Washington Law Review

Volume 55 | Number 1

12-1-1979

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Recommended Citation
William R. Andersen, *School Finance Litigation—The Styles of Judicial Intervention*, 55 Wash. L. Rev. 137 (1979).
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SCHOOL FINANCE LITIGATION—THE STYLES OF JUDICIAL INTERVENTION

William R. Andersen*

I. INTRODUCTION

Current debates about the legality of public school funding systems recognize that existing systems combine state, local, and federal revenue sources. The exact nature of the governmental partnership involved is seldom specified, however, and the result is that the institutional relationships are not clearly seen. This failure of perception leads to difficulties when a court is asked to determine the constitutionality of such systems. Two recent state school finance opinions[1] will be analyzed here to compare two different styles of judicial intervention. This article does not deal with all school finance litigation,[2] nor with all styles of judicial involvement in that litigation. The cases discussed, however, represent two typical approaches, and the contrast between them is instructive. Some general observations about the nature of the state-local partnership precede the case discussions.

II. NATURE OF THE SCHOOL FUNDING PARTNERSHIP

A. A Note on State Participation in Public Education—Origins and Criticisms

Though public education has historically been perceived as a local service, both state and local levels of government today bear heavy respon-

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1. Seattle School Dist. No. 1 v. State, 90 Wn. 2d 476, 585 P.2d 71 (1978); Board of Educ., Levittown v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

2. For recent summaries of school finance litigation, see Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099; Lindquist & Wise, *Developments in Education Litigation: Equal Protection*, 5 J.L. & EDUC. 1 (1976); Comment, *Buse v. School Finance Reform: A Case Study of the Doctrinal, Social, and Ideological Determinants of Judicial Decisionmaking*, 1978 WIS. L. REV. 1071, 1074–80. *See also* Thomas, *Equalizing Educational Opportunity Through School Finance Reform: A Review Assessment*, 48 U. CIN. L. REV. 255 (1979) for general background and history.

sibility for funding the public schools in most states.[3] State involvement in the management and funding of local public schools has been justified on two grounds. The first is the need to insure that certain educational standards are adhered to on a uniform, statewide basis. There is a long history of state involvement in areas such as curricular design, length of school year, textbook selection, and teacher certification. The purpose of these measures has been either to assure a certain minimum level with respect to the matter regulated, or to insure statewide uniformity. As a result, state standards have been imposed and the views of the local users of the system have been overridden.[4]

The second ground for state intervention is to prevent unfairness in funding public education. If funding were left entirely to local levels of government (even with state-mandated, minimum programs), unfairness to taxpayers and to the schoolchildren themselves would arise. This unfairness stems from the widely differing amounts of tax resources located within the boundaries of each school district in a state,[5] a resource difference which may bear no relationship to the district's revenue needs. If property tax revenues were used to fund schools, for example, a district with a high amount of taxable property value per pupil would have a great advantage in raising school dollars over a district with a relatively low amount of taxable value per pupil. In tax wealthy districts (typically areas with high concentrations of industrial and commercial properties), any given level of tax effort would produce more school dollars per pupil than the same level of tax effort in less wealthy districts. To residential owners in tax rich districts the effect would be a reduction in the tax price of public education. The residential owner in a poor district, by comparison, would pay a higher tax price for the same educational service.[6]

3. The following figures show the estimated revenue receipts and percentage distribution of receipts for elementary and secondary education by governmental source for 1976–77:

Governmental source	Revenue receipts (in millions)	Percentage distribution
Federal	$6,254	8.4
State	32,585	43.6
Local	35,963	48.1

ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM, 1978–79 EDITION 19, Table 12 (1979).

4. The state's legal power to control the substance of public education is undoubted. *See* A. MORRIS, THE CONSTITUTION AND AMERICAN EDUCATION 263–65 (1974).

5. *See* 1 PRESIDENT'S COMM'N ON SCHOOL FINANCE, REVIEW OF EXISTING STATE SCHOOL FINANCE PROGRAMS 14 (1971).

6. A comparison of the tax price of raising $400 per pupil in Washington school districts computed by the Washington Research Council shows that in Washington, the tax increase on a $25,000 home varies from a low of $70.75 in Anacortes to a high of $406.75 in Franklin Pierce. Washington State Research Council, Monthly Report 3 (Dec. 1976). In Northshore School Dist. No. 417 v.

Moreover, where local choice exists about the level of the service to be provided, these price differences may have substantial effects on the amount of the service purchased. Hence the schoolchildren, as well as the taxpayers, may be affected by the funding scheme.

Variations in local funding capacities are not, of course, peculiar to school funding; they affect *all* locally funded public services. The city which is wealthy in per capita tax base will have an easier time funding street repairs, police and fire services, waste disposal facilities, and parks. This kind of wealth discrimination in the provision of most local services has been accepted historically, at least in the absence of racial overtones.[7] Nonetheless, in the school funding area, this sort of wealth effect has been considered a special problem.

The potential inequity to taxpayers and schoolchildren resulting from local school funding has been recognized in the United States for more than 50 years.[8] Most states have responded with a form of equalizing grant program, specifically designed to compensate for the unequal distribution of the tax wealth in the state, and to soften the effects of tax poverty in poor districts.[9] Through such programs, the states have become significant partners in funding the nation's public schools. By the 1960's, something like 40% of all school monies came from state treasuries in the form of flat grants, equalizing grants, or categorical aid.[10]

The wave of litigation which began in the late 1960's and continued through the 1970's[11] grew from an awareness that state equalization programs did not eliminate enough of the wealth discrimination inherent in local school funding systems. In part, the inadequacy of equalization

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Kinnear, 84 Wn. 2d 685, 530 P.2d 178 (1974) the superior court judge, after hearing evidence on an original application for writs of prohibition and mandamus to the Washington Supreme Court at the request of the supreme court, found that the cost of raising $100 per pupil to the owner of a $25,000 residence in Federal Way was $99, while in Seattle the cost was only $25. Findings of Fact Pursuant to Reference Hearing at 18–19, Fact 61(c), Northshore School Dist. No. 417 v. Kinnear, No. 46166 (Thurston County Super. Ct., Mar. 23, 1973) [hereinafter cited as Findings of Fact, Northshore School Dist. v. Kinnear].

7. Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (1972), *discussed in* Comment, *Potholes, Lampposts and Policement: Equal Protection and the Financing of Municipal Services in the Wake of* Hawkins *and* Serrano, 17 VILL. L. REV. 655 (1972). For a more recent analysis, see P. DIMOND, C. CHAMBERLAIN & W. HILLYARD, A DILEMMA OF LOCAL GOVERNMENT (1978); R. LINEBERRY, EQUALITY AND URBAN POLICY (Sage 1977).

8. E. CUBBERLEY, SCHOOL FUNDS AND THEIR APPORTIONMENT (Teachers College, Columbia Univ. Contributions to Education, No. 2, 1906); P. MORT, STATE SUPPORT FOR PUBLIC SCHOOLS (abr. ed. 1935); G. STRAYER & R. HAIG, THE FINANCING OF EDUCATION IN THE STATE OF NEW YORK (1923). While this early literature launched most modern equalization programs, it was not until the appearance of C. BENSON, ECONOMICS OF PUBLIC EDUCATION (1961), that current litigation theories began to emerge.

9. J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970) [hereinafter cited as COONS, CLUNE & SUGARMAN].

10. *See* note 3 *supra*.

11. *See* note 2 *supra*.

plans was a simple matter of underfunding. Where state programs did not keep up with escalating education costs, the result was increasing dependence on educational dollars from unequal local sources. In the State of Washington, for example, the state share of educational funding decreased from 59.2% to 42.5% between 1964–65 and 1974–75.[12] The corresponding increase in the local share meant that equalization was losing force: educational funding levels were being allowed to vary as a function of local wealth.

In part, too, the failure of equalization programs was the result of infirmities in the technical funding formulas themselves. For example, districts with concentrations of pupils with more expensive educational needs (such as special-education students) would be relatively underfunded by a per pupil grant program. Similarly, if the costs of operating an educational plant were higher in one area than another (due to factors such as higher real estate costs, salary differentials, and security), equal per pupil grants would not purchase equal educational services.

Finally, it was arguable that equalization plans that did not reflect significant interarea differences in *non*educational tax burdens could not accurately measure relative educational tax sacrifice and were to that extent defective.

In response to these types of criticisms, research began to appear in the 1960's which identified the patterns of inequity and suggested litigative strategies for approaching the problems if legislative solutions were not forthcoming.[13]

B. A Model for Analysis—The Characteristics of Centralized and Localized Educational Funding Systems

School finance litigation—and the ensuing legislative debates—has begun to clarify the nature of the state-local partnership in school funding. Despite the interstate differences and proliferation of technical details, there are relatively few basic structural components of most public school finance systems. A convenient way to identify the basic components of a joint state-local system is to compare the essential attributes of a funding system which is centralized at the state level with a system which is decentralized to the local level.

12. Findings of Fact, Northshore School Dist. v. Kinnear, *supra* note 6, at 7, Fact 10; WASHINGTON STATE DEPT. OF REVENUE, 1975 TAX REFERENCE MANUAL 122 (1975).

13. The seminal, developed legal analysis is COONS, CLUNE & SUGARMAN, *supra* note 9, which in turn builds on A. WISE, RICH SCHOOLS, POOR SCHOOLS (1968) and Horowitz, *Unseparate But Unequal—The Emerging Fourteenth Amendment Issues in Public Education*, 13 U.C.L.A. L. REV. 1147 (1966).

1. Centralized Funding

In a funding system which is completely centralized at the state level, all tax dollars used to provide the services in question are paid into the state treasury by state taxpayers, and are disbursed from that treasury to fund the service involved. The state might provide the service itself (as it does with the highway patrol), it might buy the service from an independent vendor (as it may do with nursing homes), or it might provide funds to a unit of local government to produce the service (as it does, in part, with the public schools). Whichever method is chosen, all the money comes from the state and all the decisions about funding levels are made at the state level.

One of the chief characteristics of such a system is uniform service levels. While service would vary as a function of different area needs or costs, variations reflecting local taxpayer wealth or differing taxpayer preferences would not exist.

