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The Price of Education: What Local Control Is Costing American Children.

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THE PRICE OF EDUCATION: WHAT LOCAL CONTROL IS COSTING AMERICAN CHILDREN

DEBRA L. IRELAND†

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“Thank you for coming to our school. I was really happy. . .and when you said we were smart I was suprised [sic] because people usually don’t say that.”

—Desiree, sixth grade student,
Kirby Middle School, San Antonio, Texas¹

Tucked into a package of “thank-you” notes, one letter stood out. From “Desiree,” it is quoted above, and it broke my heart.

As a volunteer literacy advocate in a city where studies have shown that fewer than 40% of children in the fourth, eighth, and twelfth grades read at a level of proficiency,² I visit any class that invites me. I read aloud to students of all ages, hoping to kindle a passion for reading. I explain how critical it is to have strong language skills and the impact

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1. Letter from Desiree Solis, sixth grade student, Kirby Middle School, Judson Independent School District, Bexar County, Texas, to Debra Ireland, radio announcer for KXXM, San Antonio, and volunteer literacy advocate (December 4, 2000) (on file with author).

2. John Goodspeed, Feature, *Hank the Cowdog Fights Illiteracy*, SAN ANTONIO EXPRESS-NEWS, Sept. 3, 2000, at 1H. See also Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL’Y REV. 99, 100 (1996) (citing studies that estimate 23 million Americans are functionally illiterate, as are approximately 40% of all minority students).

such skills will have on eventual career opportunities. I also ask students about their plans for the future; it is a fascinating insight into the way today's kids view their own potential. This educational self-image also infused the letter from Desiree, and it is the reason reading her comments so disturbed me.

With those words, this child, a student in one of the so-called "poorer" school districts³ in the San Antonio, Texas, area, essentially said that it is not normal for someone from outside her district to manifest confidence in either her abilities or those of her classmates. More startling than the comment itself are its implications. Education in America prepares children for the future, readying them for their eventual participation in society as wage earners, voters, and leaders. But when an eleven year-old child is surprised to hear from an outsider that she and her classmates are "smart," it is obvious that something is wrong with the system.

Desiree's perceptions seem even more dismal when compared to the excited confidence shown in some other, generally wealthier, school districts where students are not only encouraged, but actually expected to achieve great things.⁴ When student accomplishments are promoted proudly, one can see how community perceptions regarding the success potential of the district's students can be reinforced. But as Desiree so poignantly indicated in her letter, negative reinforcements are equally powerful.

3. Comparing the free-lunch eligibility statistics is one common way of measuring the relative wealth of a district and its residents. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 Yale L.J. 2043, 2096 (2002). According to its own figures, 43% of all students in the district in which the letter-writer's school is located are eligible to receive free or reduced-price lunches. Desiree's school, Kirby Middle School is in the Judson Independent School District (ISD), Bexar County, Texas. Judson Independent School District, Information on Schools and Enrollment, available at <http://www.judsonisd.org/jisdinfo/factsfig/default.htm> (last visited September 24, 2003). Another way to compare relative wealth is to calculate per-student property values in the districts. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 n.50 (1973) (referring to "poor property districts" and "wealthy and poor districts" in describing the school districts alleged to be using unconstitutional school financing arrangements).

4. See e.g., North East Independent School District (NEISD) at <http://www.neisd.com> (last visited September 24, 2003). North East ISD shares a border with Judson ISD. See *SOUTHWESTERN BELL TELEPHONE L.P., SAN ANTONIO MOVING GUIDE*, 44 (1998). On its website North East touts the fact that 84% of its 2002 graduating class was college-bound, and \$24.3 million dollars in scholarships were offered to members of the class. North East Independent School District, Information on Scholarships Offered to Graduating Students, at <http://www.neisd.com/neisdinfo/scholarships.htm> (last visited September 24, 2003). Compare with Judson Independent School District (JISD) at <http://www.judsonisd.org>. While Judson ISD also promotes its college-bound graduate rate (66%), this district also seems compelled to note that 43% of its students meet federal guidelines for reduced price or free meal eligibility. Judson ISD profile at <http://www.judsonisd.org/jisdinfo/factsfig/default.htm> (last visited September 24, 2003).

