Uniformity of Taxation and the Preservation of Local Control in School Finance Reform

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INTRODUCTION

By all accounts, Americans strongly support public education and believe that spending on schools should be a high government priority.[1] According to the polls, an overwhelming majority also firmly believes that all children are entitled to a "quality public education."[2] This staunch support has translated into enormous outlays of public revenue for education.[3] It has not, however,

[1] *See* Lowell C. Rose & Alec M. Gallup, *The 37th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, 2005 PHI DELTA KAPPAN 41, 42-43, *available at* http://www.pdkintl.org/kappan/k0509pol.htm (concluding "[t]he high level of support Americans give to schools in their community is unchanged" and "[t]he public's strong preference is for improvement that comes by reforming the current public schools rather than by finding an alternative system"); Pew Research Ctr. for People & Press & Council on Foreign Relations, Economy, Education, Social Security Dominate Public's Policy Agenda 2001 § A.17.d. (2001), *available at* http://people-press.org/reports/print.php3?PageID=35 (reporting percentage of Americans surveyed who named "improving the educational system" "top priority" for President and Congress as 76% (Sept. 2001), 78% (Jan. 2001), 77% (Jan. 2000), 74% (July 1999), 74% (Jan. 1999), 78% (Jan. 1998), and 75% (Jan. 1997)). The Public Education Network conducted a similar survey and found that strengthening public education remains the top spending priority of 55% of the American public. *See* Wendy D. Puriefoy, *Education: America's No. 1 Priority*: *Polls Show That We Value Education Above All Else*, STATE LEGISLATURES, Sept. 2003, at 18.

[2] *See, e.g.*, PUB. EDUC. NETWORK, DEMANDING QUALITY PUBLIC EDUCATION IN TOUGH ECONOMIC TIMES: WHAT VOTERS WANT FROM ELECTED LEADERS, 2003 NAT'L SURVEY OF PUB. OPINION 3 (2003), *available at* http://www.publiceducation.org/pdf/Publications/national_poll/2003_poll_report.pdf (concluding that "quality public education remains a core American value even at a time of increased threats to our national security and at a time of deep budget crises in all states"); Memorandum from Stanley B. Greenberg & Anna Greenberg, Greenberg Quinlan Rosner Research Inc., *Taxes, Government, and the Obligations of Citizenship* 4 (Nov. 12, 2003), *available at* http://www.gqrr.com/articles/1562/1986_pip_m111203.pdf (reporting that 70% of those surveyed felt government should be "strong[ly] responsible" for "guaranteeing a quality public education").

[3] In absolute per-pupil terms, the United States ranked first among six G8 countries studied by the National Center for Education Statistics, spending $7,877 per-pupil for primary and secondary education in the year 2000, with other averages ranging from $6,380 (France) to $5,135 (United Kingdom). U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, COMPARATIVE INDICATORS OF EDUCATION IN THE UNITED STATES AND OTHER G8 COUNTRIES: 2004, at 16-17 (2005), *available at* http://nces.ed.gov/pubs2005/2005021.pdf. In 2002 and 2003, total expenditures in U.S. elementary and secondary schools were estimated at $455 billion. *See* U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2002-03, at 1 (2005), *available at* http://nces.ed.gov/pubs2005/2005353.pdf. At the same time, U.S. school spending patterns displayed much less equality of distribution than other countries. *See* U.S.

produced uniformly high standards of performance and academic achievement.[4] The gap in U.S. public education between the "haves" and the "have-nots" remains stark, with the resources[5] and educational

GEN. ACCT. OFFICE, SCHOOL FINANCE: STATE EFFORTS TO EQUALIZE FUNDING BETWEEN WEALTHY AND POOR SCHOOL DISTRICTS 41 (1998), *available at* http://www.gao.gov/archive/1998/he98092.pdf [hereinafter GAO, EQUALIZE]; Michael Heise, *Equal Educational Opportunity and Constitutional Theory: Preliminary Thoughts on the Role of School Choice and the Autonomy Principle*, 14 J.L. & POL. 411, 419 n.37 (1998); Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation,* 32 GA. L. REV. 543, 565-66 (1998) [hereinafter Heise, *Hollow Victories*] (noting that United States outspends almost all counterparts). According to one prominent commentator, per-student spending in U.S. schools quintupled for each 50-year period between 1890 and 1990. *See* Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, 113 ECON. J. F64, F67 (2003) (noting threefold increase in per-pupil spending from 1960 to 2000); *see also* Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, *in* LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 110 (Jay P. Huebert ed., 1999) (noting that United States spends "more than virtually all other industrialized countries both as a total per pupil and as a percentage of government expenditures").

[4] Though the performance of U.S. children in international assessments ranged from relatively good at the fourth-grade level to below average at the twelfth-grade level, students in other countries routinely outperform their American counterparts. *See* NAT'L CTR. FOR EDUCATION STATISTICS, ELEMENTARY AND SECONDARY EDUCATION: AN INTERNATIONAL PERSPECTIVE 27-28 (2000), *available at* http://nces.ed.gov/pubs2000/2000033.pdf. *See also* Michael Heise, *Choosing Equal Educational Opportunity: School Reform, Law, and Public Policy*, 68 U. CHI. L. REV. 1113, 1114-18 (2001) (summarizing data on performance of U.S. students on international tests and government spending on education). The well-publicized decline in Scholastic Aptitude Test ("SAT") scores is also used as evidence of declining student achievement in the face of rising student expenditures. *See* Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL'Y 633, 642 (2002) [hereinafter Heise, *Unintended Consequences*]. *But see* Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 502-03 (1998) (summarizing one international literacy study that ranked American students highly). In fact, recent SAT scores show modest gains, leading some to express guarded optimism. *See* Diana Jean Schemo, *High School Seniors Get Highest SAT Math Scores in 35 Years*, N.Y. TIMES, Aug. 27, 2003, at B9.

[5] A government survey concluded that on average, wealthy districts spend at least 24% per-pupil more than poor districts. GAO, EQUALIZE, *supra* note 3, at 2; *see also* U.S. GEN. ACCT. OFFICE, SCHOOL FINANCE: STATE EFFORTS TO REDUCE FUNDING GAPS BETWEEN POOR AND WEALTHY DISTRICTS 2, 7 (1997), *available at* http://www.gao.gov.archive/1997/he97031.pdf [hereinafter GAO, GAPS]. The Illinois State Board of Education recently released spending figures on all Illinois school districts. The gap between the highest spending district ($23,799 per student) and the lowest ($4,438) had increased $4,000 over the previous year's figure, notwithstanding a $400 million increase in state aid. *See* Diane Rado & Darnell Little, *Spending Gap*

achievement[6] of the poorest schools lagging seriously behind those in wealthier school districts. Compounding the disparity is the fact that poor districts typically tax themselves at higher rates to generate fewer dollars.[7]

The modern legal challenges to school finance statutes, filed more than thirty-five years ago in state and federal courts,[8] provided stark

Grows for Schools: Despite State Effort, Poor Districts Can't Gain Ground on Rich, CHI. TRIB., Aug. 1, 2005, at 1. The Illinois State Board of Education's web site has the complete listing. *See* Illinois Local Education Agency Renewal Network, http://webprod1.isbe.net/ilearn/ASP/index.asp (last visited Feb. 19, 2007). Illinois's statistics are not unusual. The Education Trust reported that in 2004, the gap between wealthy and poor districts increased in 22 states. KEVIN CAREY, THE FUNDING GAP 2004: MANY STATES STILL SHORTCHANGE LOW-INCOME AND MINORITY STUDENTS 8 (2004). Plaintiffs in recent school finance cases have no shortage of evidence to illustrate the results of years of fiscal disparity. In *DeRolph v. State*, 677 N.E.2d 733, 743-44 (Ohio 1997), the court described the truly decrepit conditions in which many of its state's children were forced to go to school. The incomplete list of inadequacies included: no books for some classes (or a lottery to hand out the few available books), no honors classes, no science lab, carbon monoxide leaking from furnaces into classrooms, rooms without ventilation, students breathing coal dust from an old coal heating system, raw sewage flowing onto sports fields, falling ceiling plaster, and cockroaches in the restrooms. *Id.* The Arkansas Supreme Court referred to similar "deficiencies . . . that plague the State's school districts." Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 489-90 (Ark. 2002).

[6] A recent study determined that in early elementary students, poverty is a risk factor that affects the time it takes to achieve complex reading and math skills. NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2005, 42 (2005), *available at* http://nces.ed.gov/pubs2005/2005094.pdf. Additionally, this study found that "[t]he level of poverty in the school, as measured by the percentage of students eligible for free or reduced price lunch, was negatively associated with student achievement" in reading and mathematics for both fourth and eighth graders. *Id.* at 43-44. *See also* David M. Engstrom, *Civil Rights Paradox? Lawyers and Educational Equity*, 10 J.L. & POL'Y 387, 387-88 (2002). For one court's view of the wealth-based achievement gap, see Abbott v. Burke, 710 A.2d 450, 460 (N.J. 1998).

[7] According to a study conducted by the General Accounting Office, "poor districts in 35 states made a greater tax effort than wealthy districts." *See* GAO, GAPS, *supra* note 5, at 21. In addition, because the higher tax rate provides a disincentive for economic development, the pattern of taxing high to produce few dollars becomes a vicious cycle of economic disinvestment. *See* John Dayton, *Recent Litigation and Its Impact on the State-Local Power Balance: Liberty and Equity in Governance, Litigation, and the School Finance Policy Debate, in* BALANCING LOCAL CONTROL AND STATE RESPONSIBILITY FOR K-12 EDUCATION 93, 106 (Neil D. Theobald & Betty Malen eds., 2000) [hereinafter BALANCING LOCAL CONTROL].

[8] School finance litigation dates from the early twentieth century. *See* W. Norton Grubb, Laura Goe & Luis A. Huerta, *The Unending Search for Equity: California Policy, the "Improved School Finance," and the* Williams *Case*, 106 TCHRS C. REC. 2081, 2082 (2004). Most commentators refer to the California Supreme Court's opinion in

statistics about how those important state laws produced staggering discrepancies between rich and poor districts.[9] The concurrence of two phenomena was largely to blame: first, the socioeconomic segregation of the populace, which intensified in the post-World War II era when many middle- and upper-class Americans left cities and settled in prosperous homogeneous suburbs;[10] and second, the use of the local property tax as an important school funding source.[11] The revenue-raising ability of that tax, of course, depends crucially on the value of property within the government's borders. Thus, as wealth segregation increased in U.S. communities, the redistributive function of the local property tax decreased. The result was a growing disparity in the revenue-raising potential between rich and poor school districts.[12]

Serrano v. Priest, 487 P.2d 1241 (Cal. 1971), as marking the beginning of modern school funding litigation. *See* John Dayton & Ann Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2359-61 (2004).

[9] Early education funding plaintiffs, in both federal and state courts, documented tremendous inequalities in school funding. *E.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 11-16 (1973); *Serrano*, 487 P.2d at 1246; Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392-94 (Tex. 1989).

[10] See LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 230-55 (2003), for a description of how suburbanization produced communities highly stratified on the basis of income and socioeconomic status. Sheryll Cashin's recent book provides empirical documentation. *See* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 95-96 (2004); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1397-98 (1994) (noting tendency for communities to sort themselves on basis of socioeconomic status). See also KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 231-45 (1985), for a description of the suburbanization of the United States. Professor Jackson identified five characteristics of the postwar suburbs: increasingly distant from central cities, low density development, architectural sameness in construction, low prices associated with mass production, and racial and economic homogeneity.

[11] Nationally, local revenues account for 43.5% of total public school expenditures. NAT'L EDUC. ASSOC., RANKINGS AND ESTIMATES 41 (2004). A comparison of individual states, however, reveals a substantial range. *Id.* Aside from Hawaii, whose statewide school system is unique in the United States, New Mexico is the state with the least reliance on local revenue raising. *Id.* As of 2004, it derived only 13.3% of its revenues locally. Illinois, at the other end of the spectrum, generated 62% of its school funds from local property taxes. *Id.* The statistics also indicate a slight decrease in the percentage of school funds provided by state governments from 49.1% in 2002-2003 to 48% in 2003-2004. *Id.* at 41-42.

[12] As the Supreme Court has noted, many school funding systems were created in the nineteenth century to finance schools in predominantly rural communities. At

In numerous cases, plaintiffs convinced state courts that the inevitable inequality produced by heavy reliance on local property tax revenues violated state constitutional guarantees of equal protection or the state constitution's education clause.[13] Their victories, however, were often "Pyrrhic."[14] In most successful cases, courts agreed with the plaintiffs that the overall funding scheme violated important state constitutional principles, but did not invalidate the root cause of the evil. By leaving local property tax revenue-raising powers untouched, the judicial holdings produced what has turned out to be a continuing stream of state legislative catch-up efforts to aid those districts whose property wealth cannot generate sufficient revenues. In hard economic times, however, state spending on schools declines. Local districts that can afford to do so increase their property tax rate, thus frequently recreating the maldistribution of revenues that started the litigation initially. In fact, courts now can predict with reasonable certainty that invalidating a school funding system but allowing the retention of district taxing and spending discretion will, within a matter of years, restore the inequality and inadequacy that prompted the litigation.[15] Although many courts are sympathetic to the "*Serrano*

that time, population and property wealth were distributed more evenly. As a result the local property tax produced far less inequality than it does today, since American communities are now heavily segregated along socioeconomic lines. *See Rodriguez*, 411 U.S. at 7-8 (citing sources); Montoy v. State, No. 99-C-1738, 2003 WL 22902963, at *13 (Kan. Dist. Ct. 2003) (noting constitutional sufficiency of local property tax "when the assets of the state consisted virtually entirely of unimproved prairieland, and when school districts had about equal amounts of that"); *see also* JOHN E. COONS, WILLIAM H. CLUNE, III & STEPHEN D. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 49 (1970) (recounting history of U.S. public education and describing use of local property taxes in early twentieth century as "tolerable" because of "relative uniformity of wealth and population distribution").

[13] For a recent compilation of wins and losses in the 50 states, *see* Perry A. Zirkel & Jacqueline A. Kearns-Barber, *A Tabular Overview of the School Finance Litigation*, 197 W. EDUC. L. REP. 21, 23 (2005); *see also* Jeffrey Metzler, *Inequitable Equilibrium: School Finance in the United States*, 36 IND. L. REV. 561, 562 (2003).

[14] Bradley Joondeph used this term to describe the victory achieved by California's *Serrano* plaintiffs. Bradley W. Joondeph, *The Good, the Bad, and the Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform*, 35 SANTA CLARA L. REV. 763, 814 (1995).

[15] *See* Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1349 (2004) (noting that state efforts to pull up bottom are frustrated by "recessions, new emergencies, and the desires of a public whose attention shifts rapidly"). The experience of Kansas illustrates the phenomenon. *See* Mock v. State, No. 91-CV-1009 (Kan. Dist. Ct. Oct. 14, 1991) (noting that district court opinion in recent *Montoy v. State* litigation

principle"[16] that the wealth of a school district should not determine

extensively described and quoted this case); Montoy v. State, No. 99-C-1738, 2003 WL 22902963, at *1, *17 (Kan. Dist. Ct. Dec. 2, 2003) (invalidating Kansas' property-tax based school funding scheme); *id.*, at *3, *9-10, *21-22 (describing and quoting *Mock*). In response, the state legislature passed the School District Finance and Quality Performance Act, KAN. STAT. ANN. §§ 72-6405 to -6440 (2005). That law was upheld by the Kansas Supreme Court. Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1197 (Kan. 1994). Eleven years later, another challenge was filed, arguing that the disparity between rich and poor school districts had climbed back to its pre-*Mock* levels, reaching a gap of 300% between the top and bottom. *See Montoy*, 2003 WL 22902963, at *37. In Washington, the history is similar. The legislature reacted to its supreme court's 1978 invalidation of the state school finance law by adopting the seemingly more equalizing reforms of a statewide property tax and caps on local school district property tax power. In 2005, however, the gap between rich and poor was "almost back to where we started." *See* League of Education Voters, A Brief History of School Finance in Washington, http://www.educationvoters.org/school.funding/how_did_washington_get_to_where_.htm (last visited Mar. 6, 2007). See Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH. U. L.Q. 755, 785-88, 797-802 (2004), for a description of the litigation and legislative responses in Washington and Kansas. Arkansas is another good example of the same problem. The supreme court's holding in *Dupree v. Alma School District No. 30*, 651 S.W.2d 90 (Ark. 1983), invalidated the state's school finance statute and condemned its failure to provide equal educational opportunity. *Id.* at 93-95. More than 20 years later, the court once again invalidated the state's school funding system, condemning the "glacier speed" of the legislative response. Lake View Sch. Dist. No. 25 v. Huckabee, 362 Ark. 520 (2005), *available at* 2005 WL 1358308, at *1 (Ark. Sup. Ct. June 9, 2005). Wyoming's experience is also illustrative. In *Washakie County School District No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980), the court invalidated a school finance system whose reliance on the local property tax produced typical amounts of district inequality. *Id.* at 315, 322. In spite of post-*Washakie* legislative reforms, 10 years later the gap between rich and poor districts had grown by a factor of more than six. *See* Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1250 (Wyo. 1995).

Jeffrey Metzler's recent analysis of school funding reform led him to hypothesize that an "inequitable equilibrium" explains the frequency with which legislative reform of school funding statutes does not produce meaningful equalization: "In many states, the distribution of education resources is primarily a function of the distribution of political power in the state. This distribution is the 'equilibrium point,' and in many states it is an inequitable equilibrium insofar as it permits wealthy districts, even at lower tax rates, to spend more per student than poor districts." Metzler, *supra* note 13, at 564. Although an adverse judicial opinion may "temporarily upset this equilibrium," in many cases the legislature "manipulates [its legislative reform] in order to restore the previous equilibrium." *Id.*

[16] The "*Serrano* principle" refers to the California Supreme Court's decision in *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), in which the court invalidated California's school funding system and determined that "funding available for education [must] be a function of the wealth of the state as a whole and not . . . of the wealth of the individual district." *Id.* at 1244; Dayton & Dupre, *supra* note 8, at 2359; Janet D. McDonald, Mary F. Hughes & Gary W. Ritter, *School Finance Litigation and*

the funds available for schools,[17] so long as the local property tax is in place as a source of local revenues, it inevitably will.[18]

In an earlier article, I argued that neither adequacy nor equality of educational opportunity can realistically be achieved without capping the level at which school districts can tax the real property within their borders and spend the revenues they generate on their own schools.[19] Moreover, surveying the results of states that sought greater equality through the imposition of legislative caps on local taxing

Adequacy Studies, 27 U. ARK. LITTLE ROCK L. REV. 69, 72 (2004). The *Serrano* principle is one of fiscal equality, which was forcefully articulated and defended in a well-known volume by three leading academics, COONS ET AL., *supra* note 12; GAO, GAPS, *supra* note 5, at 5 (describing fiscal neutrality as holding that "no relationship should exist between educational spending per pupil and local district property wealth per pupil"). The *Serrano* court extensively cited a Coons, Clune, and Sugarman article that articulated the principle described in their monograph. *See Serrano*, 487 P.2d at 1248, 1253, 1258-59, 1262, 1265 (citing John E. Coons, William H. Clune, III & Stephen D. Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305 (1969)).