In the public education context, this kind of uniformity has its proponents and its detractors. Some feel that all schoolchildren in a state should receive the same quality of education, irrespective of the wealth of their parents, the tax wealth of the school district, or the willingness of local electors to finance education. Many feel, too, that this sort of equality in educating future citizens is an important component in meeting the political needs of the democratic system.[14]

On the other hand, uniformity of educational service levels is regarded as a disadvantage by those who believe local taxpayers and parents should have some choice in determining the size of an area's educational investment. They point out that in a fully centralized system, an area which wants *more* expensive public schools than the state is willing to provide is not permitted to increase spending to achieve that objective (any more than people in one area of the state can buy extra state highway patrolmen if they feel the need for the service and are willing to pay for it). By the same token, if an area wants *less* expensive schools, it cannot reduce its spending in a centralized system. Parents are unable to choose to invest their money in ways they feel would be more useful to their children, either by investing in alternative public services (such as parks or welfare) or by reducing tax burdens to permit the purchase of private services (such as travel or home tutoring).[15]

14. 1 FLEISCHMANN REPORT 55–57, 60–63, 85–95 (Viking ed. 1973); ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FINANCING SCHOOLS AND PROPERTY TAX RELIEF—A STATE RESPONSIBILITY (1973); Silard & Goldstein, *Toward Abolition of Local Funding in Public Education*, 3 J.L. & EDUC. 307 (1974). For a general analysis, see Campbell & Gilbert, *The Governance and Political Implications of Educational Finance*, in SCHOOL FINANCE IN TRANSITION 199 (J. Pincus ed. 1974).

15. COONS, CLUNE & SUGARMAN, *supra* note 9, at 14–20.

A second characteristic of a completely centralized funding system is substantial central control over programs and standards. In addition to control over funding levels, one would expect the central funding authority to exercise substantial control over the manner in which the money is spent. This is obvious if the state is providing the service itself. It is just as clear when the state chooses to provide the service by independent contractor or by funding a unit of local government. In either case, state standards will be imposed to control the uses to which the state money is being put. A centralized funding system for public schools, therefore, would no doubt see increased state control over educational programs, standards, teacher compensation, and the like.

Central control of funding does not, however, require total central control of programs and standards. Although the state would insist on a level of control sufficient to insure that its money was being spent efficiently and for the intended purpose, significant control of programs could be left in the discretion of local governments operating with state-determined funding levels. The degree of local control of programs would, of course, be a decision for the central authority.

As with uniform service levels, central control of programs has its supporters and its critics. Supporters point to program uniformity across the state, which insures a known educational base for the future citizens of the state and which facilitates mobility. On the other hand, critics point out that central control of programs makes it impossible (at least difficult) for different areas to respond to different educational needs. Thus, even assuming two districts are happy with central decisions about funding levels, one district might want to spend its money on more college-level math for its predominantly college-bound students, while another might prefer more vocational education for its students. To the extent one perceives real differences in the educational needs of different areas of the state, central control of programs which results in inflexible program uniformity can be undesirable.[16]

Beyond controlling funding levels and standards, a central funding authority could be expected to become the administrative center of the system. Although this is not logically required—the state could provide the dollars and leave all administrative details to local units—in the real world some centralized administration would be inevitable. In the public education setting, centralization might extend as far, for example, as state-wide collective bargaining for teacher salaries—an arrangement which might alter the degree of economic power exercised by public em-

16. In spite of this, some see advantages in central control of programs. *See* Silard & Goldstein, *supra* note 14.

ployee unions and the degree of local control thought to be implicit in the local power to negotiate wages.

Still another characteristic of a centralized funding system is that it will permit the use of the greatest range of taxes, thereby affording the maximum range of choice in allocating tax burdens among citizens. A centralized system can effectively employ tax instruments reaching sales, income, and property as taxable forms of wealth. Since each tax instrument has a different pattern of incidence, choice from among tax instruments permits the state to determine with some care (subject of course to the usual doubt about the reliability of our incidence theories)[17] which income classes in the state will bear which shares of the cost of government. Funding education through a progressive income tax, for example, will have a different effect on lower income people than funding the service through a regressive property or sales tax. The state—with full control over all forms of taxes—can locate the incidence of school taxes where, in its view, such incidence is most desirable. Local governments, by contrast, cannot effectively reach sales and income as significant forms of taxable wealth, since those tax bases are movable. For example, if a city imposes a sales tax sizeable enough to fund its schools, many residents would shop in the suburbs. As a result, the burdens of paying for education in a locally funded system will be distributed according to the incidence patterns of the property tax, which has a nonmovable base.

Finally, central funding may seem the only way to achieve real equalization. If the state produces the service, or funds local provision of the service with uniform funding levels, there will be equalization by definition: service levels will not vary with local taxpayer wealth, or with the tax wealth of the area. Even if the state permits some variation of funding levels, equalization is possible by formulas guaranteeing a local area equal dollars for equal tax effort. As will be seen below, some states are experimenting with such systems in education finance; but they must be administered at the central level.[18]

2. *Localized Funding*

In contrast to the centralized model, a locally funded model has largely the opposite features. There will generally be *non*uniform service levels

17. R. Musgrave & P. Musgrave, Public Finance in Theory and Practice 400 (2d ed. 1976). The incidence of the property tax has been of special concern in education funding. *See* A. Odden & P. Vincent, The Regressivity of the Property Tax (Educ. Comm'n of the Rep. States Rep. No. F76-4, 1976); Ladd, *The Role of the Property Tax: A Reassessment*, in Broad Based Taxes: New Options and Sources 39 (R. Musgrave ed. 1973); Silard & Goldstein, *supra* note 14, at 326–28.

18. *See* Barro, *Alternative Post-*Serrano *Reforms and Their Expenditures Implications*, in School Finance in Transition (J. Pincus ed. 1974).

as the effects of different tastes and of wealth disparities manifest themselves. Similarly, there will be nonuniform standards and programs, which will be subject to *local* control. Some additional features of locally funded systems warrant further comment.

Local funding is generally perceived as providing the consumer of the service with enhanced control over those producing the service. This control may be direct, as when the citizen has the opportunity to vote on a particular budget item (such as in a special school levy election), or it may be indirect, as where the citizen votes for local officials who, in turn, make budget decisions. In either case, it is commonly assumed that the citizen has more control over the service if funding and program decisions are made locally. Of course, the state legislature is also a representative body, but it may not be perceived as representing citizens in the same way, or on the same issues. Many would feel, for example, that as local citizens they have more control over local police services than they do over state highway patrol services. Some degree of accountability, therefore, is felt implicit in local funding, and may be a strong element in the resistance to central funding.

Another aspect of local funding appears whenever the local system gives voters direct control over a particular budget by some special election process. Special elections are, for one thing, expensive, and if frequent, may interfere with orderly planning. The uncertainty generated by an annual levy vote on a significant part of the budget makes efficient planning of long-term programs all but impossible.

Perhaps the most important feature of local voting, however, is that the service in question is singled out for a more intense citizen control than are other public services. Of course, no one would suggest that elections are objectionable merely because people can use them to vote tax reductions. The problem is rather a distortion in choice that arises in a system in which only one service is subject to direct vote, while others are subject to the more generalized kind of control involved in legislative appropriation. Especially in times of taxpayer retrenchment, the service singled out for special public vote is something of a sitting duck. It is likely to be the place where the taxpayer expresses his desire to lower taxes, not because the service is the one most deserving of a cut, but for the less elegant reason that it is the only service over which he has direct budgetary control. With special voting on school budgets, for example, cutting school spending is simply easier than cutting police spending.

As has been indicated, a fundamental characteristic of local funding is that funding levels are to some degree a function of individual and of district wealth. Proponents urge that local funding gives local taxpayers more choice, while opponents argue that, in reality, the availability of

choice is unevenly distributed: districts composed of taxpayers of larger than average incomes have more real choice, for example, than do districts made up of the relatively poor. Since people tend to locate in areas populated by those with similar incomes, the smaller one draws the boundaries for funding a service, the greater the likelihood that the area will be economically homogenous. That, in turn, increases the likelihood that decisions about spending levels will be affected by taxpayer wealth. Just as one would expect expenditures among the relatively wealthy to be higher for homes, cars, food, and clothing, so one would expect school spending to be higher in districts composed of relatively wealthy taxpayers in a locally controlled funding system. In the analysis presented here, therefore, one characteristic of a centralized funding system is its ability to eliminate the disparate effects of local taxpayer wealth which characterize a system of local funding.

Beyond the question of individual wealth, local funding will also permit variations in local tax wealth to affect decisions about spending levels. Tax-rich districts will be able to spend at high levels with low tax rates; tax-poor districts will be unable to spend at high levels even with near-confiscatory tax rates.

Local funding also permits cost differences to affect outcomes. As indicated above, districts with concentrations of high-cost pupils, or districts with higher per pupil transportation, security, or other costs cannot match the service levels of other districts even if their per student revenues are equal.

Finally, the choice of local funding means reliance on the property tax, the only tax with a nonmovable base and hence, as a practical matter, the only tax available to local governments in significant amounts. Choosing local funding, therefore, means choosing that particular package of regressivities and inelasticities that characterizes the property tax. Other patterns of tax incidence are unavailable to local governments, although state programs, such as income-related property tax relief, may vary the final incidence of the property tax.

C. The Role of the Courts

It is apparent from the above review of the nature of the state-local partnership in school funding that the question of institutional design presented relates to the proper blend of central and local features of the system. The pure centralized system has serious disadvantages, as does the pure decentralized system. By legislative "fine-tuning," one can approach that particular blend of central and local components which will produce the desired level of uniformity, the proper degree of

equalization, the correct tax incidence, and the appropriate deference to local tastes—all within an acceptable administrative regime.

These are delicate adjustments with obvious political elements. In addition, there is considerable need to keep any particular resolution flexible enough to respond to changing circumstances. For these reasons, the intervention of the judiciary with its relatively blunt doctrinal instruments raises inevitable process questions. There is a substantial issue in all school finance cases about the degree to which the courts should impose constraints on the range of legislative choice. The judicial role will turn somewhat on constitutional language, of course. But most state constitutional formulas are broad enough to leave room for much judicial interpretation and to accommodate a significant range of judicial roles.

