



MILDRED ROBINSON 

## Advancing the Legacy of *Brown*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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FORTHCOMING

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

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

which to pay the levy.

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

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

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

Tax specialists believe that in apportioning public costs, tax-

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

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

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

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

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

#### FOOTNOTES

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



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