[17] The plaintiffs in *Rodriguez v. San Antonio Independent School District*, 337 F. Supp. 280 (W.D. Tex. 1971), rested their case on the claim that equal protection principles require fiscal neutrality in school revenue raising. *Id.* at 284. Although the district court ruled in their favor, the Supreme Court rejected their arguments. *Rodriguez*, 411 U.S. at 6. Some state courts have been more sympathetic. *See, e.g.*, Montoy v. State, 112 P.3d 923, 937 (Kan. 2005) (holding that school finance system characterized by "a continuing lack of constitutionally adequate funding together with . . . inequity-producing local property tax measures" violates education provision of Kansas Constitution); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989) ("[S]pending disparities among the State's school districts translate into a denial of equality of educational opportunity."); Abbott v. Burke, 575 A.2d 359, 385-86 (N.J. 1990) ("The [Public School Education] Act must be amended . . . so as to assure that poorer urban districts' educational funding is substantially equal to that of property-rich districts. . . . The funding mechanism is for the Legislature to decide. However, it cannot depend on how much a poorer urban school district is willing to tax."); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 752 (Tex. 1995) (Enoch, J., concurring and dissenting) ("The State has so expanded its reliance on local property taxes to fund the entire public school system that the State has abdicated its constitutional duty to make suitable provision for public schools in violation [of the state constitution]."); *Washakie*, 606 P.2d at 336 ("[W]hatever system is adopted by the legislature, it must not create a level of spending which is a function of wealth other than the wealth of the state as a whole.").

[18] Texas may be one exception to that generalization, but that is only because of its extremely unstable "Robin Hood" school funding system, whereby wealthy districts must redistribute to poorer districts all local property tax revenues that exceed a state stipulated amount. For an explanation and evaluation of Texas's school funding scheme, see Reynolds, *supra* note 15, at 788-92.

[19] *See id.*

discretion, I found that substantial inequality remained even in those states.[20] In nearly all states with legislatively adopted caps, the caps themselves are so riddled with exemptions and exceptions that they invariably preserve, and sometimes exacerbate, the disparities that led to their imposition.[21] As a result, I concluded that only a total severance of property wealth and school revenue could eliminate the inequalities that plague American schools.[22]

In this Article, I elaborate on my suggestion that the state eliminate the local property tax as a source of school funding and replace it with a uniform statewide property tax. First, I claim that state reliance on the local property tax to fund schools violates state constitutional law. Because state constitutions explicitly commit the provision of public education to the state government, I argue that the state cannot transfer power to its political subdivisions if that transfer produces a result that the state could not implement itself. Subsequently, I survey the results of school funding litigation and suggest that neither the equality nor the adequacy "wave"[23] of litigation has produced the desired results even on the heels of ostensible judicial victory. Although I recognize that both theories can be used to advance the case for the elimination of the local property tax for school funding, I argue that the vertical equity principle better highlights the inadequacy and illegitimacy of wealth-based school funding. Thus, I

[20] *Id.* at 779-804.

[21] *See id.*

[22] *See id.* at 804-16. My suggestion is not new. As a law student, Professor Kirk Stark proposed funding schools with a statewide property tax on all non-residential property. *See* Kirk J. Stark, Note, *Rethinking Statewide Taxation of Nonresidential Property for Public Schools*, 102 YALE L.J. 805, 806-07 (1992).

[23] School funding litigation is traditionally described as consisting of three waves. The first consisted of federal equal protection challenges. The second turned to state courts with challenges based on inequality of funding and educational opportunity. The third uses adequacy instead of equality for its legal doctrinal basis. For an example of some of the vast literature discussing the three waves, see, for example, Dayton & Dupre, *supra* note 8, at 2359-76; Michael Heise, *Hollow Victories*, *supra* note 3, at 571-79; Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995) [hereinafter Heise, *Third Wave*]; Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. LEGIS. 507 (1991); Reynolds, *supra* note 15, at 762-67; William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decisions as a Model*, 35 B.C. L. REV. 597 (1994); William Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990).

advocate a reformulation of the equality theory and propose that total statewide funding of schools is necessary. I argue that doctrinal, strategic, and pragmatic considerations all favor the rejection of local funding sources and that a statewide property tax is the preferable, and perhaps the only realistically effective solution to the problem of grossly unequal school funding.[24] As a trade-off for the loss of local revenue-raising power, I propose that the state make local control a meaningful term for all its school districts by empowering them with initiative policy powers similar to those enjoyed by home rule units of government.

I. UNIFORMITY OF STATE TAXATION

Although the states have tremendously broad powers of taxation, their discretion is limited by the requirement that taxes be uniform.[25] Whether the state constitution explicitly contains a requirement of uniformity[26] or proportionality,[27] or whether the courts have derived

[24] As numerous commentators have stressed, fair school funding is necessary but not sufficient for successful educational reform. Whether more equalized funding enhances educational opportunity "depends entirely on what we do with the money." *See* U.S. GEN. ACCT. OFFICE, SCHOOL FINANCE: THREE STATES' EXPERIENCES WITH EQUITY IN SCHOOL FUNDING 15 (1995), *available at* http:///www.gao.gov/archive/1996/he96039.pdf (recommending that school funding reform be linked to accountability); Carey, *supra* note 5, at 15. Commentators note increasing demands for standards and accountability in public schools, with supporters seeking to define clear expectations for school performance and to identify appropriate assessment mechanisms for evaluating achievement. *See* Heise, *Unintended Consequences*, *supra* note 4, at 634-35; Michael Heise, *Equal Educational Opportunity and Constitutional Theory: Preliminary Thoughts on the Role of School Choice and the Autonomy Principle*, 14 J.L. & POL. 411, 428 (1998); McUsic, *supra* note 3, at 117-19. I am also sympathetic to the argument that "segregated schools, even with equal funding, can never be equal," but believe that the current inequality in the distribution of public revenues for schools is indefensible both as a legal and policy matter. McUsic, *supra* note 15, at 1335. Thus, I believe that equalization of educational opportunity is currently as compelling as the goal of integration. *Cf.* Taunya Lovell Banks, Brown *at 50: Reconstructing* Brown's *Promise*, 44 WASHBURN L.J. 31, 43 (2004) (claiming that "[i]ntegration without equalization does not constitute equal educational opportunity").

[25] For a discussion of uniformity limits in state and local taxation, see RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 558-76 (6th ed. 2004); Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 383-84 (2004).

[26] *See, e.g.*, GA. CONST. art. vii, § 1, ¶ 3(a) ("[A]ll taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."); ME. CONST. art. IX, § 8 ("All taxes upon real and personal estate . . . shall be

the principle from state equal protection[28] or special legislation clauses,[29] the uniformity requirement applies to invalidate classifications that treat similar or identical property or taxpayers differently. Judicial definitions of the parameters of the uniformity clause are remarkably similar across the country. Although most courts tolerate significant legislative discretion,[30] if a tax makes an irrational distinction between the taxpayers or the property incident to the tax,[31] or if it reveals purposeful discrimination,[32] it will be invalidated through application of the uniformity clause.

It seems reasonably clear that no matter how deferential the judicial approach nor how minimal the textual requirement of uniformity, no state would uphold, for example, a state income tax that taxed residents of one community at a higher level than residents of

apportioned and assessed equally according to the just value thereof."). *See also* PA. CONST. art. VIII, § 1 (noting that "all taxes shall be uniform"); MICH. CONST. art. 9, § 3 (noting that "legislature shall provide uniform . . . taxation"); N.J. CONST. art. VIII, § 1, ¶ 1(a) (noting that "[p]roperty shall be assessed for taxation under . . . uniform rules"). Many state constitutions were amended to require uniformity of taxation during the late 1800s, in response to many perceived legislative abuses of taxing and spending powers. *See* Kristin E. Hickman, Comment, *The More Things Change, the More They Stay the Same: Interpreting the Pennsylvania Uniformity Clause*, 62 ALB. L. REV. 1695, 1698 (1999).

[27] *See, e.g.*, N.H. CONST. part II, art. V (stating that legislature may "impose and levy proportional and reasonable . . . taxes"). The New Hampshire Supreme Court applied this clause to invalidate unequal local school tax rates in *Claremont School District v. Governor*, 703 A.2d 1353, 1357 (N.H. 1997). *See also* MASS. CONST. part II, ch. 1, § 1, art. IV (noting that state's legislature may "impose rational basis test to find reasonableness of the tax").

[28] *See, e.g.*, Medlock v. Leathers, 842 S.W.2d 428, 430-31 (Ark. 1992) (applying rational basis test to find reasonableness of tax).

[29] *See, e.g.*, Desenco, Inc. v. City of Akron, 706 N.E.2d 323, 330 (Ohio 1999) (analyzing whether tax is constitutional through two prong "special nature test").

[30] *See* City of Lancaster v. City of Lancaster, 599 A.2d 289, 294 (Pa. Commw. Ct. 1991) (noting that uniformity is satisfied upon showing of "a reasonable distinction and difference between classes of taxpayers sufficient to justify different tax treatment").

[31] *See, e.g.*, *In re* Opinion of the Justices, 557 A.2d 273, 275 (N.H. 1989) (finding amendment that taxes certain employers differently is unconstitutional); Johnson & Porter Realty Co. v. Comm'r of Revenue Admin., 448 A.2d 435 (N.H. 1982) (invalidating minimum business tax as lacking uniformity because it imposes greater burden on taxpayers with less income).

[32] *See, e.g.*, Pharr Road Inv. Co. v. City of Atlanta, 162 S.E.2d 333, 335 (Ga. 1968) (finding graduated licensing tax system discriminatory and unconstitutional); Topeka Cemetery Ass'n v. Schnellbacher, 542 P.2d 278 (Kan. 1975) (finding discriminatory burial tax unconstitutional).

another.[33] The same fate of invalidation would befall a state property tax that taxed property around the state at different rates if the differential depended only on the property's location.[34] Statewide taxes for school funding would be subject to those same uniformity restrictions: a state property tax, levied at different rates on different geographic areas, would not withstand legal scrutiny.[35]

The property tax levied for school funds in most states, though, is purportedly local in nature. Thus, for uniformity purposes, the question becomes whether the state's decision to transfer school revenue-raising powers to its political subdivisions should insulate the resulting lack of uniformity from invalidation under the uniformity clause. Since the duty to provide education is explicitly committed to the state in all state constitutions,[36] the state's political subdivisions should not be allowed to implement their state's constitutional duty in a manner that would be foreclosed to the state for lack of uniformity.

Although several school funding plaintiffs have raised uniformity challenges to their state laws,[37] only one was successful. In *Claremont*

[33] *Cf.* County of Alameda v. City & County of San Francisco, 97 Cal. Rptr. 175, 179 (Ct. App. 1971) (invalidating discriminatory San Francisco tax ordinance); City of New York v. State, 730 N.E.2d 920, 930 (N.Y. 2000) (finding tax law discriminatory against interstate commerce invalid); Danyluk v. Bethlehem Steel Co., 178 A.2d 609, 610 (Pa. 1962) (invalidating local income taxes that imposed higher rate on nonresidents than residents).

[34] *See, e.g.*, Martin v. Ellis, 249 S.E.2d 23, 26 (Ga. 1978) (invalidating tax differential created across taxing districts); Put-in-Bay Island Taxing Dist. Auth. v. Colonial, Inc., 605 N.E.2d 21, 23 (Ohio 1992) (invalidating excise tax applying only to vendors on islands).

[35] Rose v. Council for Better Educ., 790 S.W.2d 186, 216 (Ky. 1989) (invalidating state's school finance system, stressing that any statewide property tax must be levied on property assessed at 100% of fair market value and taxed at uniform rate across state). In one of the supreme court rulings in New Hampshire's *Claremont* school finance litigation, the court's application of uniformity principles led it to invalidate a legislative phase-in of a statewide property tax that would have softened the blow for wealthy districts over a period of years, by levying unequal (and lower) rates on wealthy districts. *See* Claremont Sch. Dist. v. Governor (*Claremont III*), 744 A.2d 1107, 1111-12 (N.H. 1999).

[36] *See* Dayton & Dupre, *supra* note 8, at 2356; McUsic, *supra* note 15, at 1346 n.72; *see also* Yohance C. Edwards & Jennifer Ahern, Note, *Unequal Treatment in State Supreme Courts: Minority and City Schools in Education Finance Reform Litigation*, 79 N.Y.U. L. REV. 326, 327 n.2 (2004) (citing all state constitutional provisions). The authors note the disagreement over whether Mississippi's constitution guarantees a right to education. *See* Edwards & Ahern, *supra*, at 329 n.14.

[37] *See* Gould v. Orr, 506 N.W.2d 349, 352 (Neb. 1993); Robinson v. Cahill, 303 A.2d 273, 288-90 (N.J. 1973); Coal. for Equitable Sch. Funding, Inc. v. State, 811 P.2d

School District v. Governor,[38] the New Hampshire Supreme Court reasoned along the lines proposed here to invalidate a school funding formula that relied on disparate local property tax revenue-raising power. The court concluded that because the duty to provide education is a state and not a local duty, any property tax levied for public schools is a state and not a local tax.[39] As a result, the New Hampshire Constitution's uniformity clause applied to invalidate the "disproportionate and unequal [local property tax] rates [adopted] to fulfill the State's constitutional duty."[40]

The claim that a state constitution's uniformity clause should invalidate unequal local property tax rates for schools is less wide ranging than may appear at first glance. It would not, for instance, apply to require statewide uniformity of all local taxation efforts. In

116, 117-18 (Or. 1992). Only in the New Jersey case, however, did the plaintiffs focus on the fact that the duty whose breach was alleged was textually committed to the state. In other cases, plaintiffs unsuccessfully raised a related concern about uniformity, basing their argument on state constitutional provisions that guarantee a uniform system of education. *See* James v. Harper, 713 So. 2d 869, 871 (Ala. 1997); Shofstall v. Hollins, 515 P.2d 590, 592-93 (Ariz. 1973); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1014-19 (Colo. 1982); Skeen v. State, 505 N.W.2d 299, 302-12 (Minn. 1993); Olsen v. State, 554 P.2d 139, 148-49 (Or. 1976).

[38] Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1354 (N.H. 1997). In *Claremont School District v. Governor* (*Claremont I*), 635 A.2d 1375 (1993), the court held that the state's school funding statute did not live up to the state's constitutional obligation to provide an adequate education. *Id.* at 1376. After the court invalidated the local property tax as a source of state funding in *Claremont II*, its decision in *Claremont III* invalidated the legislature's response to the earlier decisions. In its most recent opinion, *Claremont School District v. Governor* (*Claremont V*), 794 A.2d 744 (N.H. 2002), the court exercised its ongoing jurisdiction over the case and declared that state law continued to display "deficiencies that are inconsistent with the State's duty to provide a constitutionally adequate education." *Id.* at 745.

[39] *Claremont II*, 703 A.2d at 1356. The court's holding on this point was not a revolutionary break with precedent, but rather a reiteration of principles articulated in two earlier cases: Opinion of the Justices, 149 A. 321, 325 (N.H. 1930); Opinion of the Court, 4 N.H. 565, 571 (1829). The trial court in the ongoing school finance litigation in Kansas, using a similar rationale, invalidated the use of local property taxes to finance the state's constitutional obligations. Montoy v. State, No. 99-C-1738, 2003 WL 22902963, at *11 (Kan. Dist. Ct. 2003), *aff'd in part, rev'd in part*, 120 P.3d 306, 308 (Kan. 2005) (finding current education pay scheme unconstitutional).

[40] Opinion of the Justices (Reformed Pub. Sch. Financing Sys.), 765 A.2d 673, 677 (N.H. 2000). The court stopped short of invalidating local property tax revenue-raising for schools, concluding only that local property taxes cannot be used to fund the state's constitutionally required provision of an adequate education. Once that minimum standard is satisfied, however, the court indicated that local districts may levy property taxes to generate supplemental funding. *See Claremont II*, 703 A.2d at 1356.

the typical transfer of power from state to local government, no constitutional language explicitly charges the state with an affirmative duty to undertake the action that is subject to the transfer. When the local government receives state power to adopt a sales tax, for instance, it is of course subject to the same state principles that restrict state taxing powers. That is, the local governments cannot exercise their powers of taxation in a way that would violate state or federal constitutional limitations.[41] The state's uniformity clause, however, does not apply to invalidate the resulting disparity among municipal sales tax rates; it serves only to guarantee that the intrajurisdictional taxation rate meets uniformity standards. The local government's adoption of a local sales tax is not an implementation of a state duty, but rather the expression of local initiative in economic matters, adopted pursuant to the state's decision to enable the political subdivision.[42]

The situation is different, however, when the state constitution specifically requires the state to undertake an obligation. In those few instances,[43] I argue, the local government's actions should be subject

[41] *See, e.g.*, City of Homewood v. Bharat, L.L.C., 931 So. 2d 697, 703-04 (Ala. 2005) (invalidating local lodging tax under constitutional prohibition of special legislation); City of Modesto v. Nat'l Med, Inc., 27 Cal. Rptr. 3d 215, 219 (Ct. App. 2005) (invalidating local tax under state requirements of equal protection and due process); City of Bromley v. Smith, 149 S.W.3d 403, 405 (Ky. 2004) (invalidating city tax for failure to conform with state constitutional requirement that local property taxes be based on assessed valuation); Wesley United Methodist Church v. Dauphin County Bd. of Assessment Appeals, 889 A.2d 1180, 1182 (Pa. 2005) (ordering property tax exemption for church parking lot, in compliance with Pennsylvania Constitution and General County Assessment Law); Baylor v. Ctr. County Bd. of Assessment & Revision of Taxes, 623 A.2d 882, 883, 885 (Pa. Commw. Ct. 1993) (local occupational tax levied on ordained minister found to violate federal constitutional protection of religious freedom); Tredyffrin-Easttown Sch. Dist. v. Valley Forge Music Fair, Inc., 627 A.2d 814, 821 (Pa. Commw. Ct. 1993) (invalidating school district's amusement tax under state constitution).