The importance of fashioning a proper role for the courts was apparent at the beginning. Legal attacks on current systems of school funding date from the late 1960's. In *McInnis v. Shapiro*[19] and *Burruss v. Wilkerson,*[20] federal courts were asked to rule that the effect of existing financing systems was that the education received by some children was inferior to that received by others. In upholding these finance systems, both courts recognized the difficulty of judicial resolution of the issues as framed. *McInnis* held the controversy not justiciable because "there [were] no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated."[21] Similarly, *Burruss,* in rejecting plaintiff's attack, noted that courts have "neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of" students.[22]

With the publication of the Coons, Clune and Sugarman volume entitled *Private Wealth and Public Education,*[23] a doctrinal approach to the problem was presented which did not require courts to become mired in the substantive debates over education, or to assume unmanageable tasks. It proposed a subtle analytical tool based on the concept of "fiscal-neutrality" which left courts free to deal with important structural parts of the school funding problem, but left maximum policy choice in the legislature. The theory of fiscal neutrality developed in the Coons work, and the constitutional doctrine woven around it, involved a shift from a concern for *equality* to a concern for *fairness*. While it was not feasible for a court to mandate equality in education (given the definitional, poli-

19. 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 384, U.S. 322 (1969).

20. 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970).

21. 293 F. Supp. at 335 (footnote omitted).

22. 310 F. Supp. at 574.

23. COONS, CLUNE & SUGARMAN, *supra* note 9.

cing, and measurement problems), it was consistent with the judicial role and with conventional equal protection analysis for a court to prohibit a state from treating children differently in the absence of rational explanations for the difference. On this basis, for example, different spending levels traceable to different amounts of taxable wealth in two districts could be forbidden, unless the state could establish a connection between the amount of taxable wealth in the districts and their educational needs—clearly an impossible burden in most cases. Such a decision would not depend on a judicial finding that equality was required, but on the inability of the state to show a rational justification for the different spending levels. Judicial adoption of such a theory would not mandate statewide uniformity. The legislature would be free to adopt a uniform system, or one in which there were local spending variations, provided the variations were reflections of local taxpayer choice, and not the result of the mere happenstance of the location of industrial or commercial properties.

In *Serrano v. Priest*,[24] the California Supreme Court adopted a version of this fiscal neutrality theory, and with this judicial foundation the wave of litigation began. The movement was only temporarily slowed by the United States Supreme Court's adoption, in 1973, of a narrow view of the requirements of the federal constitution.[25] Litigation continued on the basis of the educational finance requirements of state constitutions. In 1978, the Supreme Court of the State of Washington[26] and a trial court in New York[27] handed down lengthy opinions on the legality of the school funding systems in those two states. In comparing these two judicial responses, this article will be especially concerned with the ways in which different styles of judicial intervention expand or contract the range of choice open to a legislature in designing the optimum blend of state and local components of a school funding system.

III. THE SEATTLE SCHOOL DISTRICT LITIGATION

In its broad outlines, school finance in Washington in the early 1970's followed a fairly traditional pattern. School districts received substantial sums from state grants, but not nearly enough to provide adequate educational programs under state standards. As a result, there was a significant

24. 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (1970), *opin. vacated and cause rev'd and remanded*, 5 Cal. 3d 584, 487 P.2d 1241 (1971), *aff'd*, 18 Cal. 3d 728, 557 P.2d 929 (1976).

25. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (*e.g.*, a 5–4 decision).

26. Seattle School Dist. No. 1 v. State, 90 Wn. 2d 476, 585 P.2d 71 (1978).

27. Board of Educ., Levittown v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

reliance on locally voted funds. The Seattle School District, for example, received about 60% of its revenue needs from state and federal sources, leaving it dependent on locally voted (and unequalized) excess levies for the remaining 40%.[28]

The first attack on the Washington system was in 1974, in *Northshore School District No. 417 v. Kinnear*.[29] Pursuing a fiscal neutrality argument under the Washington constitution, plaintiff school districts attacked the unfairness implicit in a wealth-affected system. Plaintiffs urged that a system which permitted district wealth to have demonstrable effects on spending levels violated the constitutional provisions which made it the "paramount duty of the state to make ample provision for the education" of the state's schoolchildren through a system that was "general and uniform."[30] In addition, the unjustified difference in treatment of the children under the state's system was attacked as a violation of the privileges and immunities clause of the state constitution,[31] treated by the Washington courts as a state equivalent of the federal equal protection clause.[32] The lower court found plaintiffs' allegations to be true: by itself the state contribution to school finance was not ample,[33] and the supplementing system of locally voted levies was wealth-affected.[34]

In an essentially opaque opinion for himself and two other members of the court, Justice Hale concluded that plaintiffs had not established the unconstitutionality of the system. Three other judges concurred in the result but not the opinion. Three justices dissented, in a lengthy opinion by Justice Stafford.[35] Justice Hale's plurality opinion seemed to have concluded that no matter how much variation existed in the treatment of the state's schoolchildren, the system retained its generality, its uniformity, and its ampleness if all children received enough education to allow them to transfer to another district without loss of credit. Missing the central thrust of the interparty fairness argument, Justice Hale held that uniformity at the barest threshold level satisfied the constitutional commands; that some children were much better treated than others above that minimum seemed not to be of constitutional significance, despite the

28. Seattle School Dist. No. 1 v. State, No. 53950, *mem. op.* at 29 (Thurston County Super. Ct., Jan. 14, 1977).

29. 84 Wn. 2d 685, 530 P.2d 178 (1974).

30. WASH. CONST. art. IX, §§ 1–2.

31. *Id.*, art. I, § 12.

32. De Funis v. Odegaard, 82 Wn. 2d 11, 37, 507 P.2d 1169, 1185 n.16 (1973).

33. Findings of Fact, Northshore School Dist. v. Kinnear, *supra* note 6, at 12–13, Facts 32, 33, 34, 35.

34. *Id.* at 12, 15, 18, Facts 31, 45, 59, 60, 61.

35. For a more complete analysis of the Northshore litigation, see Andersen, *School Finance in Washington—The Northshore Litigation and Beyond*, 50 WASH. L. REV. 853 (1975).

rather opposite tenor of constitutional terms such as uniformity and generality.

Justice Stafford's dissent also emphasized the ampleness issue rather than the issues of interparty fairness. He found that because the state contributions were not ample, most districts were forced to rely on uncertain local elections for important parts of their revenue. That compulsion, said Justice Stafford, violates the constitution.

The *Northshore* opinions thus did not squarely address the fiscal neutrality theory of the complaint. The plurality opinion, the concurring opinions, and the Stafford dissent focused instead on the issue of ampleness, and in the case of Justice Stafford, on the additional question of the uncertainty of reaching ampleness in a system relying so heavily upon local voting.

In the shadow of the *Northshore* opinions, attorneys for the Seattle School District readied another assault on the summit. Since the fiscal neutrality theory of the *Serrano* opinion and *Northshore* complaint and briefs had not caught the enthusiasm of the court, the new case was framed on a different theory. The district filed an original action in the state supreme court seeking a declaratory judgment that the use of the special levy system for school funding denied to many children the "ample provision" of education required by article IX, section 1, of the state constitution. The district did not pursue the question of interparty fairness but instead embraced the theory of the *Northshore* dissent. It argued that ampleness is destroyed by the wide use of special levies: in any district in which a levy fails, the state guarantee available for the school year is not ample.[36]

The cause was transferred to superior court for determination of legal and factual issues. In March 1977 the Thurston County Superior Court issued an opinion essentially agreeing with the school district's position. The court said that special levies were unconstitutional except when used for "enrichment" purposes, and that the state itself had to provide ample education by funding all educational programs up to a level identified in the opinion as "basic education." The superior court directed the legislature to enact the necessary legislation and to appropriate the necessary funds so that the judicial mandate could be effective by July of 1979.[37]

On appeal, the state supreme court largely affirmed the lower court decision. In a majority opinion by Justice Stafford—no different in substance from his *Northshore* dissent—the court first held that the duty-

36. Seattle School Dist. No. 1 v. State, 90 Wn. 2d 476, 481, 585 P.2d 71, 76 (1978).

37. Seattle School Dist. No. 1 v. State, No. 53950, *mem. op.* (Thurston County Super. Ct., Jan. 14, 1977).

imposing language of the constitution was not merely hortatory and was not merely a preamble, but was a real duty in the Hohfeldian[38] sense. The state had asserted that any duty imposed by the constitutional language was imposed on the legislature, and that the sole means of enforcement of such a duty was by the voters at the polls.[39] Justice Stafford conceded that all branches of the government had obligations to enforce the constitution; nevertheless, he concluded that where important individual rights were at stake, and where the very terms of the constitution itself needed interpretation, the power to act was plainly within the judicial province.[40]

If the constitution creates a judicially enforceable duty, what then are its terms? To begin with, the language of the constitution makes the duty to make ample provision for education the "paramount" duty of the state. The word paramount was given a fairly literal meaning by the Stafford opinion. The court said that by the use of the word, the constitution has created a duty that is "supreme, pre-eminent or dominant."[41] Presumably, it is a duty which the state must meet even at the cost of being unable fully to perform other constitutionally required duties.

The more complex issue concerns the substantive content of the duty. In general, the court said that the duty to make ample provision is a duty to provide resources that are " 'liberal, unrestrained, without parsimony, full, sufficient.' "[42] The court refused to give much specific content to the duty thus described, since it wished to leave "the greatest possible latitude" to the legislature "to participate in the full implementation of the constitutional mandate."[43] The court, accordingly, refused plaintiff's invitation to prescribe the state role in matters such as deployment of instructional and classified staff, staffing ratios, salaries, individualized instruction for the handicapped, recognition of unique demographical and geographical demands, and local control and support services.[44]

Still, given the theory it was following, the court could not wholly avoid the task of measuring educational benefits, for the plaintiff district was alleging that the state had failed to meet its duty. The first step in the court's analysis was a holding that the state's duty must be met by funds

38. The court cited Hohfeld, *Some Fundamental Legal Concepts as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). 90 Wn. 2d at 512 n.10, 585 P.2d at 91 n.10.

39. Reply Brief of Appellants at 22–23, Seattle School Dist. No. 1 v. State, 90 Wn. 2d 476, 585 P.2d 71 (1978).

40. 90 Wn. 2d at 504, 585 P.2d at 87.

41. *Id.* at 511, 585 P.2d at 91.

42. *Id.* at 516, 585 P.2d at 93.

43. *Id.* at 515, 585 P.2d at 93.

44. *Id.* at 519–20, 585 P.2d at 95–96.

over which local voters had no control. This meant that the issue was not whether *total* school spending was ample but whether the state share by itself was ample. This is so, said the court, because the local share—being subject to local veto—is not guaranteed to the district. The meaning of the constitutional terms, said the court, is that ample education must be provided "through dependable and regular tax sources."[45] Since special levies are neither dependable nor regular, the state could no longer be permitted to rely on them in meeting its constitutional duty.