Why the disparity? Is it possible that what a community expects for its students varies according to the socio-economic status of the neighborhoods they live in and the schools they attend? Could the disparity in expectations be so obvious that an eleven year-old child knows her future is thought to be less bright than that of another child, simply because she lives in a different part of town? It is not only possible; it is actually happening.

For too long, communities have accepted the fact that some children are born to less, get less, and are expected to accomplish less. The expectation of accomplishment that is instilled in some students is not imparted to all, and sadly, the deficit often tracks school district lines. While education advocates have fought battles to desegregate schools,⁵ work toward fiscal equity,⁶ and promote basic adequacy,⁷ there remains a noticeable difference in the way we view and treat students depending on the relative wealth of the school district in which they reside. In turn, this economic discrimination denies poor children access to the full scope of the “public, free education” we profess to provide.⁸ Using the Texas experience as a backdrop, this Comment seeks to clarify what is unequal in education, and why, as well as some of the reasons we as a community have lulled ourselves into tolerating the inequities.

It is a fact that wealth and property are not equally distributed.⁹ Yet as Americans, we believe that opportunity *is*. We traditionally hold up edu-

5. See *Brown v. Board of Educ. Of Topeka (Brown I)*, 347 U.S. 483 (1954).

6. See generally *Rodriguez*, 411 U.S. 1; *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).

7. See, e.g., *Campaign for Fiscal Equity, Inc. v. New York*, 744 N.Y.S.2d 130, 148 (N.Y. App. Div. 2002) (reversing lower court and holding evidence insufficient to prove students not being deprived of sound basic education).

8. See e.g., CAL. CONST. art. IX, § 5 (providing for “a system of common schools by which a free school shall be kept up and supported in each district”); FLA. CONST. art. 9 § 1 (mandating “high quality system of free public schools”); MICH. CONST. art. VIII, § 2 (requiring the legislature to “maintain and support a system of free public elementary and secondary schools”); N.J. CONST. art. VIII § 4 (establishing a “thorough and efficient system of free public schools for the instruction of all children in the State”); N.Y. CONST. art. XI, § 1 (setting up “system of free common schools”); TEX. CONST. art. VII, § 1 (providing for the “support and maintenance of an efficient system of public free schools”). *But cf.* N.H. CONST. pt. II, art. 83 (stating that it shall be the duty of the government only to “cherish” public schools). See also Erin E. Buzuvis, Note, “A” For Effort: *Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy*, 86 CORNELL L. REV. 644, 654 (2001) (providing a thorough examination of the education clauses in state constitutions).

9. For example, data from the 2000 U.S. Census indicates that the median household income in San Antonio wealthiest enclave is \$171,469. David Uhler, Feature, *Affluent Address: Highest-Income Neighborhood in County Isn’t Where You Might Think It Is*, SAN ANTONIO EXPRESS-NEWS, Nov. 17, 2002, at 01J, available at 2002 WL 102861947. However the median household income in the most impoverished census tract is \$10,871, and nearly 60% of its residents live below the poverty level. Approximately 65% of the tract’s re-

cation as the one tool that is available to anyone who wants to set out on the path to the American Dream.¹⁰ But contrary to the rhetoric, American education and its community-centric structure now exacerbate the naturally unequal distribution of wealth and resources.¹¹ To make education a truly viable route out of poverty for underprivileged children, changes are needed. Before making modifications though, we must consider two pertinent issues: asking first, why efforts to date have not leveled the educational playing field, and second, what we can do to make sure the American education system gives children equal opportunity to succeed.