[42] *See, e.g.*, C & S Wholesale Grocers, Inc. v. City of Westfield, 766 N.E.2d 63, 66 (Mass. 2002) (finding local option to set tax rates, which produces statewide disparity, did not violate uniformity principle).

[43] In fact, the state education clause may be the only or one of a very few affirmative state obligations found in the state constitution. *See Claremont II*, 703 A.2d at 1358 (noting that New Hampshire Constitution imposes only two affirmative obligations on state: to provide education, and to ensure "'prompt and temporary succession to the powers and duties of public officers' in the event of enemy attack"); Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & EDUC. 167, 178 (2002) (noting that right to education is only governmental service with constitutional stature in

to the same limitations that would restrain the state's discretion if it decided to fulfill its obligation directly. In other words, the level of government at which the service is guaranteed is the level at which the uniformity clause should apply. Uniformity of local property tax rates for school funding is required, not because the state has transferred power to a political subdivision, but because the power that it has transferred is a constitutional mandate that operates directly on the state itself. If the state has a constitutional obligation to provide education to its citizens, it can perhaps authorize its political subdivisions to offer that service, but it should not be able to allow the exercise of local control to produce a result that the state itself would be unable to adopt.

The general rule that a state should not be able to do indirectly what it cannot do directly has been an important limit on the relationship between a state and its political subdivisions. On that basis, courts have invalidated state attempts to empower local governments in ways that would be foreclosed to the state itself. If, for instance, a state constitution prohibits state adoption of a particular tax, the state cannot circumvent that limitation by authorizing one of its political subdivisions to implement the tax.[44] Similarly, if the state is incapable of passing a certain type of statute or regulation, it cannot avoid that restriction on its sovereignty by purporting to authorize one of its political subdivisions to exercise the desired power.[45] Applying that principle to school funding, the uniformity limitation should invalidate unequal local property tax rates for school funding. This result is required, not because the uniformity clause should apply to all local exercises of transferred taxation powers, but rather because the uniformity clause applies to the state's implementation of its constitutional responsibilities. In the vast majority of states, where local governments exercise substantial freedom to fund their schools by taxing the property within their jurisdictions at whatever rate the local populace will tolerate, the lack of uniformity is patent.[46]

II. REFOCUSING THE DOCTRINAL BASIS OF

Vermont).

[44] *See* Chanin v. Bibb County, 216 S.E.2d 250, 253-54 (Ga. 1975).

[45] *See* Arkansas Game & Fish Comm'n v. Clark, 96 S.W. 2d 699, 700 (Ark. 1936); Clark v. Miller, 105 So. 502, 505 (Miss. 1925).

[46] In the New Hampshire *Claremont* litigation, for instance, the difference in local property tax rates across the state reached a difference of 400%. *See Claremont II*, 703 A.2d 1353, 1356-57 (N.H. 1997).

SCHOOL FINANCE LITIGATION

The uniformity argument advanced in the previous Part, if successful, leads to the inevitable result that local property taxes cannot be used to fulfill the state's constitutional duty to provide education. The few courts that have reached that same conclusion have relied on various doctrinal principles. This Part traces those judicial developments and illustrates how well-established principles of both equality and adequacy can be used as the legal doctrinal basis for the uniformity challenge. Nevertheless, I ultimately conclude that the equality and adequacy theories should be replaced with a reconfigured equality standard, one which would require that school revenues be allocated on the basis of the child's educational needs. This vertical equity standard, which has been advanced by school funding plaintiffs in two recent cases, is preferable for two main reasons. First, it is the most consistent with the Supreme Court's command in *Brown v. Board of Education*; second, it is the standard that most clearly compels a clean and total break between the wealth of property in a child's school district and the school funds allocated to that child.

A. Coming Full Circle on Equality

Scholars have categorized the doctrinal underpinnings of school finance litigation as resting either on equality-equity or adequacy grounds. The standard account of the history shows how the original lawsuits comprise two waves of equal protection litigation, first at the federal and then at the state level.[47] In general, the early lawsuits sought to neutralize the fiscal disparity that came from heavy reliance on the local property tax. After the U.S. Supreme Court denied relief in federal courts,[48] the litigation moved to state constitutional challenges, with some success. According to one count, of the twenty equality cases brought in state court, seven were successful.[49]

Subsequently, beginning in the 1980s, the third wave of school finance litigation began, as many plaintiffs shifted to education-specific claims, arguing that the education clauses of state

[47] For a summary of the waves of school finance litigation, see sources cited *supra* note 23.

[48] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4-6 (1973).

[49] James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 267 nn.74-75 (1999).

constitutions provided an independent basis for relief.[50] Because all state constitutions create state responsibility for the provision of education,[51] plaintiffs began to argue that the states were woefully out of compliance with their constitutional mandates. Rejecting the basic premise of the equality litigation, the adequacy theory implicitly accepted the inequality inherent in a system that relies on local property tax funding.[52] In place of the claim that the poorest and worst performing school districts in the state suffered from unconstitutional inequality in school finance, the adequacy lawsuits sought judicial declarations that the shocking inadequacy present in those same schools violated state constitutional guarantees of education. Thus, the argument shifted from the comparative parameters of equality to the absolute gauge of inadequacy. Although the adequacy doctrine is still prevalent in school finance litigation,[53] references to a "fourth wave" of accountability and output assessment litigation suggest that the underlying legal doctrines will continue to shift to reflect new developments in educational practice and new strategies to deal with changing political realities.[54]

[50] *See* sources cited *supra* note 23. The New Jersey Supreme Court's opinion in *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), was the first to adopt the adequacy rationale based on its constitution's education clause. *See* Dayton and Dupre, *supra* note 8, at 2364-66.

[51] *See supra* note 36.

[52] For instance, the Ohio Supreme Court's *DeRolph* opinions expressly declined to examine the plaintiffs' equalization claim. *See* DeRolph v. State, 677 N.E.2d 733, 740 n.5 (Ohio 1997). One commentator suggested that the plaintiffs were able to garner substantially more popular support by focusing on "leveling-up." *See* Larry J. Obhof, DeRolph v. State *and Ohio's Long Road to an Adequate Education*, 2005 B.Y.U. EDUC. & L.J. 83, 99.

[53] *See, e.g.*, Montoy v. State, 112 P.3d 923, 931 (Kan. 2005) (focusing on "this court's specific concerns about whether the actual costs of providing a constitutionally adequate education were considered as to each of the formula components and the statutory formula as a whole"); *Claremont II*, 703 A.2d 1353, 1354 (N.H. 1997) (finding that vast differences in property tax rates across state were unreasonable and disproportionate); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 348 (N.Y. 2003) (holding that education financing system for New York City schools must be reformed to provide "a sound basic education"); DeRolph v. State (*DeRolph IV*), 780 N.E.2d 529, 530 (Ohio 2002) (reiterating *DeRolph I*'s call for "'a complete systematic overhaul' of the school-funding system [so as to] enact a school-funding scheme that is thorough and efficient"); State v. Campbell County Sch. Dist. (*Campbell II*), 19 P.3d 518, 526 (Wyo. 2001) (outlining legislative modifications needed to provide "a constitutionally adequate education appropriate for our times").

[54] Professor James Ryan has identified an incipient "fourth wave" of litigation that seeks desegregation of the public schools and redistricting to achieve integration. *See*

Looking back on the waves of litigation in school finance, commentators have observed that successful equity plaintiffs often were unable to obtain the equalization they sought.[55] Although the gap between wealthy and poor districts has decreased in the wake of equalization orders, at least according to some analyses,[56] it is difficult to find a school funding system that is true to the *Serrano* principle of fiscal neutrality that a child's educational opportunities should depend only on the wealth of the state and not on the wealth of the school district in which the child resides.[57] It is even more difficult to find a state committed to the goal of equal educational opportunity (also referred to as "vertical equity"), in which revenues are allocated to schoolchildren on the basis of their educational needs.[58]

Ryan, *supra* note 49, at 307-10. *See generally* Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867 (1998). Other commentators describe an evolving "improved school finance" litigation theory based on accountability and standards. *See* Grubb, Goe & Huerta, *supra* note 8, at 2083.

[55] *See* McUsic, *supra* note 15, at 1336-54 (concluding that "equalizing funding has not equalized opportunity"). More fundamentally, in the vast majority of states, school funding is not equalized. Nationwide, the GAO has calculated that "on average wealthy districts had about 24% more total funding per weighted pupil than poor districts." *See* GAO, GAPS, *supra* note 5, at 2; *see also* sources cited *infra* note 80.

[56] *See* Joondeph, *supra* note 14, at 808-09; Michele Moser & Ross Rubenstein, *The Equality of Public School District Funding in the United States: A National Status Report*, 62 PUB. ADMIN. REV. 63, 64 (2002). The GAO attributes most of the equalization gains to greater taxing efforts by poor districts. *See* GAO, EQUALIZE, *supra* note 3, at 5.

[57] Even in California, where the state has met the *Serrano* court's requirement that there be no more than $300 in per-pupil spending differences across the state, the figures are misleading. Thirty percent of California's funding for schools comes in the form of categorical grants. *See* LAWRENCE O. PICUS, CALIFORNIA SCHOOL FINANCE 1998-99: MORE MONEY FOR SCHOOLS, BUT WHAT WILL IT BUY? 3 (1998), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/11/27/3b/pdf. In addition, facilities funding falls outside the *Serrano* mandate. Both of these expenditures have anti-equalizing effects. *See* Grubb, Goe & Huerta, *supra* note 8, at 2084-85. For a critique of the state's response to *Serrano*, see generally Hanif S.P. Hirji, Comment, *Inequalities in California's Public School System: The Undermining of* Serrano v. Priest *and the Need for a Minimum Standards System of Education*, 32 LOY. L.A. L. REV. 583, 583 (1999). For analysis of the California school funding system, see Liz Kramer, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC. 1, 19-22 (2002).

[58] This more "extreme" form of equalization recognizes that some children may be more expensive to educate than others and allocates funds on the basis of children's needs. Fiscal neutrality merely requires that no relationship exist "between educational spending per pupil and local district property wealth per pupil." *See* GAO, GAPS, *supra* note 5, at 5. Vertical equity, in contrast, is based on the goal of equal educational opportunities and recognizes that some children are more expensive

Three interrelated factors appear to be at work. First, the legislative responses to judicial invalidations won by equality plaintiffs did not focus on how to equalize the educational opportunities available to children. Rather, state legislatures tended to seek a regime of taxpayer equality; or, in some cases, per capita revenue equality; and in a very small number of cases, a cap on local spending by wealthy districts. None of these methods has produced equality of educational opportunity. Under the very common "district power equalizer" system, for instance, states guaranteed that identical taxpayer efforts would generate identical school revenues, irrespective of the value of the property on which the tax was levied.[59] Any district levying the state-stipulated rate would receive the same per capita revenues. Thus, state contributions were needed to provide additional funds to those communities whose property wealth was incapable of generating the target amount. Not surprisingly, the district power equalizer solution was destined to preserve substantial inequality in education spending and in educational opportunity.[60]

Even in the rarer cases in which the state court insisted on per student equalization of revenues, equalization was limited to operating expenses. This approach ignores the huge backlog of deferred maintenance and inadequate facilities caused by years of inequality, and does not include local revenue raising for school facilities.[61] More

to educate than others. *Id.* In a case filed in 2000, *Williams v. California*, the plaintiffs argued that the continuing inequality of educational opportunity violated the supreme court's *Serrano* ruling. Their complaint, which embodied an "improved" school finance perspective, asked the California court to shift its focus from inadequacy or inequality of revenues to a standard of adequacy of "real resources — credentialed teachers, adequate textbooks, and appropriate physical facilities." Grubb, Goe & Huerta, *supra* note 8, at 2094. In 2004, the parties settled, with the state agreeing to provide money for books, safety in schools, and more highly qualified teachers. *See* Cal. Dept. of Educ., *Williams* Case History, http://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp (last visited Apr. 7, 2007).

[59] For an explanation of the district power equalizer, see Kirk Vandersall, *Post-*Brown *School Finance Reform*, *in* STRATEGIES FOR SCHOOL EQUITY 17, 22 n.1 (Marilyn J. Gittel ed., 1998); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 110-11 (1995).

[60] For one thing, district power equalizer formulae leave to the local districts the decision whether to use state funds to reduce overall education spending and local tax levels, and thus facilitate a shift from "low spending because of low wealth to low spending because of low tax politics." *See* William H. Clune, *New Answers to Hard Questions Posed by* Rodriquez*: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 728 (1992).

[61] In California, for example, responsibility for funding new schools lies largely

fundamentally, per-pupil expenditure equality ignores the fact that some students, particularly those with special needs, many of whom live in poverty, are more expensive to educate than others.[62] As a result, per capita spending equality does not guarantee equalization of educational opportunity. Finally, even in the few states whose legislatures sought equalization through the imposition of caps to limit the ability of wealthy districts to generate unlimited local property tax revenues, the caps were typically so riddled with anti-equalizing exemptions as to be ineffectual.[63]

A second explanation for the failure of equalization orders relates to the forces of the political process itself. Legislative school funding reforms are prisoner to a phenomenon labeled by Jeffrey Metzler as the "inequitable equilibrium."[64] According to Metzler's theory, in all states the settled equilibrium point reveals a substantial gap in

with the school districts themselves, which means that wealthy districts are much more likely to have new facilities. For a survey of the ways in which California school districts can raise funds for schools, see Cal. Governor's Office of Planning & Research, *A Planners Guide to Financing Public Improvements* ch. 5 (June 1997), http://ceres.ca.gov/planning/financing/chap5.html#chap5.

[62] Because many of the nation's most disadvantaged children are educated in large urban districts, the district power equalizer frequently will not result in added funding for inner city schools. Large cities usually are not at the bottom in terms of their per capita property wealth or their total dollars spent per student. Clune, *supra* note 60, at 730. That per capita student spending figure may overstate the education dollars available to urban districts, however. One commentator described an analysis of the Hartford school district's spending and found that although the district ranked high in terms of per-pupil expenditures, when the money spent on special needs programs was subtracted, "actual per-pupil spending on regular academic programming . . . was far less in Hartford than the regional or state average." *See* McUsic, *supra* note 15, at 1358. The same is true in New York City, where 22% of its total school budget is spent on special education. *See* McUsic, *supra* note 3, at 106. The original proponents of fiscal neutrality recognized the incompleteness of per capita equality, but argued that it was a necessary first step in school finance reform:

> Neither power equalizing nor related systems of fiscal equity . . . would resolve the problems facing public education; their only necessary consequence is the removal intrastate of preference for rich districts. These reforms do not guarantee any special support for needy groups or individuals. Still, they are unquestionably a step forward: we cannot have compensation until we have equality.

COONS ET AL., *supra* note 12, at 245.

[63] See Reynolds, *supra* note 15, at 779-88, for a discussion of the failure of legislatively imposed caps on local school district spending.

[64] *See* Metzler, *supra* note 13, at 564. See *supra* note 15 for Metzler's definition of the term.

education revenues between the rich and poor districts. Because of its force, the conditions that caused the original litigation will be restored within a number of years.[65] Moreover, according to his study, the type of school funding reform adopted is singularly unimportant to the amount of equalization ultimately achieved. Metzler's statistical analysis of public spending on schools in all fifty states discovered that the relationship between type of legislative amendment and equalization in the allocation of school revenues is irrelevant. The drift back to the political dynamic that created the inequality and that prompted the litigation in the first place appears to exert a much stronger force than the judicial order that resulted from the litigation. Thus, without major legislative reform to block the inevitable lapse to inequality, or aggressive judicial supervision of recalcitrant legislatures, school funding litigants are likely to find that their victories do not translate into sustained results.[66]

Finally, one important factor that contributes to the failure of judicial equalization orders goes to the heart of the school funding system left in place after judicial invalidation. Equalization cannot be achieved without eliminating a property tax system that inevitably produces inequality. High levels of socioeconomic segregation across the country and the resulting disparity of property wealth make it inevitable that funding schools with local property tax revenues will preserve wealth-based inequality in schools. Because the vast majority of judicial orders left the local property tax in place,[67] they suffer from the essential paradox of invalidating the results of a school funding system while leaving untouched the source of the

[65] *See* Metzler, *supra* note 13, at 564, 584-91.

[66] *See id.* at 591.

[67] The situation in Ohio is typical, though perhaps a bit extreme. In a series of lawsuits, the Ohio Supreme Court repeatedly underscored its insistence that children not be deprived of high quality education because of the wealth of their local communities. *See* DeRolph v. State, 677 N.E.2d 733, 737-38, 742 (Ohio 1997) (condemning "vast wealth-based disparities" as depriving students of "high quality educational opportunities" and asserting that inequality in resources produces "inadequate educational opportunities"). The court never invalidated the local property tax. As of 2003, the court essentially gave up on school funding, holding that although the state financial system was fatally flawed, the judiciary's involvement in the dispute was ended. *See* State v. Lewis (*DeRolph V)*, N.E.2d 195, 199 (Ohio 2003), *cert. denied*, 540 U.S. 966 (2003). Judicial opinions in Wyoming, Kansas, New Hampshire, and Vermont are exceptions to that generalization. *See infra* notes 118-36 and accompanying text.

unconstitutionality.[68]

Cognizant of the doctrinal hurdles and the long-term ineffectiveness of judicial invalidation under the equality rationale, school funding plaintiffs gravitated toward a theory based on adequacy. The causes of the doctrinal shift were multiple. Chief among the explanations offered by the commentators was political reality. State efforts to equalize school funding challenged the ability of wealthy communities to use their property wealth to generate local property tax revenues sufficient to build and operate lavish schools that poorer communities could never achieve.[69]

Shifting to an adequacy basis, then, was less threatening to that segment of U.S. society. Other supposed advantages of adequacy led to the prediction that adequacy would achieve greater success than the

[68] The Texas legislative solution, adopted on the third try after the supreme court invalidated alternative attempts to meet the court's holding in *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989), presents an unusual combination of removing district wealth disparity, preserving the local property tax, and avoiding the state constitution's prohibition of a statewide property tax. The state's current, and much maligned, Robin Hood system requires wealthy districts to redistribute (or have the state redistribute) property tax revenues generated beyond a certain threshold. See Reynolds, *supra* note 15, at 788-92, for a description of the caselaw and the Texas legislative response. For criticism of the Texas system, see Kramer, *supra* note 57, at 26-32, 41. Professor Maurice Dyson describes recent proposals to eliminate Robin Hood. *See* Maurice Dyson, *The Death of Robin Hood? Proposals for Overhauling Public School Finance*, 11 GEO. J. ON POVERTY L. & POL'Y 1, 18-22, 25-26 (2004).