The question thus became whether the current level of *state* grants to the Seattle School District met the constitutional duty to make ample provision for education. Laying down what it called "guidelines," the court adopted some highly generalized propositions about what the legislature was supposed to accomplish. It adopted the lower court's definition of education as the " 'act of developing and cultivating the various physical, intellectual, esthetic and moral faculties,' "[46] and said the state's duty "embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas."[47] The state must prepare pupils "to exercise their First Amendment freedoms," and "to inquire, to study, to evaluate and to gain maturity and understanding."[48]

Obviously, such generalities will be of little aid to a legislature setting a funding level for public education, and of even less help to a court faced wih the task of determining if any given level of educational funding is constitutionally sufficient. Accordingly, the court felt obliged to go further in considering the meaning of ample education.

The trial court had considered three possible definitions of ample education. It had looked first at the specifications for an adequate educational program promulgated by the State Board of Education and the State Superintendent of Public Instruction. Second, it had examined the level of education needed to meet state school accreditation standards. Third, the trial court had examined—at plaintiff's instance—what was called the "collective wisdom" approach to defining education, which was based on a rough statewide average of educational spending. The trial court had concluded that the state grants alone would not fund education up to any one of these levels.[49]

45. 90 Wn. 2d at 522, 585 P.2d at 97.
46. *Id.* at 516, 585 P.2d at 94.
47. *Id.* at 517, 585 P.2d at 94.
48. *Id.* at 517–18, 585 P.2d at 94.
49. Seattle School Dist. No. 1 v. State, No. 53950, *mem. op.* at 53 (Thurston County Super. Ct., Jan. 14, 1977).

The supreme court, making its own educational cost estimates for meeting each of the three levels, agreed with the lower court's conclusion. The supreme court concluded that education which failed to meet any of these standards could not be considered ample within the meaning of the constitutional provision.[50]

The resulting constitutional standard provides for a nondelegable duty on the part of the state to fund education up to a basic or ample level, without reliance on locally voted taxes. How much of education is basic and how much is enrichment will depend on legislative choice within these somewhat vague judicial standards. Beyond that level, special levies will still be permitted. Any such levies would, of course, be wholly unequalized—wealthy districts will find it easier to obtain enrichment than poor districts.[51]

In a separate concurring opinion, Justice Utter agreed that by any colorable definition of educational quality, the current state contribution alone was inadequate. He was concerned, however, that the majority's approach intruded further into the legislative process than was necessary. For Justice Utter, it was sufficient to eliminate the specific part of the finance system which produced wealth-related variations and levy loss traumas—the special levy itself. He would limit the reach of the case to declaring unconstitutional any school funding system which made "any substantial part of the total school budget . . . subject to local veto."[52] The system under review did not meet that constitutional standard, in Justice Utter's view, since 30% to 40% of local school budgets in the state were made up of special levy dollars, and therefore were subject to being vetoed by local voters.

A three-judge dissent written by Justice Rosellini expressed the belief that while the state's constitutional duty to fund the school system was plain, it was not judicially enforceable. In Justice Rosellini's view, it was a mistake for the court to interfere with legislative discretion as to the definition of education, as to the level of funding, and as to the primacy of this state obligation over other state duties. All these matters were more appropriately left to the legislative branch. The usual ballot box remedies for breach of the duties were adequate. Citing the New Jersey experience[53] with this sort of judicial adventurism, Justice Rosellini also

50. 90 Wn. 2d at 535–36, 585 P.2d at 103.

51. The Stafford opinion was joined by Justices Wright, Brachtenbach, Horowitz, and Dolliver.

52. 90 Wn. 2d at 546, 585 P.2d at 109.

53. The New Jersey Supreme Court's experience was a classic case of judicial overinvolvement in legislative matters. In April of 1973 the court held that New Jersey's school finance system was unconstitutional under the state constitution, which required a "thorough and efficient" education. Robinson v. Cahill I, 62 N.J. 473, 303 A.2d 273 (1973). After permitting the parties to comment on

stressed the dangers of this kind of detailed judicial involvement in matters essentially legislative.[54]

On the central question under examination here—how much should courts constrain legislative discretion in designing a state-local funding system—the three opinions in the case took three quite different stances. The majority opinion of Justice Stafford disavowed any intent to intrude in legislative matters at all. But, in fact, the opinion substantially limited the range of legislative choice. To begin with, the majority opinion removed from possible legislative choice any system with significant local control over funding levels. No legislative plan can meet the Stafford requirements that is not essentially a fully state funded plan. While the debates still continue on the virtues of local control of funding,[55] wholly eliminating legislative consideration of the option hardly seems nonintrusive.

Moreover, the majority opinion purported to lay down substantive educational guidelines. These may be so vague as to be meaningless as guides to the legislature, but at least the court felt it was framing some principles of operational significance in the legislative halls.

On closer examination, of course, the majority opinion might tolerate, as an appropriate level, the existing total level of educational funding—represented by the "collective wisdom" of the state's school districts. If

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the content of the judgment, the court—perhaps perceiving the difficulty its adoption of a substantive standard would produce—stayed its hand, and gave the legislature 18 months to resolve the matter. Robinson v. Cahill II, 63 N.J. 196, 306 A.2d 65 (1973). When the legislature failed to agree on a new finance system within the prescribed time, the court heard again from the parties and stayed its hand a second time. Robinson v. Cahill III, 67 N.J. 35, 335 A.2d 6 (1975). The legislature's continued refusal to act thereafter backed the court into a corner and forced it to order some reallocation of school monies, over the strenuous opposition of the state legislature and several dissenting judges. Robinson v. Cahill IV, 69 N.J. 133, 351 A.2d 713 (1975).

Finally, in late 1975, the legislature did enact a "reform" law which was immediately challenged by the plaintiffs as inadequate. The new law did not abolish local property taxes for funding schools, did not substantially mitigate the influence of wealth differences among districts, and only nominally increased the state's share of school funding. It seems generally agreed that the law did not significantly change the existing system. R. LEHNE, THE QUEST FOR JUSTICE 200 (1978); Coons, *Recent Trends in Science Fiction:* Serrano *Among the People of Numbers,* 6 J.L. & EDUC. 23, 36 (1977).

Disregarding these concerns, the court quickly capitulated and approved the new system. Robinson v. Cahill V, 69 N.J. 449, 355 A.2d 129 (1976). Still, the problem was not resolved. The legislature failed to fund the system and the court was asked once again to intervene. With no alternative left, the court ordered the New Jersey school system to close. Robinson v. Cahill VI, 70 N.J. 155, 358 A.2d 457 (1976). Following the court-ordered closure, the legislature passed a highly controversial income tax measure to fund the schools. The court responded by reopening the schools and the issue was finally resolved. Robinson v. Cahill VII, 70 N.J. 464, 360 A.2d 400 (1976).

This textbook example of a power struggle among the courts, the legislature and the governor is the subject of Professor Lehne's book, THE QUEST FOR JUSTICE (1978), a study of the judicial system in a role far removed from its usual adjudicatory function.

54. 90 Wn. 2d at 578–79, 585 P.2d at 127–28.

55. *See* notes 15, 16 *supra,* and 88 *infra.*

that is a fair inference, the majority opinion—despite its substantive guidelines and principles—in effect only commanded the legislature to change the method by which the *existing* level of education is funded. Henceforth, those funds must come from the state and not be subject to local voting. If this is where the majority opinion really led, it arrived by a roundabout and obscure route at the precise point of the Utter concurrence: that the state should be prohibited only from allowing local voting to affect educational funding levels.

Justice Utter's more candid approach would seem far preferable. While it also eliminated legislative choice of local control, it did leave the legislature free (subject only to electoral checks) to fund education at whatever level it feels appropriate given the wealth of the state as a whole, changing perceptions about the importance of education, and competing demands on the state's financial resources. There was no judicial pressure here—rhetorical or otherwise—to raise educational spending to any particular (basic) level. Nor was there any judicial formulation of educational standards by which legislative choice could be cabined. Justice Utter believed the majority opinion went too far in holding that "the constitution mandates a specific 'basic education' . . . . For the court to cast in terms of constitutional doctrine the meaning of this term . . . deprives the people of this state of a continuing legislative and political dialogue on what constitutes a proper education."[56]

The dissent, unwilling to interfere with the legislative discretion even to this degree would have held against plaintiff. Justice Rosselini's opinion is an impressive statement of the values in the separation of powers doctrine and a forceful reminder of the natural limits of the judicial power.

A final note on the *Seattle* case concerns its treatment of the *Northshore* decision. As has been indicated, the theories of the two cases were deliberately different. The *Northshore* plaintiffs complained, in part, about funding differentials growing out of differing district property wealth. In *Seattle,* on the other hand, the plaintiff focused primarily on the adequacy and dependability of the funding levels. Had it been upheld, the *Northshore* theory would have accommodated special levies if they were equalized; the theory advanced in *Seattle* was aimed essentially at eliminating local choice of funding levels and moving to full state funding. Because these were fundamentally different lawsuits, it would have been a simple matter for the *Seattle* court to have distinguished *Northshore*. But Justice Stafford and the other *Northshore* dissenters—their numbers augmented by new additions to the bench—made

56. 90 Wn. 2d at 547, 585 P.2d at 109.

no attempt to distinguish *Northshore*. Instead, Justice Stafford's majority opinion in *Seattle* goes out of its way in a number of places to expressly overrule the *Northshore* case.[57] It should also be noted that the remaining members of the *Northshore* majority were, with the exception of Justice Wright, dissenters in *Seattle*. All this would seem to suggest that the different outcomes in the two cases were ultimately not so much a function of different legal theories or different trial strategies, but rather a reflection of personnel changes on the court.