When I began my research, I expected to find that we still have not found a truly equitable manner in which to distribute the funds that pay for education, even here in San Antonio where the school funding debate began.¹² Financial inequity means that only some districts can afford new

sidents did not finish high school. Hector Saldana, Feature, *The Pride in Tract 1105: Stubborn Poverty is Balanced by a Fighting Spirit*, SAN ANTONIO EXPRESS-NEWS, Dec. 1, 2002, at 01K, available at 2002 WL 102863006. An analysis of 2000 census data by the Lewis Mumford Center for Comparative Urban and Regional Research indicates suburban neighborhoods and cities, in both San Antonio and the United States in general, are significantly wealthier than urban ones. Suburban median household incomes in the San Antonio area are nearly \$11,000 higher than median household incomes in urban neighborhoods. Chuck McCollough, Feature, *Study Shows Suburban Advantages*, SAN ANTONIO EXPRESS-NEWS, Dec. 25, 2002, available at <http://news.mysanantonio.com/help/search/index.cfm?type=sitesearch> (last visited October 20, 2003).

10. This sentiment was reinforced by President George W. Bush's remarks upon signing the No Child Left Behind Act of 2001 (NCLBA). Bush said, "Our schools will have higher expectations. . . every child can learn. Our schools will have greater resources to help meet these goals. . . [f]rom this day forward, all students will have a better chance to learn, to excel, and to live out their dreams." President's Remarks on Signing [the] No Child Left Behind Act of 2001 in Hamilton, Ohio, 38 WEEKLY COMP. PRES. DOC. 26 (Jan. 14, 2002), available at 2002 WL 14546901. The Act replaces the Elementary and Secondary Education Act of 1965 and its subsequent amendments, which itself was an outgrowth of the Economic Opportunity Act of 1964 and before that, Title VI of the Civil Rights Act of 1964. See Michele Moser & Ross Rubenstein, *The Equality of Public School District Funding in the United States: A National Status Report*, 62 PUB. ADMIN. REV. 63, 64 (2002).

11. For example, the argument against using property tax valuations as the basis for school funding centers on this concept. Critics contend that districts with higher property valuations generate more money to spend on education; because more money is generated, the cost of educating each student requires a smaller proportion of each property owner's total tax contribution, and the tax rate per \$100 of valuation can be set at a lower level than in property-poor districts. Districts with lower property valuations must tax at a higher level to generate an amount of money equal to that raised in a wealthier district. Consequently, the tax burden is proportionately higher for families who live in poorer areas and can least afford it. See generally *Rodriguez*, 411 U.S. 1; *Serrano*, 557 P.2d 929.

12. Two lines of cases featuring key judicial rulings on school funding and financial equity began in San Antonio. See generally *Rodriguez*, 411 U.S. 1; see also *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 399 (Tex. 1989) (ruling state system of financing

technology, the most experienced teachers, and an environment conducive to learning.¹³ Thus, some children who attend public schools, even within the same city, arguably get better educational experiences.¹⁴ However, after evaluating property value-based school funding methods, as used in Texas, and some innovative alternatives being proposed or tried in other states,¹⁵ I am less convinced that efforts to ensure dollar-for-

education based on value of taxable property, which caused great disparity between districts, violated state constitution); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 500 (Tex. 1991) (finding failure to remedy disparity between districts was continued violation of state constitution, and that state could not recapture local tax revenue as remedy); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 493 (Tex. 1992) (ruling legislation enacted to bring education financing system into compliance with prior court holdings also violates constitution); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 726 (Tex. 1995) (stating education financing system finally not in violation of state constitution) [hereinafter referred to as *Edgewood I, II, IIA, and III*, respectively]. *Rodriguez* became the only school funding case to ever be heard by the United States Supreme Court, and its resolution effectively closed the door to further constitutional challenges under the equal protection clause of the Fourteenth Amendment. The *Edgewood* cases were filed in state, rather than federal, court as a result of the United States Supreme Court's holding in *Rodriguez*. Education litigation in states other than Texas followed a similar path through state courts. See, e.g., *Serrano*, 557 P.2d 929; *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996); John Dayton, *Serrano and Its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 EDUC. L. REP. 447 (Dec. 6, 2001) (providing a detailed history of school finance litigation through state courts).

13. See Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991). See also Cynthia D. Prince, *Missing: Top Staff in Bottom Schools; The Challenge of Attracting Exemplary Teachers to Neediest Schools*, SCH. ADMIN. 6, ¶ 4 Aug. 2002, no. 7, vol. 59, at 6-7.