[69] *See* John Augenblick, *The Role of State Legislatures in School Finance Reform: Looking Backward and Looking Ahead*, *in* STRATEGIES FOR SCHOOL EQUITY, *supra* note 59, at 89, 98; Dayton & Dupre, *supra* note 8, at 2409; Enrich, *supra* note 59, at 155-58; Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1, 16-17 (2002); Molly McUsic, *The Uses of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 327-29 (1991); Robinson, *supra* note 4, at 515-16 (describing efforts to redistribute property tax from wealthy districts as "doomed to ultimate failure"). In the words of noted school funding commentators, "local citizens, and especially parents, do not like to be told that they cannot raise and spend local revenues on their own schools." James E. Ryan and Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2060 (2002). Another commentator describes the difficulty of limiting local discretion to spend as "the worst single problem besetting school finance litigation." *See* Clune, *supra* note 60, at 738-39. School finance plaintiffs sometimes make the strategic decision not to threaten wealthy school district taxing discretion. One description of Kentucky school reform describes how proponents were "mindful of the need to reassure wealthier school districts and the public generally that they themselves were, as they put it 'anti-Robin Hood.'" Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance in Kentucky, 1984-1995*, 26 LAW & SOC. INQUIRY 631, 648 (2001).

equality waves that preceded it. Strategically, adequacy would be far less expensive to achieve, because it is not predicated on the assertion that all children are entitled to the same high quality education.[70] For large urban districts, adequacy was thought to be preferable because many of those districts receive more than the average per-pupil funds in their states, yet continue to underperform.[71] In addition, adequacy would resonate better with those who saw education as implicating a broader societal concern about an educated citizenry, while equality framed the issue in terms of an individual child's right to education.[72] Supporters identified doctrinal advantages as well. Whereas the equality doctrine allegedly suffered from a lack of agreement over the definition of "equality,"[73] "adequacy" was advanced as a single, although perhaps not obvious, norm.[74] Similarly, the Supreme Court's rejection of plaintiffs' equal protection challenges to school finance was also seen as a barrier in state courts, where interpretation of the federal equal protection clause serves as a brake on state interpretation.[75] Moreover, because all state constitutions have an

[70] In the adequacy litigation in Texas, for example, the state Attorney General claimed that bringing all districts up to the level of the wealthiest school districts would require the infusion of an amount equal to four times the total state budget. Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 495-96 (Tex. 1991); *see* McUsic, *supra* note 15, at 1352 nn.102-05.

[71] *See* Ryan & Heise, *supra* note 69, at 2062; Joondeph, *supra* note 14, at 791; Heise, *Unintended Consequences*, *supra* note 4, at 648.

[72] *See* Helen Hershkoff, *School Finance Reform and the Alabama Experience*, *in* STRATEGIES FOR SCHOOL EQUITY, *supra* note 59, at 32.

[73] The terms "horizontal equity," "vertical equity," and "fiscal neutrality" have all been used to describe the type of equity sought in school finance litigation. Horizontal equity treats all students equally, thus requiring equal per-pupil expenditures. Vertical equity recognizes that equality must be sensitive to the specific, special needs of students, and that some students will require more services. Fiscal neutrality treats taxpayers equally, ensuring that equal taxpayer effort will generate equal funds. *See generally* U.S. GEN. ACCT. OFFICE, SCHOOL FINANCE: STATE EFFORTS TO EQUALIZE FUNDING BETWEEN WEALTHY AND POOR SCHOOL DISTRICTS (1998) (discussing different definitions of "equity"). On a related note, because many urban districts had higher than average per capita student revenues, yet performed at the lowest levels of achievement in the state, under some definitions of "equality," urban districts would be net losers. *See* Ryan & Heise, *supra* note 69, at 2062; Heise, *supra* note 24, at 648.

[74] *See* Hershkoff, *supra* note 72, at 32; Enrich, *supra* note 59, at 143-55. Professor Mildred Wigfall Robinson prefers adequacy because it avoids "the seductive trap of quantified precision" inherent in the equality approach. *See* Robinson, *supra* note 4, at 495.

[75] *See* McUsic, *supra* note 69, at 312.

education clause,[76] judicial holdings under that specific provision would be limited to the educational context and could not be generalized to other types of allegedly inadequate or unequal municipal services.[77] And finally, adequacy was seen as more obviously aligned with the claim that standards and outputs are the key to school reform, whereas equality focuses on the narrower and less relevant goal of achieving equality of inputs.[78]

In spite of the substantial agreement in the literature and among the litigants on the strategic and doctrinal advantages of adequacy litigation over the equality doctrine, a comparison of the results obtained produces little cause for celebration. In terms of wins and losses, the adequacy results have been mixed.[79] In addition, analysis of legislative reforms undertaken pursuant to adequacy and equality decrees does not establish that adequacy litigation produces superior results.[80] Nevertheless, most commentators continue to favor

[76] *See* sources cited *supra* note 36.

[77] *See* Enrich, *supra* note 59, at 161; McUsic, *supra* note 69, at 312. The Supreme Court made that suggestion in its *Rodriguez* opinion. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54 n.110 (1973). Several state courts have also explicitly recognized the concern. *See, e.g.*, Shofstall v. Hollins, 515 P.2d 590, 593 (Ariz. 1973); Thompson v. Engelking, 537 P.2d 635, 646-47 (Id. 1975); Robinson v. Cahill, 303 A.2d 273, 281 (N.J. 1973).

[78] Robinson, *supra* note 4, at 497.

[79] Courts upholding adequacy claims include Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 815-16 (Ariz. 1994); Rose v. Council for Better Educ., 790 S.W.2d 186, 189-90 (Ky. 1989); McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 553-54 (Mass. 1993); Helena Elem. Sch. Dist. No. 1 v. State, 769 P.2d 684, 685 (Mont. 1989); Reform Educ. Fin. Inequities Today v. Cuomo, 655 N.E.2d 647, 649 (N.Y. 1995); Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997); DeRolph v. State, 677 N.E.2d 733, 737 (Ohio 1997); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989). *Contra* Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406-07 (Fla. 1996); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1183-87 (Kan. 1994); Skeen v. State, 505 N.W.2d 299, 315 (Minn. 1993); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1189 (Ill. 1996); Pawtucket v. Sundlun, 662 A.2d 40, 63 (R.I. 1995).

[80] A number of commentators have noted the disappointing results of ostensible judicial victory in school funding cases. *See, e.g.*, John Dayton, *Recent Litigation and Its Impact on the State-Local Power Balance: Liberty and Equity in Governance, Litigation and the School Finance Policy Debate*, *in* BALANCING LOCAL CONTROL, *supra* note 7, at 93, 103; Patricia F. First & Barbara M. De Luca, *The Meaning of Educational Adequacy: The Confusion of* DeRolph, 32 J.L. & EDUC. 185, 187 (2003) (noting "there is no definitive research establishing a causal link between a court ruling and school funding outcomes"); Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y.U. REV. L. & SOC. CHANGE 691, 693-95 (1995); Anna Williams Shavers, *Closing the School Doors in the Pursuit of Equal*

adequacy over equality as a doctrinal basis for litigation.[81]

Neither equalization nor adequacy has made enough progress over the last thirty-five years to inspire confidence that the future trajectory is bright. Stripped of the rhetoric, and in spite of the fact that some states boast fairly high levels of per capita equalization (at least with regard to the distribution of ongoing operating expenses), the essential first principle of *Brown v. Board of Education*[82] remains unfulfilled: equality of educational opportunity does not exist in the U.S. public school system. There is much to be learned from the history of school finance litigation, and much to be gained from a return to the powerful simplicity of *Brown*'s call for equality of educational opportunity. The equality theory was not given up easily,[83] and the adequacy theory that replaced it has not done much better than its predecessor. Adopted as a pragmatic trade-off in search of some improvement in the educational opportunities available to the state's most underprivileged children, adequacy has not delivered enough change to justify continued adherence.

Moreover, even when the plaintiffs are successful, adequacy victories are extremely precarious. In case after case, the legislative infusion of funds to correct inadequacy falls prey to two eroding forces. First, the continually evolving nature of adequacy means that the standard is a moving target, as the prerequisites for success as a citizen are continually changing.[84] And second, when states fall on

Education Opportunity: A Comment on Montoy v. State, 83 NEB. L. REV. 901, 908-11 (2005); Tracy A. Thomas, *Ubi Jurisdictions, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1635-36 (2004); William E. Thro, *Judicial Paradigms of Educational Equality*, 174 EDUC. L. REP. 1, 27-28 (2003) (noting lack of success of many judicial remedies).

[81] Commentators argue that adequacy is the better, and probably easier, challenge. *See, e.g.*, Enrich, *supra* note 59, at 166-83; Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995); McUsic, *supra* note 3, at 90-92; McUsic, *supra* note 69; Robinson, *supra* note 4, at 495-501 (1998).

[82] In plain and forceful terms, the Supreme Court described education in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), as "a right which must be made available to all on equal terms."

[83] Commentators reluctantly recognized that success with the adequacy theory would leave in place much of the inequality that began the waves of litigation. *See* Clune, *supra* note 60, at 728-30; Enrich, *supra* note 59, at 157-59.

[84] *See* Rebell, *supra* note 80, at 705 ("The concept of a minimum adequate education is subject to constant change in our fast-moving society. A remedy based solely on adequacy standards runs risks of emphasizing adherence to outdated precepts or involving courts in continuing modifications of remedial decrees to

hard economic times, the districts at the top will inevitably be better able to take care of themselves, and the decrease in state revenues will hit the poor districts the hardest. Equality and inequality, in contrast, are capable of measurement without judicial involvement in the important policy debates about curricula, assessment, and achievement levels. Although standards of educational adequacy may change, the question whether all children in the state have equal access to educational opportunities depends on the application of an unchanging standard. Moreover, the equality standard leaves the judiciary with the manageable task of evaluating the degree of difference of educational opportunity across school district borders. It properly assigns to the legislative branch the more difficult, and more essentially legislative, questions about what that educational opportunity should provide.[85]

A return to the basic standard of equality as the applicable norm in school finance does not condemn litigants to a repeat performance of equality's previous widespread failures. The disappointing results of successful equality lawsuits may have resulted more from how

respond to changing educational realities.").

[85] Some commentators claim that adequacy is a more manageable judicial norm because it avoids equality's "seductive trap of quantified precision." *See* Robinson, *supra* note 4, at 495. *But see* Heise, *Unintended Consequences*, *supra* note 4, at 633 (tracing development of standards movement in education and its incorporation by judiciary, and concluding that courts are not well suited to define and monitor educational policy); James E. Ryan, Sheff*, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 549 (1999) (noting how judicial definition of adequacy is idiosyncratic and subjective). One author has argued that in several important ways, equalization is more manageable for the court because it keeps the court out of the difficult inquiry about how much money must be spent on schools. Equality orders, in contrast to adequacy orders, say nothing about how much money is needed, but rather insist that "the same kind of decision be made for all the children in the state — a decision free from the influence of local wealth. The core of the wrong . . . is not the deprivation of any particular level of education but the deprivation of a fair decision about the spending level." Clune, *supra* note 60, at 728. In fact, in one of the country's most famous adequacy opinions, *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989), the Kentucky Supreme Court produced a list of essential components for an adequate education. The list sounds suspiciously legislative in nature, and in fact the court adopted it wholesale from a legislative committee's recommendations. *See* Larry J. Obhof, *Rethinking Judicial Activism*, 27 HARV. J.L. & PUB. POL'Y 569, 597-98 (2004) (comparing judicial approaches to school funding disputes and concluding that proper judicial role consists of determining constitutional standard and then deferring to legislative implementation of that standard); William. E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 533-34 (1998).

equality was defined and the remedies implemented than with an inherent shortcoming of the equality principle itself. If the right at stake is a child's right to education, it is the state's responsibility to provide equality of educational opportunity. Inequality in state revenues, inequality of taxpayer effort, or even inequality in dollars spent on each child should not be the focus. Reconfiguring the equality doctrine as a claim for vertical equity[86] and equality of educational opportunity would refocus school funding litigation on the goal that began the litigation decades ago.

In fact, plaintiffs in two recent lawsuits have made arguments similar to those suggested here. In *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*,[87] the complaint alleged that the state had failed "to create and maintain an educational funding system that provides suitable and substantially equal educational opportunities."[88] Similarly, California plaintiffs in *Williams v. State*[89] focused on the dramatic inequality and inadequacy in terms of educational resources available in California, such as teacher qualifications, textbook availability, and sufficiency of the school facilities.[90] Although the litigants have returned to the earlier waves' focus on equality, the equality they seek does not depend on a showing that all schools have substantially equal per capita revenues.[91] Rather, the claim to equality of educational opportunity implicit in their theory of vertical equity focuses directly on the constitutional right guaranteed. The claim is based on the assertion that the most meaningful measure of equality looks at the opportunities for education presented by the state to its children. This search for a new doctrinal basis by today's litigants is not surprising after decades of failed school reform. In fact, these cases have been filed in states whose supreme courts first invalidated

[86] *See supra* note 58 and accompanying text (describing "vertical equity").

[87] Complaint, Conn. Coal. for Justice in Educ. Funding v. Rell, (Conn. Super. Ct. filed Nov. 21, 2005) (on file with author). The National School Boards Association's website provides background information on the case. *See* National School Boards Association, Connecticut Coalition for Justice in Education Funding Challenges Adequacy of the State's Public Education Funding Scheme (Nov. 2005), http://nsba.org/site/doc_cosa.asp?TRACKID=&VID=50&CID=451&DID=37399.

[88] Complaint, *supra* note 87, at 41.

[89] See sources cited *supra* note 58.

[90] *See* Grubb, Goe & Huerta, *supra* note 8, at 2083.

[91] In fact, distribution of school operating revenues in California currently meets the *Serrano* court's definition of fiscal equality. *See* sources cited *supra* note 58 and accompanying text.

the state school finance statute more than twenty or thirty years ago.[92] Decades later, shocking inequality and inadequacy remain.

A reformulated equity theory that focuses on equality of educational opportunity and vertical equity is a hybrid of the earlier equity wave and the subsequent focus on adequacy. Like the adequacy theory, it can be based on the right to education guaranteed in all state constitutions.[93] Thus, it can avoid the equal protection hurdles that wealth is not a suspect class and that education does not constitute a fundamental right.[94] And, like the first two equality waves, the reconfigured equality claim recognizes that the courts are better equipped to determine whether two similar students receive equal opportunities than to articulate the components of an adequate education.[95] This new gauge of equality is distinguishable from the doctrines underlying the three previous waves because it more closely tracks the right at stake. Under this standard, the relevant constitutional question is whether children with similar needs have access to roughly equal educational opportunities in any public school in the state. Thus, it makes clear that the equality sought is not equality in taxpayer effort, equality in district revenue-raising ability, or some other measure unrelated to the quality of education provided to the state's children.[96]

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[92] *See* Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971); Horton v. Meskill, 445 A.2d 579, 580-81 (Conn. 1982).

[93] The Vermont Supreme Court took that approach in *Brigham v. State*, 692 A.2d 384 (Vt. 1997). For a description of the Vermont litigation and supreme court holding, see Rebell & Metzler, *supra* note 43, at 171-79; Erin E. Buzuvis, Note, *"A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy*, 86 CORNELL L. REV. 644, 662 (2001).

[94] Michael Rebell has argued that the Supreme Court's opinion in *Plyer v. Doe*, 457 U.S. 202 (1982), adopted middle tier scrutiny for equal protection claims regarding education, but that courts "continue woodenly to apply the lower standard of review." Rebell, *supra* note 80, at 701.

[95] *See* sources cited *supra* note 85 and accompanying text.

[96] Equalization of educational opportunity does not demand equal dollars per student. Per capita expenditures are an imperfect measure of equality. For instance, some students may be more expensive to educate; some districts may be small, rural, and less efficient; and some districts have different costs of living. *See* Montoy v. State, No. 99-C-17382003, 2003 WL 22902963, at *14-21 (Kan. Dist. Ct. 2003); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 334-37 (Wyo. 1980); McUsic, *supra* note 15, at 1352 (noting that equalization does not mean equal dollars).

B. Focusing on the Remedy

Although a reconfigured equality standard of vertical equity might be more faithful to the mandate of *Brown* and may be a more manageable standard than one that implies judicial competence to define an adequate education, it would be a mistake to over-emphasize the difference between the two theories.[97] Equality continues to be an important factor in school funding litigation, notwithstanding its nominal replacement with adequacy in legal doctrine.[98] Moreover, inadequacy and inequality typically go hand in hand. In no state in which the court concluded that its school finance system produced inadequacy did the distribution of revenues reveal anything but gross inequality.[99] Similarly, no state court conclusion of unconstitutional inequality applied to a system in which the poorest or worst performing districts could be deemed adequate.[100]

Successful school funding litigants may have been able to force the state to provide a large infusion of funds for the state's poorest districts,[101] obtained greater equalization of taxpayer efforts, or

[97] *See* Maurice R. Dyson, *A Covenant Broken: The Crisis of Educational Remedy for New York City's Failing Schools*, 44 HOW. L.J. 107, 110 (2000); Kramer, *supra* note 57, at 14; Reynolds, *supra* note 15, at 767 n.51; Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133, 147-48, 189 (2003).

[98] *See* Dayton & Dupre, *supra* note 8, at 2382; Patricia F. First & Barbara M. De Luca, *The Meaning of Educational Adequacy: The Confusion of* DeRolph, 32 J.L. & EDUC. 185, 189 (2003).

[99] In fact, adequacy courts frequently point to inequality as evidence of inadequacy and stress the importance of equality in education. *See, e.g.*, Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989) (noting interdistrict property wealth disparity with 700:1 ratio); *id.* at 397 (noting court's insistence that children are entitled to "substantially equal access" and "substantially equal opportunity," although basing holding on adequacy). In *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), the New Jersey Supreme Court based its holding on the state constitution's education clause and rejected plaintiffs' equal protection arguments. *Id.* at 277-87. Yet the court insisted that New Jersey's children deserved equality of educational opportunity. *Id.* at 294-95. Ohio's adequacy holding is similar. *See* DeRolph v. State, 677 N.E.2d 733, 737-38, 742 (Ohio 1997) (condemning "vast wealth-based disparities" and asserting that inequality in resources produces "inadequate educational opportunities"). McUsic, *supra* note 15, at 1346.