IV. THE LEVITTOWN LITIGATION

A few months before the *Seattle* case was handed down, a trial court in New York published a lengthy opinion striking down the New York system of funding public education. In *Board of Education, Levittown v. Nyquist*[58] two groups of plaintiffs challenged the New York educational funding system. The original plaintiffs were school districts and pupils in the system. A second group of plaintiffs was allowed to intervene representing certain of the large urban school districts in the state. All plaintiffs sought a declaration that the system violated both federal and state constitutions.[59] In addition, the intervenor large-city plaintiffs sought special relief for large-city systems, including judicial redirection of appropriated funds if the legislature failed to act.[60]

The New York school funding system is similar in its essentials to the Washington system examined above. State and local governments are both heavily involved as funding partners in the system, and the effect of wealth differences and of cost differences is therefore likely to be significant.[61] Under the 1974 New York financing law, the more than 700 New York local school districts receive funds from three sources: approximately 5% comes from the federal government, over 50% comes from locally levied property taxes, and about 40% comes from the state through a series of grants and allocations under various aid formulas.[62] The basic system guarantees any district willing to impose a 15 mill local property tax that it would receive a minimum of $1200 per pupil. Pupil weightings gave some recognition of cost differences among the various areas within the state. This had the effect, for example, of diverting addi-

57. *Id.* at 514, 520, 522, 537, 585 P.2d at 93, 96, 97, 104.
58. 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).
59. *Id.* at 609–10.
60. *Id.* at 611.
61. *Id.* at 614–17.
62. *Id.* at 614–15; ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM 1978-79 EDITION 19, Table 12 (1979).

tional funds into districts with heavy concentrations of disadvantaged children. In addition, a flat grant system was in effect which provided all districts with additional dollars.[63] Certain state monies were provided in the form of specifically identified categories of expense, such as transportation or construction. Finally, there were "save-harmless" provisions, the effect of which was to produce funding patterns that were more the product of history than the above described allocation formulas.[64]

The legal attack on this system did not follow the *Seattle* approach. The theory of the complaints in *Levittown* did not focus on the constitutional adequacy of any particular funding level. Rather, as in *Serrano* and *Northshore*, the original plaintiffs sought to establish constitutional infirmities in the unequal provision of taxing resources in the different school districts. These plaintiffs alleged that there were wide disparities in property tax wealth among the state's school districts which affected the equality of educational opportunity.[65] The record showed that the poorest district in New York had approximately $8900 per pupil in taxable property, while the wealthiest had over $412,000 per pupil. Even the 80% of the districts in the middle of the wealth spectrum ranged from $20,000 to $90,000 per pupil in taxable wealth.[66] Plaintiffs argued that with local taxes making up more than half the total school budget, this differential capacity to raise money would have inevitable effects on educational spending. The record seemed to bear this out: on the average, property-poor districts spent about $1700 per pupil, while property-rich districts spent about $3700.[67]

An additional form of discrimination was raised by the intervenor large-city school districts. In any equalization program in which funds are allocated with an eye to the grantee's wealth and costs, accurate measurement of both wealth and costs is critical. The large-city districts argued that the existing formulas for measuring district wealth significantly overstated their wealth while at the same time the existing cost formulas greatly understated their true costs.[68] Thus, even if the original plaintiffs succeeded in ridding the system of the first form of wealth discrimination discussed above, the large city school districts would remain disadvantaged so long as these measurement errors remained in the allocation formulas.

63. The formula for this program was not quite flat: wealthier districts received a little less per pupil than poorer districts. 94 Misc. 2d 466, 408 N.Y.S.2d at 613.

64. *Id.* at 613–14.

65. *Id.* at 609–11.

66. *Id.* at 614–15.

67. *Id.* at 617.

68. *Id.* at 611.

The wealth measure in use was, as has been indicated, assessed-value-per-pupil. Plaintiff intervenors argued that this wealth measure was unfair to districts which suffered from what is termed "municipal overburden": large cities were burdened with such significant *non*educational expenses that a given dollar of assessed value available for taxation already had substantial claims on it when it came time to raise money for education. These plaintiffs showed that New York City, for example, spent some $400 per capita on noneducational expenses, while cities in the remainder of the state spent less than $200 per capita for such expenses.[69] These differences arose from the fact that urban populations are very costly to serve. The elderly, the very young, and the uneducated are high-cost citizens, especially when living in dense population groupings with deteriorating housing stocks.[70] Compared to small cities, therefore, large cities bear significantly greater per capita tax burdens for such noneducational local services as police, fire, welfare, health care, medicaid, corrections, courts, transportation, and parks. For taxpayers so disproportionately burdened by noneducational expenditures, dollars for education require a much greater sacrifice. Stated otherwise, any given level of assessed-value-per-pupil overstates the real tax wealth available to finance education in any district in which noneducational expenses are significantly above average—the typical plight of large-city school districts.

Not only was their wealth overstated by the assessed-value-per-pupil measure, argued the intervenors, their educational costs were greatly understated. It was urged that a pupil in an urban school setting costs much more to educate than a pupil in other settings. The record showed that larger districts had per pupil costs 47% higher than did the smaller districts.[71] These higher costs arose from higher salary levels said to be required to attract quality teachers into urban schools, plus the additional costs associated with high concentrations of children with impaired mental and physical health, learning disabilities, language problems, vocational training needs, and the like. In addition, the cost of maintaining physical plants is greater in urban areas.

The court first dismissed the original plaintiff's claims under the federal constitution, feeling itself foreclosed by the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.[72] Turning to the state equal protection analysis presented by

69. *Id.* at 621.
70. *Id.* at 622.
71. *Id.* at 624.
72. 411 U.S. 1 (1973).

the original plaintiffs, the court began by identifying the factual components of the alleged discrimination, and essentially agreed with the plaintiff's allegations.[73] The court found discrimination in the "markedly unequal distribution of real property value among the state's school districts," a corresponding "unequal access to taxable real property wealth," a "strong relationship between the disparities in the distribution of taxable real property wealth and the disparate levels of local expenditures," and the "significant consequences that flow from the inability of property-poor districts to attain the spending level of property-rich districts," consequences extending to such matters as "difference in tax burden, professional staff ratios, class size, curriculum offerings, teacher characteristics, services available to pupils and the availability of equipment and supplies."[74] On the issue of the effect of money on educational quality, the court conceded that a dispute was raging among the students of the problem,[75] but concluded that the failure of the experts to agree should not be allowed to validate a funding scheme in which some districts have demonstrably superior student-teacher ratios, curricula, teacher quality, student services, support for special problem children, and supplies. Since in each of the areas mentioned wealthier districts had significant advantages over poorer districts, the court was willing to conclude that the discrimination in funding affected educational quality.[76]

On this factual basis, the court rooted its legal analysis. It examined the legality of this discrimination under the state's equal protection clause using two standards: the "sliding scale" standard and the "rational basis" standard.[77] Under the sliding scale standard, the court determines whether the challenged discrimination serves a substantial state interest and, if so, whether there are less restrictive ways of achieving those goals. The purposes of the school funding are clearly substantial; they include providing " 'a system of free common schools,' " "affording all school children . . . equal educational opportunity," and "remedying inequalities in such educational opportunities."[78] Referring to recent studies and experimentation in other states, the court found that there are less restrictive alternatives available to accomplish these ends.[79] The court said: "[T]here exists a body of knowledge . . . available for

73. 94 Misc. 2d 466, 408 N.Y.S.2d at 634–40.

74. *Id.* at 637.

75. *Id.* at 618–19.

76. *Id.* at 637.

77. *Id.* at 636. The court refused to apply the strict scrutiny standard to these facts because of a prior decision by the New York Court of Appeals holding that education was not a fundamental interest. Levy v. City of New York, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13 (1976).

78. 94 Misc. 2d 466, 408 N.Y.S.2d at 636.

79. *Id.* at 637–38.

consideration by the legislature concerning methods [less objectionable than those] currently employed."[80] The court concluded that the current system, judged by the sliding scale approach, "denies the . . . plaintiffs equal protection of the law under . . . the New York State Constitution."[81]

The court next considered whether the funding system met the less demanding rational basis test, the conventional inquiry into the adequacy of the justifications asserted on behalf of differential treatments. Reviewing the operation of the system, the court found that especially because of the implicit tax wealth discrimination, the use of flat grants, and the save-harmless provisions, the system did not represent a reasonable method of reaching legitimate goals. To the contrary, the court found the system tended to perpetuate the very wealth discrimination it was designed to eliminate. Referring to the "irrationality of the manner in which the state aid system actually operates," the court concluded that the system did not satisfy the rational basis test for compliance with equal protection requirements of the state constitution.[82]

Turning to the case of the large-city intervenors, the court found that the equal protection clauses of both the state and federal constitutions had been violated.[83] The court accepted as a matter of fact the theory of municipal overburden, calling the per pupil wealth standards "flawed measures of fiscal capacity."[84] On the question of special urban costs, the court likewise accepted plaintiff-intervenor's allegations. The court spoke of the state's failure to "give effect to the overburdening factors affecting large-city school districts."[85] As a result, significant numbers of large-city pupils attended schools with inadequate buildings and physical security, restricted sports and recreational activities, insufficient library facilities and health services, and diminished offerings in art and music.[86]

The court concluded on these facts that the state's treatment of the large-city school districts bore "no reasonable relation to the statute's purpose of providing state aid to districts in proportion to their need . . .

80. *Id.* at 638.
81. *Id.*
82. *Id.* at 639. The court also held that the system violated article 11, section 1 of the New York Constitution which requires that the legislature support and maintain a system of free schools. *Id.* at 640.
83. *Id.* at 641–42.
84. *Id.* at 641.
85. *Id.*
86. *Id.* at 634.

[and] must be found therefore to constitute a denial of equal protection of the law . . . ."[87]

In all of these legal conclusions, several matters stand out. First, the court put substantial weight on new research and state experimentation with systems of school finance—the post-*Serrano* wave of reforms. Given the controversy these issues have raised in the literature,[88] one may doubt whether there is now established a set of proven alternatives for school finance which are effectively wealth neutral. *Levittown*, however, did not impose on plaintiffs the burden of making such a showing.[89] It was enough that there was credible testimony that such alternatives have been discussed, and that they were "susceptible to being fashioned to suit the needs of New York's educational system."[90] The New York court seems here to have taken a critial step. How much weight should a court put on tentative, incomplete social science research findings, especially in a litigation setting where what is at stake are far-reaching changes in institutional structure? McDermott's persuasive

87. *Id.* at 641.