14. See Thomas A. Husted & Lawrence W. Kenny, *Evidence on the Impact of State Government on Primary and Secondary Education and the Equity-Efficiency Trade-Off*, 43 J.L. & ECON. 285, 298 (2000) (showing some correlation between higher SAT scores and per-pupil spending increases, class size decreases, and higher teacher salaries). However, the authors find that overall, while per-pupil spending has some benefit, the negative effect of equalization of school budgets, to wit, loss of local control, outweighs any positive result achieved. *Id.* at 306.

15. See generally TEX. GOV'T CODE ANN. § 403.301 (Vernon 1998) (affirming objective to ensure "equity among taxpayers in the burden of school district taxes and among school districts in the payment of state financial aid to schools"); TEX. EDUC. CODE ANN. §§ 41.001-.257 (Vernon 1996 & Supp. 2002) (detailing the manner in which equity will be achieved); see also Rachel F. Moran, *Milo's Miracle*, 29 CONN. L. REV. 1079, 1094 (1997) (discussing Connecticut's guaranteed tax base grant formula and minimum expenditure requirements); 16 VT. STAT. ANN. tit. 16 §§ 4000-4030 (Supp. 2002); Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & EDUC. 167 (2002) (detailing the transition from local to statewide property tax with block grant sharing pool); and Liz Kramer, Article, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC. 1, 1 (2002), (comparing attributes and detriments of systems of school finance in California, Kentucky, and Texas). Discussion and analysis *infra*.

dollar equal access to financial resources are going to provide the results sought.¹⁶

The traditional argument holds that equitable distribution of funds is necessary so that all children may receive educations of comparable quality.¹⁷ But how that money is used and who determines its use matter even more.¹⁸

Further, this Comment proposes that there are two key components of the education financing equation that have been overlooked. One is the impact budgeting decisions have on community perceptions and expectations; the other is the power of community favoritism. Until we include these concepts in the school financing debate, *any* funding scheme will be prone to inequities.

Both will be examined further in subsequent sections of this Comment. However, by way of introduction, consider how a community's perception of the value of its schools could be influenced by the attention external sources give them. For example, if the amount of money that is spent per student on education in one district varies widely from that spent in another, could it not seem as though the funding entities are determining what each child's future is worth?¹⁹ No child should be sacrificed to such a base standard of valuation, simply because he was born poor.

Just as the community expectation aspect of education funding has not yet been made part of the overall equity debate, so too has the concept of community favoritism been overlooked.²⁰ However understandable the desire, a natural tendency to favor one's own neighborhood schools and

16. See Frank J. Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts*, 30 VAL. U.L. REV. 551, 553 (1996). Macchiarola is an attorney and former Chancellor of the New York City Public School System (1978-1983); he and Diaz, also an attorney, have concluded that "even when fairness issues are resolved, the problems remain with the effectiveness of that [equalized] funding."

17. See *Rodriguez*, 411 U.S. at 1; see also *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992); and *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995).

18. See EDUCATIONAL RESOURCES INFORMATION CTR., FINANCIAL EQUITY IN THE SCHOOLS, ERIC DIGEST, NO. 76, (Dec. 1992), at <http://www.ericfacility.net/ericdigests/ed350717.html> (last visited October 1, 2003) (emphasizing that while equal per-student spending, per se, is not enough to improve student performance, how that money is spent can have significant impact, and therefore having that money available to spend is critical).

19. See *Rodriguez*, 411 U.S. at 11-14 (comparing amount spent, per pupil, in the wealthy Alamo Heights Independent School District to the poor Edgewood Independent School District).

20. See generally Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL'Y REV. 99 (1996). See also Andrew Stark, *What's Wrong With Private Funding for Public Schools?*,

give them an edge over other schools or districts will skew any attempt to make the education system equal for all children.²¹ Because the community as a whole suffers when favoritism is permitted, it is therefore important to develop a broader perspective when deciding how to dole out the dollars.