[100] *See, e.g.*, Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) (describing how poorest districts can only provide "the barest necessities"); Horton v. Messkill, 376 A.2d 359, 368-69 (Conn. 1977) (noting "direct relationship between per-pupil school expenditures and the breadth and quality of educational programs").

[101] *See* Ryan, *supra* note 85, at 536-41, 564 (describing disappointing results in

occasionally seen the adoption of a funding system in which poor districts received similar per capita operating revenues as wealthy districts.[102] They have not, however, seen a reformulation of funding formulae to provide adequate or equal educational opportunity.[103] What stands between victory in the courtroom and victory in the classroom[104] in school funding litigation is neither the emptiness of the legal claims nor the theoretical difficulty of implementing the doctrinal principles. Rather, it is the preservation of the wealth-based inequality inherent in the local property tax system that makes meaningful school finance reform a practical impossibility. Condemnation of inequality or inadequacy, without invalidation of its source, will never eliminate the evil condemned.[105] For a court committed to the elimination of the current maldistribution of educational resources, it simply makes no sense to leave in place a local taxation power that inevitably produces a wealth-based system of local school funding. Whatever the doctrinal basis of the litigation, it is the remedy and not the theory that has failed.[106] School funding is

aftermath of large infusion of state funds in Connecticut and Missouri); GAO, GAPS, *supra* note 5, at 9, 18 (concluding that state equalization efforts will fail in absence of state imposition of caps on local school district taxing power).

[102] California, for instance, is now equalized to the extent that there is no more than $300 difference in per capita operating expenses between districts, *see supra* note 57, but plaintiffs in the recently filed case of *Williams v. State* repeatedly alleged the existence of substandard conditions in many California schools. *See* National Access Network, Litigation — California, http://www.schoolfunding.info/states/ca/lit_ca.php3 (last visited Apr. 7, 2007).

[103] In part, this failure may be due to the fact that judicial opinions "often wax grandiloquent in describing the rights involved and wane to the point of silence when it comes to specifying a remedy." James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 432-57 & n.116 (1999).

[104] This reference plays off of Michael Heise's description of how the adequacy theory relies on "failure in the classroom [to achieve] success in the courtroom." *See* Heise, *Unintended Consequences*, *supra* note 4, at 633-34.

[105] Professor James Ryan has noted how court decisions frequently "wane to the point of silence when it comes to specifying a remedy." Ryan, *supra* note 103, at 457 n.116. One commentator has suggested that judicial invalidations of school finance statutes are destined to failure when the courts "put the remedy back into the hands of the perpetrator." *See* Symposium, Brown v. Board of Education *at Fifty: Have We Achieved Its Goals?*, 78 ST. JOHN'S L. REV. 281, 286 (2004) (comments of John C. Brittain). Another has suggested that plaintiffs in school funding litigation need to be more specific and careful in the formulation of the remedy sought. *See* Dyson, *supra* note 97, at 113.

[106] *See* Thomas, *supra* note 80, at 1636 (noting that in school litigation, "it may be true . . . that, since the time of *Brown*, institutional defendants have won the remedial

not in need of another doctrinal wave. Adequacy and equality both can be used to frame the argument that local property tax funding of schools impermissibly deviates from state constitutional requirements of uniformity of taxation and violates the state's constitutional duty to provide education to its students.

Staying the current course guarantees that school funding plaintiffs will continue to document inequality and inadequacy, in many instances bringing to their court's attention the very same evidence brought before that court decades earlier. As long as the local property tax is allowed to generate local funds, the quality of education available to children in the U.S. will be tied to the wealth of the district in which they live. Wealthy districts will continue to generate more money at lower tax rates than poor districts, leaving the state to offset the anti-equalizing force of local property taxation. The uniformity challenge described in the previous section leaves no doubt that the only permissible remedy is one that invalidates the local property tax because it allows the state to escape the brunt of its constitutional duty.

C. Reading the Tea Leaves in School Funding Disputes

In spite of the hurdles to removing the force of unequal property wealth from school funding formulae, some recent signals suggest that reform might be more feasible than the common wisdom would predict. Something is afoot in school funding debates. In addition to the recent lawsuits in Connecticut and California,[107] a few commentators are returning to the earlier focus on equality and equity. They note the failures of other theories and stress equality's faithfulness to *Brown*'s straightforward mandate that education is "a right which must be made available to all on equal terms."[108] It is true, of course, that some remain strongly supportive of *Brown*'s integrationist focus and urge that "[s]egregated schools, even with equal funding, can never be equal."[109] Others, however, suggest a reevaluation of *Brown*'s track record, noting the resegregation of the public schools over the last decade, the judiciary's narrow

battle").

[107] *See supra* text accompanying notes 86-91.

[108] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); *see, e.g.*, Banks, *supra* note 24; Rebell, *supra* note 80, at 705; Shavers, *supra* note 97, at 146-81.

[109] McUsic, *supra* note 15, at 1335. Ryan similarly stresses integration as the most important priority. *See, e.g.*, Ryan, *supra* note 49; Ryan, *supra* note 85.

implementation of *Brown*'s mandate, and the ease with which whites have been able to thwart *Brown*'s integrationist thrust by moving to homogeneous suburbs.[110] The equalization priority they adopt is animated by the belief that children should not have to "rely on the presence of more affluent racially diverse families to generate [the resources necessary for them to excel]."[111] In this view, equalization of educational opportunity shares center stage with the push for integration.[112] The continued use of local property tax revenues for schools produces the same inequality of educational opportunity as racial segregation once did.[113]

Along with this new articulation of the theory of equality, analysis of state court opinions suggests a tentative shift in judicial attitude about the states' continued reliance on the local property tax. These two phenomena may combine to produce a change in judicial remedies. Traditionally, state court invalidation of school funding schemes has been accompanied by a judicial pronouncement that the state must provide financial supplements to those local efforts that are incapable of generating the revenues necessary to meet the constitutional standard. Thus, for example, in Ohio's *DeRolph* litigation, the supreme court noted: "When a [school] district falls short of the constitutional requirement that the system be thorough and efficient, it is the state's obligation to rectify it."[114] Under that view, local property taxation is unobjectionable in and of itself, but the state must step in to build up the districts at the bottom when the local effort does not provide the constitutionally required level of education.

Nearly thirty years ago, the Washington Supreme Court took a slightly different approach to the relationship between state and local funding. In contrast to the Ohio court's conclusion that the state has a duty to supplement insufficient local efforts, the Washington court

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[110] *See* Banks, *supra* note 24, at 54-55.

[111] *See id*. at 43-44.

[112] For a brief description of how civil rights lawyers in the post-*Brown* era pursued "integration at the expense of equalization," see Banks, *supra* note 24, at 44-46.

[113] *See id*. at 56.

[114] DeRolph v. State, 677 N.E.2d 733, 745 (Ohio 1997). Other supreme court holdings that view the state-local relationship in that way include *DuPree v. Alma School District Number 30*, 651 S.W.2d 90, 95 (Ark. 1983), *Pauley v. Kelly*, 255 S.E.2d 859, 873 (W. Va. 1979), and *Robinson v. Cahill*, 303 A.2d 273, 294 (N.J. 1973) ("Whether the State acts directly or imposed the role upon local government, the end product must be what the Constitution commands. . . . If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation.").

placed the entire burden of funding a constitutionally sound education directly on the state. In *Seattle School District No. 1 v. State*,[115] the court concluded that the state's constitutional mandate requires it to find "dependable and regular tax sources"[116] to make "ample provision for basic education."[117] Local property tax revenues, the court concluded, did not meet that standard.[118] In the Washington court's view, then, regardless of the legitimacy of local supplemental revenues, the state was constitutionally compelled to fund its constitutional mandate completely with state funds.

Over the past ten years, four other state supreme courts (in New Hampshire,[119] Vermont,[120] Kansas,[121] and Wyoming[122]) appear to have resuscitated the Washington court's line of reasoning.[123] These courts have imposed the absolute requirement that the state must fulfill its constitutional mandate to provide education with state, and not local, revenues. Although the difference between this and the more common judicial approach illustrated by the Ohio Supreme Court may

[115] 585 P.2d 71, 98 (Wash. 1978). For analysis of Kansas's school funding litigation, which began in 1972, see Preston C. Green III & Bruce D. Baker, Montoy v. State *and State Racial Finance Disparities: Did the Kansas Courts Get It Right This Time?*, 195 EDUC. LAW REP. 681, 689-93 (2005).

[116] *Seattle Sch. Dist. No. 1*, 585 P.2d at 98.

[117] *Id.*

[118] *Id.* at 98-99.

[119] Opinion of the Justices, 765 A.2d 673, 677 (N.H. 2000) (stressing that state constitution "imposes upon the State the exclusive obligation to fund a constitutionally adequate education" and "the State may not shift any of this constitutional responsibility to local communities").

[120] Brigham v. State, 692 A.2d 384, 392 (Vt. 1997) ("Public education is a constitutional obligation of the state; funding of education through locally-imposed property taxes is not.").

[121] Montoy v. State, 112 P.3d 923, 937 (Kan. 2005) (noting that fulfillment of state obligation with state-generated funds must "pre-exist the local tax initiatives").

[122] Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1274 (Wyo. 1995).

[123] In addition to those four state courts, the Montana Supreme Court has articulated a similar attitude about the way in which the state can constitutionally apportion its funding responsibility. Its recent opinion in *Columbia Falls v. State*, 109 P.3d 257 (Mont. 2005), invalidated the state school finance law and insisted that "unless funding relates to needs such as academic standards, teacher pay, fixed costs, costs of special education, and performance standards, then the funding is not related to the cornerstones of a quality education." *Id.* at 262. This language suggests the vulnerability of a scheme that is heavily reliant on property taxes. The court refrained from issuing an opinion on the question whether the state has paid its constitutionally mandated share of education, but criticized the way in which state law imposes unequal burdens on local school districts.

seem slight, the implications are enormous. The line drawn by the Washington court and the four other state supreme courts explicitly prohibits the state legislature from using any local property tax revenues to satisfy the state's financial obligation.

By requiring the categorical exclusion of local property tax revenues from the calculation of the state's financial obligation to schools, the four state courts following Washington's lead took a giant step toward detaching property wealth from educational opportunity. At the same time, they took an offsetting step backward when they accepted the possibility that the state might be able to authorize the use of a local property tax to provide educational opportunities that go above and beyond the state's constitutional mandate. The sentiment of the Kansas court is typical: "We fully acknowledge that once the legislature has provided suitable funding for the state school system, there may be nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds for enhancements to the constitutionally adequate education already provided."[124] The supreme courts of Vermont,[125] Wyoming,[126] and New Hampshire[127] have made similar statements about the legitimacy of local supplemental revenues.

Of the four state court opinions, only the Wyoming court explicitly injected a note of caution about supplemental local levies. First, the court suggested that, although the issue was not before it, local enhancement levies may be unconstitutional.[128] In addition, it noted that because the "definition of a proper education is not static,"[129] the innovations and improvements funded by "local enhancements"[130] may well become part of the state's constitutional obligation to all

[124] *Montoy*, 112 P.3d at 937.

[125] *Brigham*, 692 A.2d at 397 ("Equal opportunity does not necessarily . . . prohibit cities and towns from spending more on education if they choose . . . .").

[126] *Campbell*, 907 P.2d at 1274 ("Once the legislature achieves the constitutional mandate of a cost-based, state-financed proper education, then assuming the legislature has a compelling reason for providing a mechanism by which local districts may tax themselves in an equitable manner, that appears to be constitutionally permissible.").

[127] Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1360 (N.H. 1997) ("Our decision does not prevent the legislature from authorizing local school districts to dedicate additional resources to their schools or to develop educational programs beyond those required for a constitutionally adequate public education.").

[128] *Campbell*, 907 P.2d at 1274.

[129] *Id.*

[130] *Id.*

districts. And in fact, if the state of Washington's history with local option revenues is our guide, the Wyoming court is correct to be skeptical about the ability of a state to sustain a constitutional system while allowing a local option to supplement it. In response to judicial invalidation of its school funding formula in 1978,[131] the Washington legislature revamped its finance formulas to provide "full state funding," but preserved some local ability to supplement. Immediately after the legislative reform, local levies accounted for a mere 8% of district budgets. By 2001, that figure had nearly doubled. For some districts, local levies now constitute 30% of their operating budget, which does not compare favorably to the prelitigation average of 24%.[132] If the full funding states ultimately allow the preservation of local property taxing discretion to supplement state funding, the history of school finance reform in Washington suggests that it is likely to undo the equalizing their courts have decreed.[133]

Even though supplemental local property tax options potentially will erode the equalization of educational opportunity gained from these decisions, the courts have properly placed the responsibility for fulfillment of the state's constitutional obligation squarely on the state. And, as a review of the doctrinal bases of their decisions reveals, they have used a variety of approaches to reach their similar conclusions. The Supreme Court of New Hampshire, for instance, used adequacy to conclude that the local property tax violated the state constitutional requirement of uniformity of taxation.[134] The court held that to the extent adequate education is funded by local property taxes, the rates

[131] Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94-95, 104-05 (Wash. 1978).

[132] *See In Our View: Levy Lid Heavy*, COLUMBIAN (Wash.), Mar. 15, 2003, at C6. For a description of the Washington litigation and analysis of its legislative reform, see Reynolds, *supra* note 15, at 785-88. In fact, Jeffrey Metzler's analysis of Washington school spending concluded that it is no more equalized (and thus presumably no more detached from the property wealth of school districts) than any other school finance formula. *See* Metzler, *supra* note 13, at 585-86.

[133] If supplementation is allowed, strict legislative limitation is needed. Making the local discretion subject to the equalizing effect of the "power equalizer" is the best way to offset its wealth bias. For a description of how the power equalizer works, see *supra* text accompanying notes 59-63. In fact, Vermont's school funding statute has taken this approach. For a description of how Vermont has power equalized its supplemental local levy, see Reynolds, *supra* note 15, at 795. The Wyoming Supreme Court also suggested that supplemental local levies be power equalized. *See Campbell*, 907 P.2d at 1274 n.40.

[134] *Claremont II*, 703 A.2d 1353, 1357 (N.H. 1997); *see* Buzuvis, *supra* note 93, at 658-60, 675; Dayton & Dupre, *supra* note 8, at 2394-97.

must be equal statewide.[135] In contrast, the Vermont Supreme Court[136] relied on an equality rationale to invalidate local property tax funding.[137] The Supreme Court of Wyoming, also applying the equity norm, has agreed that absolute fiscal neutrality is constitutionally required.[138] In Kansas, the court relied on the state constitution's education clause to require that state revenues be "constitutionally equalized"[139] and distributed according to educational need.

Other courts, though not establishing the clean break between state and local funding that comes from imposing the requirement of funding education exclusively on the state, have noted the essential failure of legislative reform after decades of litigation. With that failure comes increasing frustration with their own inability to prod their legislatures to adopt constitutional funding schemes.[140] As judicial impatience with recalcitrant legislatures grows, state court judges may become more willing to identify the local property tax as the source of the invalidity of states' school finance schemes.

On some fronts, then, a rekindled interest in vertical equity has emerged as a way to achieve equality of educational opportunity. Admittedly, this refocusing is still a trickle. Many ongoing school

[135] The court noted that the tax rate in some communities was more than four times higher than the rate in other communities. *See Claremont II*, 703 A.2d. at 1356-57.

[136] In *Brigham v. State*, 692 A.2d. 384 (Vt. 1997), the Vermont Supreme Court invalidated the state's district power equalizer, concluding that taxpayer equality was constitutionally irrelevant and that the system produced inequality of educational opportunity. *Id.* at 398.

[137] In Vermont, plaintiffs based their equality challenge on the constitution's education clause and avoided adequacy "like the plague." Rebell & Metzler, *supra* note 43, at 173.

[138] *Campbell*, 907 P.2d at 1247 (noting that its insistence on fiscal neutrality dates to court's holding 15 years earlier in *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980), that "school funding must depend on state wealth and not local wealth").

[139] Montoy v. State, 112 P.3d 923, 937 (Kan. 2005).

[140] *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 210 S.W.3d 28, 32 (Ark. 2005) (Glaze, J., concurring) ("In sum, if this court does not take all necessary steps to ensure that the General Assembly had complied with the clear terms of our *Lake View* ruling who will? No one else has done so for twenty-two years, and it is incumbent that we do so now!"). The Ohio Supreme Court's frustration with both legislation and litigation led it to issue the surprising mandate, after 12 years of litigation and five supreme court opinions, that the Ohio courts would hear no more challenges to the admittedly unconstitutional school funding statute. *DeRolph V*, 789 N.E.2d 195, 199 (Ohio 2003), *cert. denied*, 540 U.S. 966 (2003).

finance "dances"[141] between the legislature and the judiciary are based on the courts' acceptance of local property taxes as an important component of school revenues. If the results of the last thirty years of school finance litigation are predictive, however, those legislative reforms are unlikely to produce sustained equality or adequacy. Though the initial postlitigation results may be encouraging, the enormous investment of funds is typically not accomplished by long term structural reform of the funding system itself, and it generally leaves local property tax discretion untouched. This approach has invariably meant that wealthy districts are able to avoid the problem of decreasing funds that comes from state refusal or inability to more fully fund education, as the judicial decree fades into the distant past. Nevertheless, the normative claim that a state should not be able to allow its school districts to implement a state obligation with the adoption of revenue-raising devices the state itself could never adopt, coupled with convincing evidence of the failures of alternative strategies, may encourage the sentiment that the time to "dig deeper"[142] is upon us.

III. STATEWIDE PROPERTY TAX

As the previous Parts have argued, state constitutional requirements of uniform taxation should apply to invalidate state reliance on the local property tax for fulfillment of a state constitutional obligation, and both the equity and adequacy theories can support this important claim. The next step is to suggest constitutional options for school revenue-raising schemes. In this Part, I argue that the most obvious candidate for replacement of the local property tax is a uniform statewide property tax redistributed to local districts on the basis of the educational needs of their children.[143]

[141] Rick Hills colorfully described the common back and forth between court and legislature in school finance litigation as the "complicated dance of school finance litigation — the 'after you, my dear Alfonso' brinksmanship in which the state court invites the legislature to go forward with a remedy, which the state legislature then accepts or declines with varying degrees of grace or defiance, prompting another round." Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 218 (2005).