88. The controversy over reform has been substantial. The principal reform techniques are reviewed in Barro, *supra* note 18 and Grubb, *The First Round of Legislative Reforms in the Post-*Serrano *World*, 38 L. & CONTEMP. PROB. 459 (1974). Criticism of Serrano-inspired reform comes from a variety of perspectives. The literature includes Bateman & Brown, *Some Reflections on* Serrano v. Priest, 49 URB. L. ANN. 201 (1972); Billings & Legler, *Factors Affecting Educational Opportunity and Their Implications for School Finance Reform: an Empirical Study*, 4 J.L. & EDUC. 633 (1975); Bowman, *Tax Exportability, Intergovernmental Aid, and School Finance Reform*, 27 NAT'L TAX J. 163 (1974); Carrington, *On Egalitarian Overzeal: A Polemic Against the Local School Property Tax Cases*, 1972 U. ILL. L.F. 232; Gatti & Tashman, *Equalizing Matching Grants and the Allocative and Distributive Objectives of Public School Financing*, 29 NAT'L TAX J. 461 (1976), *reviewed in* Johnson & Collins, *Equalizing Matching Grants and the Allocative and Distributive Objectives of Public School Financing: Comment*, 31 NAT'L TAX J. 197 (1978); Glickstein & Want, *Inequality in School Financing: The Role of the Law*, 25 STAN. L. REV. 335 (1973); Margolis, *Public School Finance in Connecticut: An Urban Perspective*, 11 CONN. L. REV. 1 (1978); Moynihan, *Solving the Equal Educational Opportunity Dilemma: Equal Dollars Is Not Equal Opportunity*, 1972 U. ILL. L.F. 259; Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355 (1971); Silard & Goldstein, *Toward Abolition of Local Funding in Public Education*, 3 J.L. & EDUC. 307 (1974); Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L.J. 409 (1973); Treacy & Frueh, *Power Equalization and the Reform of Public School Finance*, 27 NAT'L TAX J. 285 (1974); Vieira, *Unequal Educational Expenditures: Some Minority Views on* Serrano v. Priest, 37 Mo. L. REV. 617 (1972); Zelinsky, *Educational Equalization and Suburban Sprawl: Subsidizing the Suburbs Through School Finance Reform*, 71 NW. L. REV. 161 (1976).

89. Other courts have been much less generous to plaintiffs. Some hold that in the absence of proof that such alternatives are in fact workable, they cannot qualify as less restrictive alternatives for equal protection purposes. *Rodriguez* is the prominent example. 411 U.S. 1, 42 (1973). Something of the same flavor can be found in cases like Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979) and in Northshore School Dist. v. Kinnear, 84 Wn. 2d 685, 530 P.2d 178 (1974) (in each case, note especially the dissent's concern that the majority does not give sufficient weight to facts proven by plaintiffs).

90. 94 Misc. 2d 466, 408 N.Y.S.2d at 637–38.

work on the state of this research[91] suggests to this writer that this aspect of school finance litigation might be an appropriate place for the careful use of presumptions.[92] And it may be that if a presumption were to be deliberately fashioned, the *Levittown* court's approach might be the better one: on a threshold showing by plaintiff's witnesses that research findings have generated plausible alternatives, the court would presume their practical availability until persuaded otherwise by the weight of the evidence. Whatever the approach, a fuller discussion of the matter by the court would have been helpful in formulating the presumption with some precision, in specifying the conditions which would rebut it, and in identifying the limits of its effect.

The second significant element of the New York court's legal analysis is that it accepted the relevance of municipal overburden and high urban school costs. Other courts have been presented with the municipal overburden argument with varying degrees of intensity of proof. Some have reached contrary conclusions.[93] The *Levittown* court is the first to embrace the theory with any enthusiasm; if the result survives appellate review, the New York litigation will surely be a cornerstone in the development of the theory. As with the court's reliance on social science research, however, the matter is deeply controverted, and a fuller judicial discussion would have been helpful. A franker recognition of the existing controversy would have lent weight to the court's conclusion.

Many believe there is no logic in increasing *school* aid to a district merely because residents of the district face high *welfare* or *police* costs. The logical cure for that, say the critics, is state subventions in aid of welfare or police.[94] The court briefly referred to defendants' witnesses on this matter. Defendants could not, of course, contest the fact that non-

91. INDETERMINANCY IN EDUCATION (J. McDermott ed. 1976); McDermott & Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference*, 38 L. & CONTEMP. PROB. 415 (1974).

92. *See* Coons, *Recent Trends in Science Fiction:* Serrano *Among the People of Numbers*, 6 J.L. & EDUC. 23 (1977).

93. For example, the Supreme Court in *Rodriguez* found increased expenses in urban areas did not give rise to special constitutional status, 411 U.S. at 11–12. Likewise, the Ohio Supreme Court was skeptical of the legal significance of the claims of large cities. Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813, 824–25 (1979). *See also* McInnis v. Shapiro, 293 F. Supp. 327, 336 n.38 (N.D. Ill. 1968), *aff'd mem. sub nom.*, McInnis v.Ogilvie, 394 U.S. 322 (1969); Lindsay v. Wyman, 372 F. Supp. 1360, 1370 (S.D.N.Y. 1974).

94. One of the defendant's prominent witnesses, Dean Dick Netzer of the Graduate School of Public Administration of New York University, stated in a recent letter to the *New York Times:*

> Public-finance economists are close to unanimous in considering the "municipal overburden" argument to be without merit. If cities have high non-school costs because they are saddled with fiscal responsibility for welfare, pay high salaries and fringe benefits to non-school employees or choose to engage in a host of marginal activities, then those problems should be addressed directly, by state assumption of welfare costs, tough collective bargaining, better management,

educational expenses were higher in large cities. But they did urge that any extra noneducational tax burden in urban areas was within the control of local taxpayers; such taxpayers should not be allowed to choose higher quality municipal services and then, complaining about municipal overburden, ask for additional state school aid. Plaintiffs responded by urging that increased expenses in urban areas were not a matter of choice, but were instead required by the very nature of urban life.

The court agreed with plaintiffs that these expenses were "inexorable," and concluded that the witnesses for the state failed to show how a city could avoid present levels of noneducational expenses.[95] That plainly is a difficult burden to impose on a defendant, and it is not at all clear how it could ever be met. Moreover, such a showing is not logically dispositive of the issue to be decided: whether *school* monies should be increased because of higher *police* costs. The court found, nevertheless, that municipal overburden must be recognized in state funding formulas and that its factual basis in this case had been "satisfactorily established by the evidence presented."[96]

Closely related to the overburden argument is the court's acceptance of the existence and relevance of increased costs of education in urban areas and of the increased cost of educating urban pupils. As indicated above, plaintiffs showed that significantly higher per pupil costs were incurred in urban school systems. The accuracy of this proof is not easy to contest, though some of it will be arguably impressionistic.[97] Even where the numbers are firm, however, their meanings are disputable. Higher costs may reflect increased costs of doing business in urban areas, as the court found, or may merely reflect higher program quality levels—a cause for greater spending that is not necessarily something the state should be compelled to subsidize. Higher teacher salaries may reflect the unattractiveness of urban areas for teachers, or may be caused, as some allege, by a district's unwillingness to battle teacher unions. That urban districts have greater concentrations of poor and minority students may mean, as

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or whatever. It makes no sense to increase *school aid* to offset deficiencies in welfare finance or city budgeting.

N.Y. Times, July 14, 1978, at A26, col. 4.

95. 94 Misc. 2d 466, 408 N.Y.S.2d at 623.

96. *Id.* at 624. The state argued that some of the increased expense of large-city school systems was due to voluntary program decisions of those school districts which increased their costs. *See* Brief for Defendants-Appellants, Supplemental Memorandum III at 28–32, Board of Educ., Levittown v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

97. It was the defendant's position that "[t]he trial Court's finding that minority children were more expensive to educate was based solely on impressionistic testimony and generalizations which were often contradictory, rarely supported, and largely irrelevant to the cost of educating these students." Brief for Defendants-Appellants, Supplemental Memorandum III at 58, Board of Educ., Levittown v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

the *Levittown* court found, that urban districts need more educational resources, or it may mean, as some witnesses testified[98] that state grants-in-aid of welfare should be increased. Indeed, to the extent that the state treasury is finite and claims for education and welfare are therefore mutually exclusive, the court's requirement that educational spending be increased in urban areas could result in lower welfare spending in those areas—not an obvious victory for urban areas with their relatively high proportion of welfare recipients and their relatively low proportion of public school students.[99] Finally, there are the usual arguments about whether additional amounts of money at the margin will make any difference in dealing with learning readiness, mental and physical health, poverty, and the other problems the court found to be disproportionately present in urban school systems.

On appeal, these issues will surely be debated.[100] If the trial court's response to them is upheld, the pleas of the nation's urban school districts for recognition of the increased cost of education in dense urban areas will have received significant legitimation, and that may make them more persuasive in other judicial and legislative arenas.

From the perspective of this article, the most important aspects of the New York opinion is the care with which the court selected a doctrine which minimized constraints on future legislative choice. At the rhetorical level, the court made the usual disavowal of intent to affect legislative choice:

> It is not the desire or intent of the Court to express an opinion about the suitability, [or] desirability . . . of the various [funding] techniques concerning which evidence was adduced at the trial.
>
> . . . [Such matters are] for consideration by the legislature . . . .[101]
>
> . . . [T]his Court has deemed it necessary to refrain from expressing an opinion as to the appropriateness of any particular means or technique for attaining a suitable school finance system . . . believing that "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."[102]

Unlike the *Seattle* court, however, the court here went beyond the rhetoric of judicial nonintrusion, and selected a doctrine which insures

98. *Id.* at 56.

99. *Id.* at 56–57.

100. At this writing, the *Levittown* litigation is on appeal to the appellate division. In the meantime, New York's Governor Carey has appointed a 35 member commission headed by Max Rubin, prominent New York lawyer and former head of the New York City Board of Education, to examine the present state school funding system. Hugh L. Carey, Governor of the State of New York, Press Release (Sept. 22, 1978) (on file with *Washington Law Review*).

101. 94 Misc. 2d 466, 408 N.Y.S.2d at 638.

102. *Id.* at 645.

significant legislative choice about the proper blend of state and local components of the school finance system. Under the opinion, the legislature would be free to choose a fully state funded system, in which local choice over funding levels would be wholly eliminated. Apparently, the only requirement would be that real cost differences among the various areas of the state be recognized in the allocation of state monies, in order that high-cost urban districts would not fare less well than low-cost districts. At the other end of the state-local spectrum, the legislature is free to give local choice whatever role is felt useful, including complete local control of funding levels.[103] The opinion requires only that in such a system choice in real terms be equally available to all districts. Presumably, if local control of funding is chosen, real equality of choice would require some form of power equalizing[104] formula or its functional equivalent to assure that similar levels of local tax effort produce similar levels of dollars per unit. In measuring these similarities, of course, higher urban school costs and municipal overburden would need to be considered.

