diminishing political power. There exists a lethal local brew: more money currently available but arguably

---

197 See Enrich, supra note 13, at 115.

198 See Enrich, supra note 13, at 170 ("[A]dequacy [does not] constrain the prerogative of a local district to dedicate additional resources to its schools or to develop educational programs that distinguish it from its neighbors").

199 Financial data for the last twenty years clearly demonstrate not only that the public investment in education has swelled dramatically, but also that an
ineffectively allocated, less comparative revenue capacity on the local level, a comparatively less powerful local political base, and extraordinary student educational need complicated by persistent patterns of student underachievement. Importantly, this reality contravenes the right to an education articulated in state constitutions.

This reality must be altered and can be corrected by the thoughtful expenditure of existing resources and, as necessary, by the infusion of additional resources. With the paradigm shift described, the constitutional right will be vindicated. Additional benefits will accrue from this shift. Greater state assumption of financial responsibility with its concomitant diminished reliance on the property tax will appropriately temper reliance on the unpopular property tax as a source of funding. This shift will result in more reliance being placed upon revenue systems having greater redistributive potential. Further, there is a chance, albeit remote, that a greater state role could result in the development of a broadened consensus that is more politically viable vis-a-vis other public good/public expenditure issues.

In sum, rather than continuing the increasingly questionable pursuit of equality per se, the objective of the states should more properly be that articulated early on in Robinson V. The goal of the New Jersey legislature was "to provide to all children . . . the educational opportunity which will prepare them to function politically, economically and socially in a democratic society." This objective is at the heart of the pursuit of adequacy.

When will adequacy have been achieved? That objective will have been met when glaring differences in identifiable subgroup performance no longer exist even as American students continue to compete against - to dominate - their counterparts internationally. Differences in individual levels of natural ability are a normal part of the human condition. The effort to educate appropriately accommodates such differences. However, our national obligation to educate cannot be defined along geographic lines. That obligation extends beyond those who by virtue of home address have available to them effective educational systems.

increasing share of this expense in both absolute and percentage terms has been borne by the states.

193 355 A.2d 129.

194 Id. at 132.
We as a nation must not continue to tolerate geographically-driven subgroup underachievement. There is much to support the effort to remediate through effective use of adequate resources. To do otherwise is to continue to unconstitutionally and unconscionably deny to a significant number of children a basic American right.