[142] *See* Metzler, *supra* note 13, at 564.

[143] Property tax revenues levied at the local level can form part of a system in which district wealth is severed from school revenues, but only if the state requires redistribution of locally generated funds to counter the inequality of district wealth. Texas's current Robin Hood system displays this feature. Any district that has more

A. Responding to the Critics

Fifteen states already levy some form of state property tax, and nine of them use some or all of the proceeds for education.[144] These numbers suggest that a proposal for a statewide property tax is neither unusual nor extreme; in fact, thirty percent of our states already have one. Nevertheless, the arguments against elimination of the local property tax for schools, and its replacement with a statewide tax, are likely to be sustained and vigorous. I divide the criticism into two groups. One, the Tiebout-Fischel line of argument, is based on premises of economic theory and supports local funding and service provision with as little centralization as possible in order to preserve a range of options for the "consumer voter"[145] to choose as she shops for a place to live. The second camp, far more diverse in its theories and doctrinal bent, basically agrees that school finance reform efforts have failed and that more substantial reform is needed. In the definition of a preferable remedy, the paths within this group diverge. I address the criticisms of each group separately.

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than $305,000 in property wealth per student must redistribute the revenues generated from the excess property. The districts choose one of several ways of redistributing the revenues. *See* TEX. EDUC. CODE ANN. § 41.002 (Vernon 2004). By leaving the taxing function at the local level, the strong sense of ownership of those revenues engenders sustained political opposition. For a discussion of the phenomenon, see Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1847-52 (2003); Reynolds, *supra* note 15, at 788-92, 804-07. Professor Maurice Dyson describes the political furor surrounding Texas school funding and recent proposals legislative reform, one of which would amend the Texas Constitution to allow for statewide property taxation. *See* Dyson, *supra* note 68, at 18.

[144] *See* NAT'L CONFERENCE OF STATE LEGISLATURES, A GUIDE TO PROPERTY TAXES: AN OVERVIEW 14 (2002) (listing Alabama, Indiana, Kansas, Kentucky, Maryland, Michigan, Minnesota, Montana, Nevada, New Hampshire, Utah, Vermont, Washington, Wisconsin, and Wyoming as states with property taxes levied at the state level). For examples of laws levying statewide property taxes for schools, see ALA. CONST. OF 1901 art. XIV, § 260, *amended by* ALA. CONST. amend. 111; KAN. STAT. ANN. § 72-6431(a)(2) (2005); MICH. COMP. LAWS § 211.903 (2006); MONT. CODE ANN. § 20-9-360 (2005); N.H. REV. STAT. ANN. § 76:3 (2005); VT. STAT. ANN. tit. 32, § 5402(a) (2006).

[145] *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419 (1956). For a brief summary of the doctrine and the critique it has generated, see Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 103-06 (2003). In the legal literature, the work of Professors Richard Briffault and Gerald Frug challenges many of Tiebout's premises. *See generally* Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998).

1. The Tiebout-Fischel Defense of Local Revenue Raising

Notwithstanding the inequality produced by reliance on local property tax revenue, some defend the system because it protects local control[146] or because efficiency allegedly results when residents have the power to set the level of taxation to fund their public schools. These efficiency arguments coalesce around the important work of Charles Tiebout[147]and William Fischel.[148] According to thier view, local funding of education is preferable to the "misplaced equalitarianism"[149] of more centralized (and hence more redistributive[150]) systems of school finance. They argue that home value is preserved, and in fact enhanced, when property owners join together to tax themselves to fund high quality schools. When local residents are deprived of the ability to dictate how much they spend on schools and how their tax revenues will be distributed, they allegedly rebel against their state and impose severe taxing and spending restrictions that produce widespread underfunding of schools.[151]

Whether Fischel's "homevoter hypothesis" is historically accurate,[152]

[146] I deal with the local control argument in a later part of this Article. *See infra* text accompanying notes 196-220.

[147] *See* Tiebout, *supra* note 145.

[148] *See generally* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001); William A. Fischel, *Homevoters, Municipal Corporate Governance, and the Benefit View of the Property Tax*, 54 NAT'L TAX J. 157 (2001).

[149] Fischel describes efforts to equalize school finance as "a movement whose equalitarianism seems misplaced." FISCHEL, *supra* note 148, at 129.

[150] More centralized forms of taxation are not necessarily more redistributive, but given the widespread intermunicipal socioeconomic stratification in the United States, a state property tax can be more redistributive than a local one. *See supra* text accompanying notes 10-12.

[151] *See* FISCHEL, *supra* note 148, at 98-127. Fischel devotes an entire chapter to the connection he sees between equalization of school funding (and the resulting loss of local control of revenues) and property tax revolts. He describes how, in his view, the California Supreme Court's opinion in *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), was the trigger for Proposition 13, the voter initiated amendment to the California Constitution imposing severe restrictions on local property taxes. Fischel's conclusion is categorical: "Without the *Serrano II* decision, which disconnected local property taxes from school spending, the property tax revolt would not have [passed]." *Id.* at 127.

[152] Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1274 (Wyo. 1995) ("Once the legislature achieves the constitutional mandate of a cost-based, state-financed proper education, then assuming the legislature has a compelling reason for providing

whether the claim that the quality of schools is capitalized into home values is empirically defensible,[153] and whether the amount of money local districts spend on their schools correlates with differences in "taste" or "choice," or more fundamentally with the available property wealth in the district,[154] the general proposition that public education should be made available on the basis of ability to pay is subject to criticism on normative grounds.[155] The standard account of homevoters happily coming together to tax themselves and pour money into their schools may not be as benign as it appears at first glance. As others have argued, the model rests precariously on the "parasitic relationship"[156] between wealthy communities, which exclude the poor with their zoning powers, and the communities that are left to house those with no realistic choice to exercise.[157] In addition, it is based on the assumption of a stereotypical overwhelmingly residential community of like-minded and similarly situated homeowners, specifically, the affluent suburb.[158] At most, the model is likely to describe no more than twenty-five percent of our

a mechanism by which local districts may tax themselves in an equitable manner, that appears to be constitutionally permissible.").

[153] *See* Schragger, *supra* note 143, at 1831. Schragger also questions the accuracy of the model, noting that it does not account for the multiplicity of motives that animate local residents and their governments and ignores the reality that the autonomy of local governments is greatly reduced in today's world of interdependent metropolitan regions. *See id.* at 1829-34.

[154] *See* Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 790 (1997). Amy Gutmann suggests that the choice exercised by local residents over school funding is an imperfect measure of their preference for education. Rather, because it is one of the few instances in which citizens have a direct voice on the level of government spending, Gutmann hypothesizes that the voice expressed has more to do with citizen preference for government spending generally. The voter in a school bond election, for instance, has no way to express her preference on whether she would prefer to spend less on other public services and more on education. *See* AMY GUTMANN, DEMOCRATIC EDUCATION 141-42 (1987).

[155] *See also* Lee Anne Fennell, *Homes Rule!*, 112 YALE L.J. 617, 628-30, 636-54 (2002); Reynolds, *supra* note 145, at 102-06; Schragger, *supra* note 143, at 1834-42.

[156] Schragger, *supra* note 143, at 1850; *see also* Fennell, *supra* note 155, at 624.

[157] As Professor Gerald Frug has noted, "People who live in unsafe neighborhoods or send their children to inadequate schools don't do so because they have taste for them. . . . If they had a choice . . . , they would prefer better schools and less crime." Frug, *supra* note 145, at 31. Richard Briffault makes a similar observation "[t]hat wealth — not wealth-neutral preference diversity — accounts for much of the interlocal variety in taxing and spending." Briffault, *supra* note 154, at 790.

[158] The Fischel model has been described as one of "home based suburban politics." *See* Schragger, *supra* note 143, at 1832.

school districts, those that constitute the "favored quarter."[159] And finally, because of the frequency with which high total property value in a community comes from non-residential property, the basic premise of the capitalization theory loses much of its appeal. It is one thing for homeowners to enhance their own property values by encouraging their socioeconomically similar neighbors to approve a tax rate that funds local schools lavishly. It is quite another for them to be able to guarantee themselves both high levels of property tax revenues and a low property tax rate (which will, in turn, further raise their home value) by capturing the property wealth of others.[160] Which of these two versions better captures the homevoter reality, of course, depends on the demographics and type of property within a particular district. If asked to react to the homevoter hypothesis, however, it is not unreasonable to suspect that many non-residential property owners might well indicate a preference to have their property tax dollars applied to contribute to a more evenly funded

[159] Although the term apparently originated with real estate professionals, Myron Orfield has used it in his analysis of American metropolitan areas. See MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY (1997), in which he uses it to describe the privileged, low density communities, typically on the region's edge, which have a "broad rich tax base to keep services high and taxes low." *Id.* at 5. Sheryll Cashin's work also uses the term to describe "about a quarter of the entire regional population . . . [that tends] to capture the largest share of the region's public infrastructure investments and job growth." *See* Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1985-87 (2000). For further elaboration on the phenomenon of the favored quarter, see SHERYLL CASHIN, THE FAILURES OF INTEGRATION 170-85 (2004).

[160] In the cases of Vermont and Wyoming, states whose supreme courts have insisted that local property wealth be detached from school funding, *see supra* text accompanying note 120, the imbalanced distribution of property wealth across the state came from non-residential sources. In Vermont, the inequality came from the concentration of the second homes of skiers in the "gold towns." In Wyoming, the presence of valuable minerals in certain parts of the state made for gross inequality among districts. Those political dynamics may have made elimination of the local property tax less contentious than it would be in states where wealthy school districts rely heavily on residential property wealth and the homevoters' willingness to "tax themselves." Thus, Fischel's model will help to identify places where resistance to abolition of the property tax is likely to be highest, that is, in those predominantly residential communities whose high property value is due to the presence of exclusive, expensive homes. High total property wealth in a school district may be the result of luck. *See* Schragger, *supra* note 143, at 1848. High total property wealth may also come from high state investment of infrastructure. *See* Dyson, *supra* note 68, at 5. Local control is not so obviously a positive value in these instances. *See infra* text accompanying notes 196-220.

school system across the state. They may prefer this approach to the current one, in which their property tax payments contribute only (and often at different rates than similarly situated property statewide) to the education of the children who live in the district where their property happens to be located.[161]

Second, because the right to education is universally guaranteed by state constitutions, it is not apparent that local citizens should have the ability to determine the level of revenues their schools will receive.[162] Choice and preference about the amalgam of city services may appropriately determine how many parks the community is willing to provide, but those notions seem inappropriate in a discussion about the right to education, which is constitutionally guaranteed by the state.[163] When local control is conceptualized as local people spending their own money on their own children, public tax dollars are in essence transformed into "extensions of the private resources of local residents."[164] Moreover, local communities are potentially as likely to underfund as to overfund education. When a community believes that the issue is whether it has an obligation to provide money for the education of "others'" children, as opposed to funding "our" children, as is perhaps the case in communities with high levels of immigration or large numbers of retirees,[165] the dynamics of the homevoter model will push against local willingness to tax at high levels to fund education.

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[161] When Vermont adopted a statewide property tax to fund schools, it adopted a uniform rate for all non-residential property. Supporters cited the tax's uniformity and stability as two of its major advantages. *See New Education Funding Law Will Make a Big Difference*, HERALD (Randolph, Vt.), June 5, 2003, at 1, *available at* http://www.ourherald.com/News/2003/0605/Front_Page/f02.html.

[162] *See* GUTMANN, *supra* note 154, at 127 ("It does not require an extended philosophical analysis to say something significant about how schooling should not be distributed: not by the market . . . ."); Briffault, *supra* note 154, at 789.

[163] As one critic of the public schools has asserted, "It is hard to imagine a more undemocratic system of public schooling than one that effectively limits to the affluent the opportunity to choose the best school for one's children." Paul R. Dimond, *School Choice and the Democratic Ideal of Free Common Schools*, *in* THE PUBLIC SCHOOLS 323, 324 (Susan Fuhrmann & Marvin Lazerson eds., 2005).

[164] Briffault, *supra* note 154, at 799.

[165] Race and age may work against local enthusiasm for funding schools. In Texas, for instance, an aging white population with fewer children may resist paying for the education of a growing number of minority children. *See* Dyson, *supra* note 68, at 18. Frug also notes the impact of increasing numbers of retirees. Frug, *supra* note 145, at 42; *see also* Reynolds, *supra* note 15, at 773 n.76.

And finally, the homevoter model denigrates, or at least ignores, the broader societal interest in educating all of the state's children.[166] It sees questions about the proper public investment in the education of the citizenry as a strategic calculation based on property value and narrow self-interest. As greater evidence of the failures of large numbers of schools and school districts reaches the public radar screen, that mentality may shift. With frequent news articles highlighting the growing academic gap between the United States and its better educated industrialized counterparts, warning bells are beginning to sound about the tremendous competitive cost imposed on the U.S. business community by inadequate public education.[167] Academic achievement levels nationwide continue to lag well below our societal aspirations. As a result, the broader interest in guaranteeing academic success for all, and in repairing the damage caused by years of inadequate and unequal educational opportunities, should resonate beyond the narrow self-interested community of homeowners and parents.

2. The Reformers' Rejection of Statewide Property Tax Funding for Schools

In contrast to the Tiebout-Fischel endorsement of local taxing autonomy to generate school funds, numerous critics agree with the basic proposition that those who value education should not be able to rely on local property taxes to create huge wealth-based gaps between rich and poor school districts. The reformers part ways, however, when it comes to identifying solutions. Remember that the proposal put forth here is that the state can best perform its constitutional

[166] According to Fischel's model, homevoters are more likely to vote to increase spending on teachers and schools if it increases their home value. *See* FISCHEL, *supra* note 148, at 5. In fairness, he does recognize that the model is at best an incomplete view of the world, and that mercenary concerns for property values are not the sole motivation. *See id.* at 18. Results of an annual survey conducted by the Public Education Network and *Education Week* suggest that the public is less receptive to those "mercenary" arguments. The survey documents a shift in U.S. public opinion away from a conception of education as a private good, to which one's own children are entitled, toward a view that embraces education as a public good and increasingly believes that "everyone deserves a good education." *See* Wendy D. Puriefoy, *Education: America's No. 1 Priority: Polls Show That We Value Education Above All Else*, ST. LEGISLATURES, Sept. 2003, at 18.

[167] The United States spends high and performs low when its educational achievement levels are compared with other countries. See Reynolds, *supra* note 15, at 770-71, for some of those unflattering comparisons.

obligation to provide education through the adoption of a statewide property tax, collected by the state and distributed to local school districts on the basis of educational need. A review of the literature reveals that supporters of school finance reform raise arguments attacking each discrete component of this proposal. Some argue against the transfer of funding to the state level, while others object to the use of the property tax as the funding source. I suggest here that although the criticisms raise important concerns, the shortcomings they identify are effectively neutralized by the addition of the other component. Taken together, the two qualities (a tax that is both statewide and levied on property) combine to produce a tax that could avoid the weaknesses identified. The criticisms of those who object to reliance on the property tax can be alleviated by transferring the tax to the state level. Similarly, using real property as the source of funding responds to many objections of those who oppose statewide funding.

Local property taxation as a means of funding schools is vulnerable to attack on three important fairness grounds. First, it applies unevenly across the state, thus producing disparate tax burdens for similar property. Second, it is regressive because wealthy property owners frequently pay a lower property tax rate than poorer owners. Third, it has a regressive impact on those for whom property wealth does not correlate to income level or ability to pay generally.[168] The two most frequently identified groups in this last category are the elderly, whose real property investment may have appreciated far beyond their current income stream, and family farmers, who may have substantial asset wealth that produces a limited income.[169]

The criticisms are valid, at least in the context of the current local property tax regime. Moving the property tax to the state level, however, would mean that control of its negative features and its inevitable regressivity would be more easily accomplished. For one thing, when the property tax is uniformly levied statewide, property owners will all pay at the same rate. The current wide range of the property tax rate, as it applies to non-residential property, is particularly hard to defend with arguments of local control.[170] Unlike

[168] Robinson notes, however, that the typical state replacements of the property tax, namely sales and income taxes, are likely to have similarly regressive impacts. *See* Robinson, *supra* note 4, at 513.

[169] Professor Edward Zelinsky describes this issue as one of liquidity. *See* Edward A. Zelinsky, *The Once and Future Property Tax: A Dialogue with My Younger Self*, 23 CARDOZO L. REV. 2199, 2201-02 (2002).

[170] I address local control separately. *See infra* text accompanying notes 200-24.

residential property owners, who may choose their residence based on their assessment of local school finance and the strengths of the schools, non-residential property owners do not operate with those incentives. A uniform statewide property tax would in essence establish a level playing field statewide and guarantee that all commercial, business, and industrial property contributed equally to the state's education system. Currently, non-residential property owners' main contribution to education in their state responds only to the political will of the local school district in which their property is located.

Second, reformers frequently argue against the property tax system by showing that it displays one of the hallmarks of regressivity: wealthy homeowners frequently pay a lower rate than the poor.[171] Especially as applied to residential property, a uniform state tax rate would go a long way towards ending that regressivity. Whatever one's view of the role of progressivity in taxation, no principles of tax fairness defend a tax scheme in which the poor are taxed at a higher rate than the rich. Uniform statewide taxation would eliminate that anomaly of the current local property tax scheme. In addition, it would uncover the untapped revenue-raising potential that comes from the ability of local school districts to capture their high property values for their local schools. They tax that valuable property at a lower rate than districts with lower total assessed property value, frequently producing two or three times more revenues than the poorer, and more highly taxed, districts.[172]

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[171] *See* Zelinsky, *supra* note 169, at 2201. The author ultimately concludes that the benefits of the property tax are sufficient to offset this and other negative features. *See id.* at 2203-09.