V. LIMITATIONS ON THE JUDICIAL ROLE IN STRUCTURING SCHOOL FUNDING SYSTEMS

This article has examined some broad questions concerning the proper blend of state and local components in an effective and fair school funding system. More narrowly, the analysis has focused on the appropriate judicial posture when the constitutional adequacy of an existing system is challenged in litigation. Comparing the approaches of the New York and the Washington courts suggests some further refinements of the question. In fashioning a useful and effective judicial role, the following limiting factors need to be kept in mind.

A. Problems Associated With the Data Base Used in School Funding Cases

Different legal doctrines put different stresses on the use of and need for data. A tort doctrine which imposes liability without fault requires less information about the conduct of the parties than does a doctrine which imposes liability only on a showing of negligence. An antitrust doctrine imposing liability on a per se basis requires less in the way of information about an arrangement's harms and benefits than does a doc-

103. The court expressly noted that delegation of funding decisions to local districts would be permissible, as would continued reliance on locally imposed property taxes. *Id.* at 640.

104. For a general description of such formulas, *see* COONS, CLUNE & SUGARMAN, *supra* note 9, at 200–44; Barro, *supra* note 18.

trine making liability turn on the reasonableness of the practice. In an area of rapidly growing research, courts must take special care to avoid doctrine which requires more in the way of accuracy and reliability than the state of the art fairly permits. This, in turn, suggests that litigants and their counsel should seek to avoid overselling current research findings in attacking or defending school funding systems.

There is persuasive opinion that the current state of social science research in this area is still so primitive that its findings are probably not reliable guides for specific administrative action, are certainly not reliable guides for legislative use, and are wholly unsuited for something as general and as permanent as constitutional interpretation.[105] Findings of that quality are misused when offered as answers to specific questions of educational policy and practice.[106]

The problem, in part, is that current research does not touch, much less resolve, critical questions necessary for the resolution of many educational funding disputes. We have inadequate evidence, for example, of the effects of various school funding formulas on discrete subgroups of the population, such as the poor or the educationally disadvantaged. We know too little about the effects of such formulas in different areas (such as urban and rural populations), or on different programs, or on patterns of school governance.[107] We know little about the effects of differently composed tax bases on school spending, about the effects of different patterns of tax incidence, or about the consequences of the various redistributive measures making up current property tax reform programs.[108] Indeed, there is under way today an "agonizing reappraisal" of the fundamental child development theories from which all education reform flows.[109]

Another part of the difficulty—especially relevant to the possibilities of judicial appraisal—is that what data we have is highly technical. Even in a nonmathematical summary, the reader will quickly confront such questions as whether the relationships between district wealth and income are curvilinear or merely linear,[110] whether fiscal neutrality should

105. Wise, *Foreward* to INDETERMINANCY IN EDUCATION at ix (J. McDermott ed. 1976).

106. Coons, *supra* note 92, at 30–31; Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence,* in INDETERMINANCY IN EDUCATION (J. McDermott ed. 1976).

107. Odden, *School Finance Reform: Emerging Issues and Needed Research,* in DILEMMAS IN SCHOOL FINANCE (J. Thomas & R. Wimpelberg eds. 1978).

108. *Id.* .

109. R. DELONE, SMALL FUTURES (1979). *See especially* chapter 4.

110. They may become curvilinear at some point. Hickrod & Hubbard, *Illinois School Finance Research,* in DILEMMAS IN SCHOOL FINANCE 67–68 (J. Thomas & R. Wimpelberg eds. 1978).

be measured with gross or net elasticities,[111] or whether one is justified in using the Lorenz-Gini procedure for comparing districts' wealth and spending.[112] To further compound the difficulty, these refined, theoretical concepts must be used in a practical world where measurement is clouded by such matters as overlaping district boundaries, wealth and income data collected for cities and counties but not often for school districts, the presence of substantial state and federal aid programs, and the absence of reliable cost accounting systems with which to compare districts and programs.[113]

Apart from the reliability of the data, there is often a serious question about its relevance. For example, a plaintiff in a school finance case may be able to prove that spending disparities are positively correlated with tax base disparities, but unable to show with available social science research techniques that the education programs in underfunded districts produce outputs measurably different from those of the wealthy districts. Should such a plaintiff lose? Some have argued that such a showing is necessary,[114] and most plaintiffs have made some effort to make such a showing. Some plaintiffs have indeed lost, in part, because of an inability to persuade a judge that money made a difference.[115] But is it really relevant to equal protection analysis that a person complaining about differential treatment by the state is unable to prove anything beyond the concededly different government treatment? McDermott has argued persuasively that equal protection should mean that government should not *treat* people differently, regardless of whether the different treatment can be shown to have any particular sort of demonstrable effects.[116] Surely, if the government spent more money on male students than on female students, on white students than on black students, or on students from Republican families than on students from Democratic families, no showing beyond the different sums would be required of a plaintiff claiming a denial of equal protection. No persuasive reason appears for

111. Net elasticities are more precise, but availability of data to determine gross elasticities, and acceptability of the results mean that gross elasticities are more frequently used. *Id.* at 76–77.

112. The Lorenz-Gini procedure "appears to work well . . . . [but] [n]either the descriptive nor the inferential properties of this quantitative technique are fully known at present . . ." *Id.* at 77.

113. As Klein concluded, some uses of these data are "venture[s] in correlating the mysterious with the unknown." Klein, *Cost-Quality Research Limitations: The Problem of Poor Indices*, in INDETERMINANCY IN EDUCATION 49 (J. McDermott ed. 1976). *See also* Hickrod & Hubbard, *supra* note 110, at 80–81.

114. *See* Lindquist & Wise, *supra* note 2, at 53–55; Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1315–17 (1972).

115. Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635, 641–42 (1975); Northshore School Dist. No. 417 v. Kinnear, 84 Wn. 2d 685, 530 P.2d 178 (1974) (*See especially* concurring opinion of Justice Rosellini.).

116. McDermott & Klein, *supra* note 91, at 432–33.

putting a plaintiff to a higher standard in school finance litigation.[117] And if one accepts that postion, an enormous body of social science literature and research—that bearing on the effect of dollars on educational quality—becomes largely irrelevant. Equality of input is required, not equality of output.

None of this is intended to minimize the utility of research. Indeed, the opposite message is ultimately intended—we desperately need more and better research. It is vital that these complexities be the subject of continuing study in the hope that the uncertainties can be reduced in the future.

Nonetheless, most social science experts would readily admit that current evaluation efforts are relatively primitive and cannot readily serve as bases for policy decisions about education.[118] Until reliability is very sharply increased, and relevance is convincingly established, courts should be very cautious about using the limited and tentative conclusions of this research for definitive, concrete policymaking. It is especially dangerous to do so when the court is being asked to order long-term and fundamental institutional changes.

No easy strategy can be devised for operating in an area in which such massive consequences rest on such insecure footings. Humility thus seems a becoming virtue in both judges and advocates. And, as suggested, presumptions may be useful devices to explore, choosing always those that seem designed to generate the most reliable data and to energize the most searching scrutiny.

B. Problems Associated with the Nature of Judicial Machinery

There can be little doubt that courts will have special trouble dealing with these mysteries. In part the problem is the data. Another part is the generalist nature of our judges—a highly prized judicial quality in which lies much of what we call wisdom, but which is not profitably employed in vast enterprises requiring intimate familiarity with technical, sophisticated, and highly controverted questions of statistical method and educational policy. A third part of the problem is a consequence of the very form of the judicial machinery itself. Reading a transcript or a record in one of these cases impresses one with the limited value of the testimonial process as a way of discerning truth when data are soft and key concepts undefined. The parties parade before the court witnesses of im-

117. Indeed, the dangers of hinging equal protection on demonstrable consequences have long been known. *See* Cahn, *Jurisprudence (Annual Survey of American Law)*, 30 N.Y.U.L. REV. 150, 168 (1955), *discussed in* Coons, *supra* note 53, at 27–31.

118. Mood, *The State of the Art in Educational Evaluation*, in INDETERMINANCY IN EDUCATION 17 (J. McDermott ed. 1976).

peccable background and experience to deliver their prepared view. From the variety thus presented, the judge can largely pick what he chooses.[119] Briefs by the losing party express astonishment that the trial judge could have wholly disregarded the testimony of their experts.[120] Majority opinions holding against plaintiffs in school finance cases cannot seem to find any facts to show that the system is unfair or unequal,[121] while dissenting opinions in such cases find the facts painstakingly established on the record.[122] In *Levittown*, the state's brief on appeal urges the court to disregard entirely the factual components of the case (23,000 pages of testimony and 400 exhibits) and determine the matter on the law alone.[123] On the whole, the field has not been one in which courts have found the search for truth easy, working as they must with the implements and tools of the judicial process.

Even if some consensus could be developed about the fundamental factual premises of such litigation, there remains the problem of supervision and enforcement of any remedy ordered. We are dealing here with a fast-moving, hotly contested field, in which events quickly outdate doctrine. The judicial process embraces very limited powers of continuous supervision. As needs change, as priorities shift, as fiscal conditions alter, and as perceptions modify (and these permutations seem the only real certainties) overseeing any substantive educational program, or monitoring and evaluating any educational system, are not the sorts of things courts can be expected to do. For all the brave judicial rhetoric about the meaning of education and about the ways to achieve educational fairness, a somewhat narrower judicial role is desirable if one is serious about effective employment of the judicial power as we know it.

Finally, as Lon Fuller has observed,[124] the judicial machinery is best at doing what we call adjudication, a process which has important limits, not lightly to be ignored. The sort of state-local institutional issues presented in school finance litigation involve highly intricate interrelationships and complex patterns of effects. Fuller calls such issues "polycentric"—issues in which the resolution of any part of a question has complex and largely unforseeable repercussions on the remaining web of

119. Levin, *supra* note 106, at 136.

120. *See, e.g.*, Brief for Defendants-Appellants, Supplemental Memorandum III at 21, 27, 40, 56, Points III–VI, Board of Educ., Levittown v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

121. *See, e.g.*, Northshore School Dist. No. 417 v. Kinnear, 84 Wn. 2d 685, 696–97, 530 P.2d 178, 185 (1974).

122. *Id.* at 742, 530 P.2d at 209. (dissent of Justice Stafford).