[172] When Vermont adopted a statewide property tax, the wealthy ski town of Killington was projected to generate $9.7 million in school revenues. According to the distribution formula, however, only $2 million would be retained in Killington schools. The concentration of wealth in these towns suggests that with local school revenue raising, many districts were able to generate very high levels of revenue at very low rates. *See* Diane Allen, *Tax Frustration, Fantasy Reflected in Secession Vote*, BOSTON GLOBE, Mar. 7, 2004, at B1. Illinois's inequality in property tax rates, school revenues, and property wealth concentration is also extreme. A study by A+ Illinois, a pro-education coalition, identified one school district paying $6.67 per $100 of assessed value, which resulted in spending of $8,405 per student in the district, and another school district paying $.94 per $100 of assessed value, but which resulted in $13,405 per student. *See* A+ ILLINOIS, ILLINOIS HAS A PUBLIC EDUCATION CRISIS 3 (2005), *available at* http://www.metroplanning.org/cmadocs/A+_issues.pdf. For extensive financial data on tax base, property tax rate, and per-pupil expenditures, see N. Ill. Univ., Interactive Illinois Report Card, http://iirc.niu.edu (last visited Apr. 24,

Finally, the property tax's potential regressivity for those whose property wealth does not accurately reflect their ability to pay can be offset with a statewide scheme that provides uniform exemptions and protections. Vermont's statewide property tax for education, for instance, provides that property owners with income of less than $75,000 a year pay the lower of two percent of household income or their statewide property tax bill minus $15,000.[173] These state level modifications can offset much of the regressivity that local property taxes frequently create.[174]

Those who oppose a transfer of funding to the state level[175] frequently make the disheartening observation that overall education spending may actually decrease when the state assumes greater funding responsibility.[176] This phenomenon, however, is produced not merely by the transfer of funding responsibility to the state level, but more fundamentally because of the way in which that shift throws education into the mix of overall state revenue battles.[177] When that happens, education dollars become just as vulnerable as any other budget item to the vagaries of the state's political dynamic and its inevitably changing economic health.[178] In addition, opponents of

2007). The inequality in property value and property tax rate is compounded by the fact that the state ranks last in terms of percentage of total school funds provided at the state level. *Id.* A total of 62% of Illinois school revenues come from local property taxes. NAT'L EDUC. ASS'N, RANKINGS AND ESTIMATES 41 (2005). For extensive financial data on tax base, property tax rate, and per-pupil expenditures, see N. Ill. Univ., *supra*.

[173] VT. STAT. ANN. tit. 32, § 5402(a) (2006). *See* Rebell & Metzler, *supra* note 43, at 181. Zelinsky notes the ways in which progressivity can easily be added to a property tax regime. *See* Zelinsky, *supra* note 169, at 2210-12.

[174] A slightly different criticism of the property tax is that it is outdated, taxing an asset that has been replaced by other more relevant sources of taxation, such as services. Dyson, *supra* note 68, at 34. Although state taxation of services might well be a desired modification of a state's overall tax strategy, the other advantages noted in the text suggest the advantages of taxing real property for school revenues. *See supra* notes 144-99 and accompanying text.

[175] *See, e.g.*, Robinson, *supra* note 4, at 516-21.

[176] McUsic, *supra* note 15, at 1350 n.87; Metzler, *supra* note 13, at 580 (analyzing school spending nationwide and concluding that "[l]ower state contributions as a percentage of total spending correlate with higher average spending at a statistically significant level").

[177] In a study of Texas school funding reform, the GAO described the practical difficulty of raising spending for education when state spending for Medicaid and criminal justice rose 117% and 135% over the four-year period between 1991 and 1995. *See* U.S. GEN. ACCT. OFFICE, *supra* note 24, at 31.

[178] Urban economists refer to this phenomenon as "full line forcing," that is, the

state funding point to the fact that state revenues for schools usually come from the income or sales tax, whose revenues ebb and flow in accord with the state's overall financial health.[179]

If the source of the state education tax revenues is real property, however, school funds need not fall prey to those shortcomings. With a revenue stream that is fixed and specifically and exclusively pledged to education, state education funding would be immune from the give and take of budget battles and economic cycles that may otherwise deplete the revenue stream.[180] Moreover, the relative predictability of the revenues adds greater reliability to education funding than tax revenues that crucially depend on the cyclical nature of the state's consumer economy. The statewide property tax, then, is uniquely well-positioned to establish a reliable stream of tax income, whose rates can be massaged to offset the regressivity of imposing a property tax on those groups in the states for whom property wealth does not accurately reflect ability to pay.

B. Other Benefits of a State Property Tax

Aside from the normative and doctrinal benefits that a shift to a statewide property tax would produce, strategic advantages commend it as well. As the percentage of the population with school-age children decreases,[181] the political base of support for public schools

give and take of the budgeting process. Studies of urban areas confirm that when a funding source is isolated and pledged specifically to a particular project or special district, overall revenues are higher than when the project must compete with others for a share of the general revenues fund. See generally KATHRYN A. FOSTER, THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT 189-217 (1997) for a fuller explanation.

[179] *See, e.g.*, Joondeph, *supra* note 14, at 821-22.

[180] *See generally* BRIFFAULT & REYNOLDS, *supra* note 25, at 548-51; Zelinsky, *supra* note 169, at 2208, 2217-18 (highlighting stability of tax base, as well as visibility and fixed situs of property, as additional advantages of property tax).

[181] For the first time, households with school-age children constitute a minority of households nationally. *See* Robinson, *supra* note 4, at 509. In 2000, less than 25% of households fit that definition, down from 40.3% in 1970. *See* William H. Frey & Alan Berube, *City Families and Suburban Singles: An Emerging Household Story*, *in* REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000, at 257, 260 (Bruce Katz & Robert E. Lang eds., 2003). Robinson argues that this demographic shift makes the property tax "an unpopular tax serving as an important financial mainstay for a local good of declining personal importance to a significant number of taxpayers." *See id.* at 510; *see also* Briffault, *supra* note 154, at 806-07 (noting how demographic shifts increase vulnerability of education spending when funding is done at local level).

must broaden beyond self-interested parents who want to tax themselves at high rates and homevoters who see high levels of school spending as an important way to preserve their investments in their homes. Non-residential property owners, for instance, have a greater stake in a highly qualified work force than they do in ensuring that their property value is captured locally to educate those children lucky enough to live in a district with high non-residential property wealth. This suggests a broader societal awareness that a strong economy and a healthy society require that all children receive a high quality education.[182] This argument is easier to make at the state level.[183]

Full state funding might also contribute to a lessening of the socioeconomic segregation that is prevalent, and growing, in all parts of the country. When local property tax rates determine the level of local school revenues, school districts and their communities have a fiscally rational motive to exclude poor students through their zoning regimes.[184] If school funds come directly from the state, however, the district's budget will be determined by the needs of the children who attend, and not by the wealth of their parents. Thus, it is not unreasonable to speculate that full statewide funding would reduce local incentives to adopt exclusionary zoning regimes, on the rationale that property wealth will not determine the amount of money the

[182] The business community's strong interest in an educated workforce is revealing itself in new ways. A recent article described a program adopted by IBM to encourage employees to train for a second career in teaching math or science. The company will pay up to $15,000 per employee for tuition and stipends, and the employee will continue to work for the company while enrolled in courses. A paid leave of absence will cover the employee's stint of student teaching. *See* David M. Herszenhorn, *I.B.M. Unveils Plan to Train Employees to be Teachers*, N.Y. TIMES, Sept. 17, 2005, at B5.

[183] The Supreme Court of New Jersey described how inadequate education has an impact on:

> [T]he entire state and its economy — not only on its social and cultural fabric, but on its material well-being, on its jobs, industry, and business. Economists and business leaders say that our state's economic well-being is dependent on more skilled workers, technically proficient workers, literate and well-educated citizens. And they point to the urban poor as an integral part of our future economic strength. . . . So it is not just that their future depends on the State, the state's future depends on them.

Abbott v. Burke, 575 A.2d 359, 392 (N.J. 1990). For a variety of commentaries on the importance of broadening the base of support of education beyond the self-interested parent group, see GITTELL, *supra* note 59, pt. III, at 131-76 ("Stakeholders in Equity Reform").

[184] *See* Fennell, *supra* note 155, at 624-25; Schragger, *supra* note 143, at 1828-30.

school will receive to educate the children.[185]

A related benefit of the shift to uniform statewide funding is that the fate of all schoolchildren in the state becomes inextricably linked. As long as local taxing and funding provides a significant portion of school revenues, some districts can tax themselves at the rate necessary to provide their children, and only their children, with a school system that is public in name but private in its level of luxury. When all schools are equally and completely dependent on state level funding, the "all in it together" phenomenon means that the rising tide can work effectively to pull the level of education up for all.[186] Although it is true that it may be prohibitively expensive for any state to fund all its schools at the levels currently reserved to the wealthier districts,[187] the impossibility of giving all children a public benefit that only a few currently receive simply underscores the unfairness of a public finance scheme that allocates a constitutionally guaranteed state right on the basis of wealth.

Redistribution of the revenues produced by unequal local property wealth can, of course, be remedied without upsetting local control over those revenues. As a political matter, however, so long as the property tax is levied at the local level, a local sense of "ownership" will constitute a serious barrier to redistribution of the revenues

[185] Fischel's proposed alternative to publicly funded vouchers suggests that states provide school subsidies to poor people for use in schools, not to poor districts, on the theory that the subsidy would entice districts to bring the poor into their communities. If school funds are generated and distributed at the state level, state allocation of revenues would accomplish the same goal as the direct personal subsidy Fischel envisions in a world of local property tax funding of schools. *See* FISCHEL, *supra* note 148, at 264-67.

[186] Professor James Ryan made the same point when he observed that the adequacy movement, by disconnecting the fate of wealthy districts from that of their poorer counterparts in less affluent parts of the state, removes a powerful incentive for school improvement for all children. He stated that, "[T]he best way to ensure fair treatment of a minority group is to align that group with the majority in such a way that the majority cannot help or hurt itself without doing the same to the minority group." *See* Ryan, *supra* note 49, at 271. Others note the importance of the role of the "education connoisseurs" in guaranteeing high quality education for a broader base of children. *See* McUsic, *supra* note 15, at 1358; John Schomberg, *Equity v. Autonomy: The Problems of Private Donations to Public Schools*, 1998 ANN. SURV. AM. L. 143, 163-64 (noting that if parents can put their money directly into their schools, they lose incentive to lobby for increased funding at state level).

[187] In the case of Texas, for instance, the state Attorney General estimated that it would require an amount equal to four times the total state budget to bring all districts up to the top. *See* Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 495-96 (Tex. 1991).

generated by that tax.[188] The experiences of Texas[189] and Vermont,[190] both of which imposed a recapture provision to distribute locally generated revenues that exceeded a certain state minimum, leave no doubt about the political volatility of this school funding system.[191] Though that phenomenon is described from many different doctrinal perspectives, the bottom line is the same. Whether labeled as the

[188] *See* Reynolds, *supra* note 15, at 804-07; Schragger, *supra* note 143, at 1847-52. In Fischel's homevoter model, the ownership phenomenon is a positive force, leading voters to protect their investment in their homes with their willingness to pay taxes to provide a high level of local services. *See* FISCHEL, *supra* note 148, at 120-27.

[189] Under current Texas law, if a school district's taxable property value exceeds $305,000 per student, it falls into the recapture range. State law gives school districts several choices of how to redistribute the revenues generated from the excess property, but most districts have chosen to contribute the revenues to poorer districts. TEX. EDUC. CODE ANN. §§ 41.002-.003 (Vernon 2006); *see* J. Steven Farr & Mark Trachtenberg, *The* Edgewood *Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 684 (1999); Reynolds, *supra* note 15, at 788-92.

[190] In response to the state court's invalidation of school funding formulas in *Brigham v. State*, 692 A.2d 384 (Vt. 1997), the Vermont legislature quickly implemented a radical reform of the state law to impose a statewide property tax, creating a "sharing pool" (also referred to as the "shark pool") for all revenues generated by local districts that exceeded the state level. The higher the district's average property value, the higher the percentage of revenue that was earmarked for the state. *See* Buzuvis, *supra* note 93, at 677-78; Rebell & Metzler, *supra* note 43, at 167. The law underwent substantial legislative reform in 2003, removing all non-residential property from the local district's tax levy. Pursuant to the new law, non-residential property pays a fixed property tax rate that goes directly to the state for redistribution to school districts; residential property tax rates are set at a lower rate, with all districts guaranteed the same state funds. Any district wishing to supplement the state grant may do so, and the supplement is equalized at the state level. Thus, if a local district wishes to generate 10% more funds than the state guaranteed amount, it must raise its local residential tax levy by 10%. The actual amount generated by the levy is irrelevant, and the state guarantees that a 10% increase in tax rate will generate an additional 10% increase in funds. In essence, then, Vermont's excess local levies are subject to the "power equalizer" approach. *See* Reynolds, *supra* note 15, at 792-97; *supra* text accompanying notes 59-60. The amendment to Vermont's law appears to have substantial political support, in no small part because of the way it is described as "doing away with the sharing pool." *See* Candace Page, *Funding Reform Gets Step Closer*, BURLINGTON FREE PRESS (Vt.), May 29, 2003, at 1B.

[191] *See generally* Dyson, *supra* note 68. Dyson describes the unending political opposition to Texas's Robin Hood scheme. Because of a state constitutional prohibition of statewide property taxes, however, the solution proposed in this Article is not currently open to Texas. The Texas Constitution provides: "No State ad valorem taxes shall be levied upon any property within this State." TEX. CONST. art VIII, § 1-e. One of the proposals for reform of the Texas system includes constitutional amendment to allow statewide property taxes. *See* Dyson, *supra* note 68, at 32-35.

endowment effect,[192] the principle of reciprocity,[193] or the homevoter hypothesis,[194] the theories explain why we should not be surprised to find an important link between the level of taxation power and the taxpayers' claim to ownership of those revenues. If the state is the funding source, the state should also be the revenue-raising source, and the adoption of a state level tax is the only way to make that a reality. In contrast to the bitter and unending political opposition created by states implementing "Robin Hood" or other recapture techniques, those states that have accomplished redistribution of property tax revenues through a statewide tax appear not to have produced the same unending opposition.[195]

Finally, a shift to uniform statewide funding seriously deflates the force of what Jeffrey Metzler described as the point of "inequitable equilibrium."[196] In his compelling study, he documented how in state after state, although judicial invalidation was initially followed by

[192] *See, e.g.*, Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003) (describing endowment effect as principle that "people tend to value goods more when they own them than when they do not").

[193] *See, e.g.*, Christopher C. Fennell & Lee Ann Fennell, *Fear and Greed in Tax Policy: A Qualitative Research Agenda*, 13 WASH. U. J.L. & POL'Y 75, 122 (2003) (noting that if level at which government collects revenues is different from level at which government provides benefit, less tangible sense of reciprocity contributes to citizen opposition).

[194] *See* FISCHEL, *supra* note 148, at 120 (noting that citizens view local taxes differently from taxes generated at higher levels of government because "locals view the property tax base as their own").

[195] Consider, for instance, a Wyoming newspaper's description of the impact of a natural gas boom on some Wyoming towns. Under Wyoming school funding laws, when the property tax revenue generated by local wealth exceeds a state-mandated amount, the excess is used by the state for its general education fund and redistribution to poorer districts. The state constitution, however, caps the state's ability to redistribute local revenues; when they exceed a certain amount, the surplus must remain at the local level. The limit has rarely been met. In a newspaper article describing how the gas fields in the town of Pinedale were going to generate property tax revenues that would be immune from state recapture, the town's fortunate situation was described as a "windfall." *See* Rob Shaul, *Pinedale Schools Set to Receive $8 Million Windfall*, PINEDALE ROUNDUP (Wyo.), Feb. 20, 2003, at A-1 (copy on file with author). Though certainly anecdotal, it suggests a shift in the popular perception of who owns what. Professor Richard Schragger notes how our privatized view of local government contributes to the sense of ownership. Schragger, *supra* note 143, at 1847 (wondering why New Jersey residents, who pay $2300 more per capita in federal taxes than they receive in federal spending, do not coalesce around Robin Hood rally cry, and concluding that ownership comes from "ownership of the jurisdictional boundaries themselves").

[196] Metzler, *supra* note 13, at 564.

legislative reforms to reduce inequality, within a period of years the inequality that prompted the initial litigation had returned. Metzler concluded that long term reform of school funding systems can be accomplished only by legislative reform that impedes restoration of the equilibrium point,[197] or through rigorous judicial oversight.[198] So long as the court leaves untouched the funding mechanism that produced the inequality, and so long as the legislative response eschews substantial reform, powerful political forces within the state will push the allocation of money back to the point where the wealthy enjoyed the tremendous benefits of their local wealth.[199] Removing the ability of local districts to tax themselves at a high rate to make up for state shortfalls would make it substantially more difficult to return to the unequal equilibrium point.

IV. HOME RULE FOR SCHOOL DISTRICTS

A. Local Control in School Finance Litigation

The rally cry of "local control" has long been an important part of the rhetoric advanced in support of the preservation of local revenue

[197] *Id.* at 589-90.

[198] *Id.* at 584. New Jersey is a good example. In 1973, the Supreme Court of New Jersey invalidated its state school funding statute and expressed its displeasure with the state's reliance on local property taxes. *See* Robinson v. Cahill, 303 A.2d 273, 295-98 (N.J. 1973). Noting that "there is no more evidence today than there was a hundred years ago that [reliance on local property taxes] will succeed," *id.* at 295-96, the court nevertheless refused to "unravel the fiscal skein," *id.* at 298, leaving the legislature with the task of devising a constitutional funding statute. *Id.* Another round of litigation, begun in 1981, produced 10 more supreme court opinions spanning two decades. Only when the New Jersey legislature voted to spend over half of its $8 billion education budget on the 31 poorest and worst performing districts (which educate 22% of the state's children), did the supreme court conclude that the finance scheme was facially constitutional. *See* Abbott v. Burke, 710 A.2d 450, 450 (N.J. 1998). Pursuant to the supreme court's mandate, New Jersey has finally equalized spending between the wealthiest and the poorest districts. The massive, yet narrowly targeted infusion of state funds has left many mid-level wealth districts with less state aid and a resulting increase in dependence on property taxes. *See* Catherine Gewertz, *A Level Playing Field*, EDUC. WEEK, Jan. 6, 2005, at 41. If Metzler's theory is correct, unfortunately, it suggests that judicial supervision will continue to be required. Because New Jersey has not eliminated the local property tax as a source of school funds, but rather relied on a huge infusion of state funds to poor districts, the equilibrium point may continue to exert force.