123. Brief for Defendants-Appellants, Supplemental Memorandum III at 8 n.1, Board of Educ., Levittown v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

124. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

issues. For resolving issues of that kind, the form of ordering we call adjudication is simply not suited. For example, among its attributes, adjudication requires that each affected party be provided a meaningful participation through proofs and argument—a virtual impossibility when the precise effect on each party necessarily depends on the resolution reached concerning all other parties. It is not simply a matter of a large number of affected parties; it is instead the nature of the interrelationships. Such issues may be solved by some form of managerial discretion (the baseball manager decides which players will play which positions) or by some reciprocal process (an economic market makes highly complex and interrelated allocative decisions). But adjudication is not a useful way of resolving such matters. If judges are given such tasks, they cease being judges in all but a nominal sense, and become mediators, legislators, or other political functionaries. In his review of the New Jersey cases, Professor Lehrne observed that such cases

> do not conform to the . . . traditional model. . . . [T]he court system . . . was not examining a private dispute between private parties . . . [but rather the] validity of established public policies. In such circumstances the bipolar format of courtroom adjudication made little sense. . . . [T]here was as much, if not more, conflict among the defendants on one side of the courtroom and among the plaintiffs on the other side than there was between the two supposedly antagonistic camps.[125]

C. *Problems Associated with the Nature of Legal Doctrine*

It is not only the machinery of the law which imposes constraints on useful judicial roles; the form of legal doctrine itself limits choice significantly. Legal doctrine is in the form of general principle. Especially in constitutional litigation, such general formulations are necessary if the decisions reached are to be properly grounded in prior legal authority, are to fit in some degree of order with other doctrine, and are to provide guidance with regard to a useful range of like questions. Yet principles of this generality are of limited utility in resolving specific questions of educational policy. As the New Jersey experience[126] makes clear, the attempt to answer specific substantive questions with highly general legal criteria comes very close to making a mockery of the entire process of adjudication.[127]

Further, legal doctrine can change only slowly in deference to the other process values it must serve. If a court ventures too far into the spe-

125. Lehne, *supra* note 53, at 198–99.
126. *See* note 53 *supra*.
127. *Id.*

cifics of an educational policy dispute—especially, again, in the setting of constitutional litigation—the characteristic drag of legal doctrine could prove very hurtful. If one picks any substantive issue from this article and asks if any prevailing consensus on the issue is likely to hold for more than a year or two, one can sense the risk of footing any such wisdom in the cement of constitutional dogma. Suppose, for example, one is persuaded that the concept of municipal overburden is useful and should be used in fashioning a constitutional standard for an educational finance system. In a year or two, smaller cities might begin to see that higher police and welfare budgets would in part be compensated by the state in the form of increased educational aid. If such a development resulted in inflating police budgets generally, the idea of municipal overburden would clearly be in need of revision. But how responsive can the legislature be when once the concept is woven into the fabric of the constitution? Especially in fields as fast-moving as this, freedom to change seems unusually important, and specific legal mandates seem accordingly less desirable.

D. The Problem of Legitimacy

A final concern about fashioning a judicial role is the question of legitimacy. Under our political system, it is assumed that judges should play only a limited role in making important choices about the allocation of public resources. Special care must be taken in articulating doctrine so that any substantive policy judgments left to the judges are reduced to the minimum. Since any blend of state and local components in a system of public education finance will have significant allocative consequences, any judicial prescription in the area will necessarily involve the judiciary in allocating the public resources to some degree. This judicial role cannot be wholly eliminated. But it seems clear that there are important differences in degree. The Washington court in *Seattle*, for example, has intruded much further into the choice of a state-local system than has the New York court in *Levittown*. In Washington, nothing but a fully funded state system is now possible; in New York, at least the possibility exists for some decentralized funding decisions. The choice of so basic a matter as the degree of local control of funding levels would appear to be too fundamental and too far-reaching to be left to the judges if traditional notions of legitimacy are to be respected.[128]

128. A. Cox, The Role of the Supreme Court in American Government 95–96 (1976).

VI. THE APPROPRIATE JUDICIAL ROLE

What role, then, is left for courts if the facts are too uncertain, the standards too controverted, the supervision needs too great, and the allocative choices ultimately too political for appropriate judicial resolution? The role of the courts in such a case is critical, if narrow. First, courts can help bring into focus matters that need legislative attention. Legislative and administrative action in related areas of intradistrict equity, programs for handicapped children, and assistance to non-English speaking students, for example, have followed judicial action[129] which secured the attention of the legislature in an undeniably powerful way.[130] Second, the courts can sometimes help create the structural conditions for an effective employment of the political process, as was done, for example, in the reapportionment cases.

On questions of substance, too, courts can appropriately exercise an important though narrow role. Much school finance litigation has been rooted in spirit, if not in name, in the concepts of equal protection. Even where other state constitutional terms have been relied on, they often focus on the same question: Is the state treating some classes of schoolchildren differently, without justification? In such litigation, the narrow judicial task is one of identifying, in general, the kinds and extent of differential treatment of schoolchildren which a particular finance system entails, and then seeing if appropriate justifications exist for any significant differences noted.

Both the existence of differences and the justifications for them are complex matters for judgment. For example, whether the state treats urban districts and nonurban districts differently when it grants them equal dollars per pupil was a central issue in *Levittown*. It was not an easy difference to articulate, nor to measure. But in a broad way, the court seemed to feel that there were significant differences in treatment, and reaching that judgment is an important, if narrow, judicial task. Simi-

129. Lau v. Nichols, 414 U.S. 563 (1974) (bilingual instruction); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) (handicapped children); Pennsylvania Assoc. for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972) (handicapped children); Hobsen v. Hansen, 327 F. Supp. 844 (D.D.C. 1971) (intradistrict resource allocation).

130. Kirp, *Law, Politics and Equal Educational Opportunity: The Limits of Judicial Involvement*, 47 HARV. ED. REV. 117, 134–36 (1977) details the legislative programs which have followed this litigation.

In his analysis of the New Jersey school-finance litigation, Professor Lehne suggests that courts can play an important role in "agenda-setting" on such matters. Of course, litigants inviting courts to play such a role have an obligation, argues Lehne, to frame theories which respect traditional roles of other branches of government, on pain of having the reform effort ultimately fail. Lehne, *supra* note 53, at 202.

larly, while determining the adequacy of the justification for the difference calls for subtle judgment, a court should be able to perceive the virtual absence of any justification. For example, when variations in property tax wealth result in significantly higher spending levels in one district than another, there is no apparent justification for the difference. That is, no values of local control or of educational philosophy are involved. Citizens are being charged different tax prices for the same goods as a result of the fortuitous location of industrial or commercial properties. This is simply arbitrary, and a court need have no hesitancy in so holding.

In identifying differences, courts should specify their causes with sufficient precision to allow an appropriately limited response. Again, the approaches of the Washington and New York courts are different, and the differences are instructive. In his *Northshore* dissent, Justice Stafford, though facing a complaint based on interdistrict tax base disparities, nevertheless characterized the differences among districts as matters of underfunding, or of uncertain funding, using the failed special levy as the usual example. While never stated this bluntly, this rather implies that the real problem lies in the unwillingness of local taxpayers to support education. Although there was in the *Northshore* record no special showing of local taxpayer irresponsibility, Stafford's characterization of the problem effectively invited a complaint in *Seattle* which proposed as a solution the elimination of most local control over school spending. The New York court, by contrast, though surely facing as much a problem with local responsibility as was presented in Washington, nevertheless characterized the problem as a matter of unequal tax bases and discriminatory measures of district wealth. And that characterization produced legal doctrine which left the New York legislature free to employ local choice so long as the local areas have something like equal opportunities to exercise choice. That approach limits judicial intrusion into questions of essentially legislative nature, leaving the legislature free to explore alternative funding modes and a wide range of state-local blends in its continuing search for an optimum system. The narrow, surgical stroke of the New York court seems preferable. Lon Fuller captured the essence of the distinction when speaking of the appropriate role of the court in cases that involve polycentric issues:

> [While the market process is clearly a polycentric decision model] the laying down of rules that will make a market function properly is one for which adjudication is generally well suited. The working out of our common law of contracts case by case has proceeded through adjudication, yet the basic principle underlying the rules thus developed is that they should promote the free exchange of goods, in a polycentric market. The court gets

> into difficulty, not when it lays down rules about contracting, but when it attempts to write contracts.[131]

Beyond focusing attention, insuring effective structure, and carefully identifying differences and justifications, courts probably should not go. As Professor Kirp has noted, gross inequities caused by a particular state-local partnership can be reached with judicial tools, but

> [s]ubtle questions of distributive justice persist [which] cannot be decided solely by reference to the Constitution. Because they typically involve allocative choices among claimants who are nominally equally deserving, such issues may be better fit for political rather than judicial resolution. They seem best fit for joint resolution, the courts initially defining minimal constitutional guarantees, the legislative enactments giving substance to these definitions, and the judiciary subsequently clarifying statutory ambiguities.[132]

This would seem a large enough agenda for the courts. To do this surgical task and to do it well will reflect the kind of discerning, self-limitation which is, in the end, the indispensable condition for the effective use of the judicial power.[133]

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131. Fuller, *supra* note 124, at 403–04.

132. Kirp, *supra* note 130, at 137.

133. As this article went to press, Professor Fiss published a related study. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). Fiss makes a thoughtful argument encouraging the wider use of judicial power in cases calling for structural reform. Taking a somewhat broader view of the judicial function than is here presented ("courts exist to give meaning to public values, not to resolve disputes," *id.* at 29), Fiss finds the judicial office structured to encourage objective appraisal of public values because of the dialogue which is a condition of the exercise of judicial power and because of the independence and impartiality of the judge. *Id.* at 12–14. In relation to other branches of government, therefore, courts should not be regarded as "default" institutions—authorized to act only when the other branches fail—but rather should be accorded a central role, a role ultimately justified by the fact that judges are "in the best position to discover the true meaning of our constitutional values." *Id.* at 58.

However one appraises Fiss's argument, the present article addresses a much narrower question: whether courts should adopt broad doctrinal positions which foreclose significant areas of legislative choice when narrower ground exist which are fully as effective in implementing the values at stake. The argument here being made is not that judges need be timid in protecting constitutional values, but only that in doing so courts should be sensitive to the constitutional roles of the other branches of government. There is no apparent reason, in other words, why judges should be exempt from the sensible restraint implicit in the notion of the "least restrictive alternative."