[199] Metzler, *supra* note 13, at 584.

raising and spending discretion.[200] Throughout the past thirty-five years of school finance litigation, courts have pointed to the importance and strength of the U.S. tradition of local control of education. The argument resonates with citizens and communities because it means that their districts can increase spending on their children's education by approving property tax increases, the proceeds of which will be invested directly into their school districts' coffers. The Supreme Court famously applauded the power of local control in *San Antonio Independent School District v. Rodriguez* when it rejected plaintiffs' claim that reliance on local property tax revenues violated the Equal Protection Clause by distributing school resources on the basis of wealth.[201] Many state courts have paid similar tribute to local control, stressing the importance of local discretion to tax and spend.[202]

Although the community's power to increase its tax rate to provide enhanced revenues for its own schools reflects a commendable civic commitment to the values of excellent public education, local control has a more sinister side as well. For some districts, it may mean the power to underfund education, as may happen in communities with large numbers of retirees, or a rapidly growing immigrant

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[200] *See* Briffault, *supra* note 154, at 774 (describing local control as "mantra"); Frances C. Fowler, *Converging Forces: Understanding the Growth of State Authority over Education*, *in* BALANCING LOCAL CONTROL, *supra* note 7, at 123, 123 (calling local control "sacred cow"); McUsic, *supra* note 15, at 1345; Rebell & Metzler, *supra* note 43, at 170.

[201] The majority opinion described local control in terms of both financial and political autonomy:

> The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means . . . the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973).

[202] *See, e.g.*, Lujan v. Colo. St. Bd. of Educ., 649 P.2d 1005, 1022-25 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1988); State *ex rel* Bds. of Educ. v. Chafin, 376 S.E.2d 113, 120 (W. Va. 1988); Kukor v. Grover, 436 N.W.2d 577, 582 n.13 (Wis. 1989).

population.[203] For other districts, it is the ability to tap the high property value of non-residential property that happens to be located within the community's borders, thus funding high quality schools by taking advantage of the private property wealth of others.[204] In still other districts, local control allows one small segment of the population to capture the value of state resources for their own purposes. This result occurs, for instance, when the state has funded substantial infrastructure improvements that have raised the value of property in the district,[205] or when the district's property value is enhanced by the presence of unique natural resources.[206] And finally, for some districts, those with low property value, the implications of local control are merely a "cruel joke."[207] No matter how high the tax rate, the dollars generated will be insufficient to provide a quality education. In those multiple scenarios, local control loses much of the luster that is reflected in its most common gloss. In terms of its implications for local revenue raising, then, local control may not be the civic ideal its supporters claim. Some state courts have recognized this reality.[208]

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[203] *See* Briffault, *supra* note 154, at 789. In some cases, local decisions to fund or underfund schools may reflect a class or racial bias as well. *See* Dyson, *supra* note 68, at 17-18.

[204] Municipalities that have accepted nuclear power plants within their borders present a perhaps extreme example. Fischel notes how these towns are properly rewarded for taking in a use that no other town wanted, and that if they are able to send their children to Spain to learn Spanish, they are to be commended for the choice rather than criticized. *See* FISCHEL, *supra* note 148, at 178-79.

[205] Dyson, *supra* note 68, at 5.

[206] The value of property in the "gold towns" of Vermont, for instance, largely depends on their presence in the Green Mountains and the beauty of the state's natural resources that surrounds them. *See* Yvonne Daley, *Seeking Secession: Killington Says Vt. Taxes Make for Unfair Burden*, BOSTON GLOBE, Jan. 11, 2004, at B1. The town's high property value enabled the town to generate high revenues with a low tax rate. When the Vermont legislature replaced local property taxes for funding schools with a statewide tax, the property tax bill of many wealthy property owners quadrupled, leading to a proposal for the town of Killington to secede from Vermont and annex to New Hampshire. *See* Tom Mooney, *Vermont Town in a New Hampshire State of Mind*, PROVIDENCE J. (R.I.), Mar. 14, 2004, at A-1.

[207] *See* Serrano v. Priest, 487 P.2d 1241, 1260 (Cal. 1971).

[208] *See, e.g.*, DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1360 (N.H. 1997); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 260-61 (N.D. 1994); DeRolph v. State, 677 N.E.2d 733, 777 (Ohio 1997) (Douglas, J., concurring); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 398 (Tex. 1989); Brigham v. State, 692 A.2d 384, 396 (Vt. 1997).

Local control, however, could have another meaning. It could refer to local ability to implement education policy, to adopt innovative educational techniques, or to try new strategies for the social development of the district's students. This substantial policymaking power is also a part of what courts mean when they praise local control.[209] So long as revenues are not allocated on the basis of educational needs, however, local control of educational policy rings hollow. With the invalidation of the local property tax and adoption of a system of total statewide funding of education, local policy control could offer the same exciting potential for all school districts to exercise.[210]

The crucial policymaking aspect of local control currently does not exist for many districts. In districts that cannot raise the revenues needed to provide basic educational needs, talk of innovative policies or curricula is meaningless.[211] More generally, increasing state involvement in defining the contours of public education has produced a corresponding reduction in real policymaking local control, for all districts, affluent and poor alike. In state after state, pervasive state regulations and mandates burden local districts with their substantive and reporting requirements.[212] From that

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The Ohio Supreme Court used the term "cliché" to describe the local control argument. *See DeRolph*, 677 N.E.2d at 746. For an extensive analysis of the Ohio court's school finance cases, see Dorothy A. Brown, *Deconstructing Local Control: Ohio's Contribution*, 25 CAP. U. L. REV. 1, 13-34 (1996); Dayton & Dupre, *supra* note 8, at 2385-86.

[209] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 48-53 (1973) (emphasizing non-financial aspect of local control). For state court holdings stressing how more equalized funding will bring more local control, see, for example, *Kirby*, 777 S.W.2d at 398; *DuPree*, 651 S.W.2d at 93. A GAO study of school reform concluded that Tennessee successfully protected local control over educational policy while providing enhanced state funding with no strings attached. *See* GAO, THREE STATES, *supra* note 24, at 44.

[210] Professor W. Norton Grubb argues that school funding reform should combine a top-down role for the state in providing adequate resources with bottom-up reform at the school district level to allow implementation of policies to remedy inadequacy. *See* Grubb, Goe & Huerta, *supra* note 8, at 2094-98; s*ee also* Briffault, *supra* note 154, at 774 (state government can enhance local control by increasing funding without imposing more regulatory conditions); Barry Bull, *Political Philosophy and the Balance Between Central and Local Control of Schools, in* BALANCING LOCAL CONTROL, *supra* note 7, at 21, 44 (arguing for dividing questions of governance from questions of funding).

[211] *See* Briffault, *supra* note 154, at 776 n.7, 793-94.

[212] Both state and federal laws create numerous regulatory burdens that school districts must shoulder but cannot control. *See* BRIFFAULT & REYNOLDS, *supra* note 25, at 423-24; Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading*

perspective, local control is disappearing under the weight of the increasingly heavy-handed state bureaucracy.[213] Ironically, the defenders of local control lavish their support and attention on the protection of local dollars and not on the ways in which substantive statutory mandates have eroded the many other components of local control.[214]

B. Democratizing Local Control

While the importance of local control in U.S. public education should not be underestimated, its darker sides suggest that the reality is less illustrious than the myth. It is time to give new meaning to the term. Total state funding of education would democratize the revenue component of local control that is currently enjoyed only by affluent districts. Equally importantly, however, it would revitalize the policymaking component, an aspect of local control that is on the wane with increasing state mandates and reporting requirements. As states remove revenue-raising discretion from their districts, they should consider a transfer of policymaking autonomy, creating a system of home rule powers for local school districts. By most accounts, home rule has brought renewed vitality and initiative to local governments.[215] The state's willingness to relinquish broad

as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance, 60 U. PITT. L. REV. 231, 280-82 (1998); Charles F. Faber, *Local Control of the Schools, Still a Viable Option?*, 14 HARV. J.L. & PUB. POL'Y 447, 450-58 (1991).

[213] Taking a different perspective on the issue of increasing state regulation, one commentator asks not why the states are exercising more control over education, but rather, "Why did the states abdicate their power over education for so long and then suddenly begin to assert it?" Frances C. Fowler, *Converging Forces: Understanding the Growth of State Authority over Education, in* BALANCING LOCAL CONTROL, *supra* note 7, at 123, 128.

[214] Similarly, as Briffault has wondered, it is not clear why local control arguments are heard the loudest in the context of schools, typically governed by single purpose special districts and subject to far greater state control than most general purpose municipal government units. *See* Briffault, *supra* note 154, at 784.

[215] *See generally* BRIFFAULT & REYNOLDS, *supra* note 25, at 281-309 and sources cited therein (describing local initiative home rule powers). Some of the loosely labeled "anti-sprawl reformers" criticize home rule because it allows self-contained units of government to pursue self-maximizing policies at the expense of the region. Professor David Barron, however, has persuasively argued that more fundamentally, one of the real contributors to sprawl is the fact that home rule powers have been construed too narrowly, which in turn has created substantial impediments to home rule unit power to joint regional efforts to combat sprawl and the regional inequality it produces. *See* David Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2266-77

swaths of sovereign power reflects its recognition that local officials understand and can respond best to local problems.[216] That same concept could work for school districts as well. In the words of education commentators, "A strong state role does not necessarily mean strong state control."[217]

In some parts of the country, state and local governments have experimented with tentative democratization and reorganization of schools.[218] For the most part, though, the reach of the reforms is

(2003).

[216] As of 1990, 48 states authorize home rule for at least some local government units; 37 states provide for county home rule. *See* BRIFFAULT & REYNOLDS, *supra* note 25, at 268. If nearly all states trust local government units to exercise sovereign power to regulate the lives of their citizens in areas as wide-ranging as adopting a living wage ordinance for workers, *see* City of Atlanta v. Morgan, 492 S.E.2d 193, 195 (Ga. 1997) (requiring insurance benefits for employees with same-sex partners); Kalodimos v. Vill. of Morton Grove, 470 N.E.2d 266, 276-77 (Ill. 1984); New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1160 (N.M. Ct. App. 2005) (adopting home rule municipality may set minimum wage higher than state requirement), it seems likely that other local government units can be charged with powers over the substance of the education their children receive.

[217] Neil D. Theobald & Jeffrey Bardzell, *Introduction and Overview: Balancing Local Control and State Responsibility for K-12 Education*, *in* BALANCING LOCAL CONTROL, *supra* note 7, at 3, 9; *see* Briffault, *supra* note 154, at 808-11 (concluding that local control is best interpreted as norm that pushes toward enhanced political accountability and local participation); *see also* Grubb, Goe & Huerta, *supra* note 8, at 2095 (suggesting need for allocating responsibility for ensuring equalization of resources and opportunity from "top down," i.e., state regulation, while leaving important implementation powers at "bottom up" local level).

[218] For instance, in 1988 the Chicago School Reform Act, Ill. Pub. Acts 85-1418, ch. 122, ¶ 34-2.1, 34-2.3 (1988), created a new system of "local school councils" ("LSCs") and gave the LSCs the power to select school principals, to exercise some budgetary control, and to draft school improvement plans. The original LSC voting system, which gave parents of schoolchildren a more heavily weighted vote in the election of the LSC members, was declared unconstitutional by the Illinois Supreme Court in *Fumarolo v. Chicago Board of Education*, 566 N.E.2d 1283, 1299, 1309 (Ill. 1991). The legislature has modified the LSC system to conform with the supreme court's decision, and its membership now consists of the school principal, eight elected members (six parents, two residents), all of whom are elected by the residents and parents, and two teachers appointed by the Board of Education after a non-binding advisory poll of the school's staff. *See* 105 ILL. COMP. STAT. ANN. 5/34-2.1 (West 2007). The current LSC system has been upheld by the federal courts. Pittman v. Chi. Bd. of Ed., 860 F.Supp. 495, 497-506 (N.D. Ill. 1994), *aff'd*, 64 F.3d 1098 (7th Cir. 1995), *cert denied,* 517 U.S. 1243 (1996). Of the LSCs' statutorily enumerated list of powers, three are salient. *See* 105 ILL. COMP. STAT. ANN. 5/34-2.3 (West 2007). First, LSCs have the power to decide whether to renew the principal's contract and to hire a replacement if the contract is not renewed. *Id.* Second, the LSCs must approve the budget as prepared by the principal with respect to all funds allocated and

limited to building-based committees that exercise powers previously enjoyed by a school district's central administration. Instead of producing a devolution of state power to local school districts, most of the recent decentralization has resulted in a transfer of power from the school district to individual schools.[219] In addition, the devolution trend suffers from the paradox that the shift has produced a "substantial, sustained increase in site responsibility but not a substantial, dependable expansion of site autonomy."[220] Thus, the reform efforts typically have involved a reshuffling of powers, not a serious transfer from state to local.

States should consider a second generation of home rule in which they transfer control to their school districts over many of the mandates and regulations now established in state statutes.[221] Though some critics may be incredulous that the state would really consider such an important and wide-ranging relinquishment of state power,[222] the analogy to home rule serves as evidence that states do willingly relinquish power. Moreover, if school district home rule is modeled on the legislative form of home rule powers,[223] states would retain the

distributed by the Chicago Board of Education. *Id.* Third, the LSCs are required to prepare and approve a school improvement plan, according to the statute's specific description of the content and process of that plan. *See id.*

[219] Betty Malen & Donna Muncey, *Creating "A New Set of Givens"? The Impact of State Activism on School Autonomy*, *in* BALANCING LOCAL CONTROL, *supra* note 7, at 199, 211.

[220] *Id.*

[221] Decentralization reforms have typically bypassed school districts, on the assumption that "the school district represents a monopoly of authority, which compromises the capacity of the educational system to effectively utilize the resources necessary to produce high-quality education." *See* Patrick Galvin, *Organizational Boundaries, Authority, and School District Organization*, *in* BALANCING LOCAL CONTROL, *supra* note 7, at 279, 279. The author concludes with the suggestion that reformers consider the organizational advantages that might come from transfer of more autonomy to the school district. *Id.* at 280.

[222] Some have argued that state governments are incapable of resisting the urge to regulate when they provide funds. *See* FISCHEL, *supra* note 148, at 146 ("No legislature can sit by and simply let a state-funded school-aid formula do its job."). Others vigorously dispute that claim. One author argues that "the best evidence . . . does not support the conventional wisdom that he who pays the piper calls the tune. The correlation between the amount of state control over local schools and state share of school financing is low: 'some states supply state funds with few controls, others with many controls.'" *See* GUTMANN, *supra* note 154, at 143 (quoting WALTER I. GARMS, JAMES W. GUTHRIE & LAWRENCE C. PIERCE, SCHOOL FINANCE: THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION 152 (1978)).

[223] The original "imperio" form of home rule (the term comes from the Supreme

ultimate and absolute discretion to withdraw powers if they saw fit. In fact, the state's retention of an expansive, easy-to-implement preemption power is likely to encourage a more complete transfer of power than if the state were severely constrained in its ability to react to what it deemed misguided educational policy efforts of the local school district.[224]

For school districts, therefore, my proposal is a trade-off. It requires local communities to give up their revenue-raising powers in exchange for real policymaking power and control over state-distributed revenues. As reconfigured, this form of local control would put all districts on an equal financial footing, allow state legislatures to determine how much to allocate, and limit the judicial role to ensuring the money is distributed equally on the basis of educational need. In addition, it would usher in an era in which local school districts would have the power to initiate and control many aspects of their educational policy and curriculum.

CONCLUSION

Few would disagree with the claims that our school finance statutes are in dire need of reform and that the educational system they produce for many of our most vulnerable children is a disgrace, or, to

Court's opinion in *City of St. Louis v. Western Union Telephone Company*, 149 U.S. 465, 468 (1893), referring to the city of St. Louis as an "imperium in imperio") conceived of home rule as transferring government regulatory powers over issues "pertaining to local affairs." Because the definition of "local" is not self-evident, judicial interpretation was frequently required to determine whether a particular local act fit within the scope of its home rule power. The modern generation of "legislative" home rule seeks to remove the judiciary from much of that interpretive debate. In a legislative system of home rule, local governments are presumed to be acting within an expansive grant of local power, and it is up to the legislature, and not the court, to explicitly act to preempt home rule powers. Moreover, unlike imperio's core of protected immunity for home rule units in the exercise of "exclusively local" powers, legislative home rule gives the legislature total preemptive powers over local home rule initiative. For elaboration on the history of home rule and the difference between the two types, see BRIFFAULT & REYNOLDS, *supra* note 25, at 281-85.

[224] Rick Hills made a similar observation when he argued that our federalist system, in which state governments exercise wide-ranging control of local government powers, may actually result in more robust local self-government than if the national government protected local autonomy. Hills, *supra* note 141, at 214. He tentatively attributes this to the fact that "state lawmakers have the practical political capacity to supervise their municipalities and counties." *Id.* In the home rule system proposed here, state oversight would be easy to implement if the state concluded that control over a particular issue, or a particular district, were warranted.

quote the title of a book by one of public education's most forceful critics, "the shame of the nation."[225] Even in the face of some ostensible judicial victories during the past thirty-five years of school funding litigation, inadequacy and inequality persist in all states. This Article has proposed a reformulation of school funding formulas that has the potential to put an end to the startling division between the "haves" and the "have-nots" in American public education. Yet the alternative offered here is unlikely to be readily embraced in many quarters. The proposal challenges longstanding assumptions about who should be in charge of raising money for schools, and about whether wealthy communities should have the option to build schools and provide an education whose amenities and opportunities far outstrip those located in poor communities. It would require a total overhaul of most school funding statutes, eliminating the local property tax and replacing numerous convoluted formulas with a calculation that allocates money on the basis of the needs of the children in the district.

For those who agree that the current trajectory of school finance reform is unlikely to veer off the path of entrenched inequality and inadequacy, though, the suggestions here may hold some promise. The challenge is reconfiguring school finance litigation to articulate the argument that the local property tax, when used to fund schools, violates state uniformity guarantees. As a practical matter, a new approach may be gathering strength. A number of factors converge to support the call for a refocusing of school finance claims: heightened awareness of the failure of school finance reform to date, changing demographics, the increasing gap between wealthy and poor, a growing judicial frustration with ineffectual state legislative reform, and the perceived failure of U.S. schools to provide an educated, competitive work force. When taken together, these factors may provide the necessary catalyst, holding out the hope that equal educational opportunity may someday be available to all.

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[225] JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2004). For an eloquent defense of the need for radical reform of our public education system, see Grubb, Goe & Huerta, *supra* note 8, at 2097-98 ("The claims of equity are too deeply rooted in American history and education, and the consequences of inequity — the miserable conditions in urban schools, the persistence of achievement and other gaps including the black-white test score gap, the Latino-Anglo attainment gap, the differences in college access, the persistent effects of family income and family background on every imaginable educational outcome — are unacceptable.").