If we hope to counter negative expectations and preferential treatment in education, a conceptual change must be made. It is time to move away from local *control*, and toward a new kind of local *involvement*. While continuing to encourage financial equity, we also should: centralize the responsibility for crafting fiscal policy; encourage interdependence between, first, schools within districts, and second, districts within communities; and ultimately, acknowledge that getting a good, and not simply “adequate,”²² education is a fundamental right due all American children. With education accorded the same status as treasured rights such as free speech, freedom of religion, and freedom from unlawful search and seizure, poor families will have the right to demand equal access to education and opportunity for their children.

This Comment recommends eliminating what is essentially an educational caste system, and changing the attitudes of a society that accepts it, by altering the way we collect and allocate money for schools. Doing so would likely have far-reaching effects, and most important, *benefits* for rich and poor alike: lower crime rates,²³ economic growth,²⁴ and health-

48 DISSENT, BELL & HOWELL INFORMATION AND LEARNING COMPANY, INC. 4349 (Jan. 1, 2001), available at 2001 WL 14401489.

21. See Stark, *supra* note 20, at ¶ 2, ¶¶ 29-33.

22. See *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1376 (1993) (holding state had a duty to provide “[a] constitutionally adequate education” for children). See also Macchiarola & Diaz, *supra* note 16, at 552, 555-556 (concurring that children have a right to expect a certain level of quality in education).

23. Inferential reasoning, based on the fact that there is a high degree of correlation between crime rates, poverty, and levels of educational achievement. The assertion of such a connection is supported by a comparison of literacy rates among the general public with those of the prison population. See KARL O. HAIGLER, CAROLINE HARLOW, PATRICIA O’CONNOR & ANNE CAMPBELL, NAT’L. ASSESSMENT OF ADULT LITERACY, EXECUTIVE SUMMARY OF LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY (1992) at <http://www.nces.ed.gov/naal/resources/execsummprison.asp> (last visited September 20, 2003). The authors found that 49% of prisoners in federal and state facilities lack high school diplomas or GEDs (general equivalency diplomas), and 39% attained lower levels of education than did their parents. Further, adults who are deficient in reading and arithmetic skills, both never-incarcerated and those recently released from prison, are less likely to find jobs. Any positions they do find are more likely to be low-paying. An updated analysis of literacy rates, based on 2002 data, is due in late 2003. See also IRWIN S. KIRSCH, ANN JUNGEBLUT, LYNN JENKINS & ANDREW KOLSTAD, NAT’L. ASSESSMENT OF ADULT LITERACY, EXECUTIVE SUMMARY OF ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE RESULTS OF THE NATIONAL ADULT LITERACY SURVEY (1992) at <http://www.nces.ed.gov/naal/resources/execsumm.asp>

ier,²⁵ stronger communities.²⁶ Education has been decentralized beyond what is reasonable, and it is costing us, and our children, much more than the right of local control is worth.²⁷

Section I of this Comment will briefly recap the path education finance reform has taken through the courts, and evaluate several methods of school funding, including property tax-based schemes and those that de-

(last visited September 20, 2003) (showing the illiteracy rate of adults overall to be approximately 23% as compared to the much higher prison inmate level of illiteracy cited by their colleagues); Leonard J. Long, *Optimum Poverty, Character, and the Non-Relevance of Poverty Law*, 47 RUTGERS L. REV. 693, 718 (1995) (relying on U.S. DEPARTMENT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 38 (1983) in contending that “[r]oughly half of all felony defendants meet poverty eligible criteria for legal services representation”); John M. West, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 MICH. L. REV. 1326, 1326 n.3 (1986) (utilizing F.B.I. statistics showing nearly 50% of “adult felony and nontraffic [sic] misdemeanor arrests” involved indigent defendants eligible for appointed counsel). The statistics quoted indicate that a disproportionate number of individuals who are illiterate and/or deficient in math skills (and so have fewer opportunities to obtain higher-paying jobs), have turned to crime. As individuals who receive adequate educations are likely to make more money at better jobs, improving education would likely have a positive impact on crime.

24. See Long, *supra* note 23, at 726-29 (contrasting the pros and cons of viewing education as a way out of poverty); Matt Flores, Feature, *Education Called Key to Cash Boost*, SAN ANTONIO EXPRESS-NEWS, Nov. 15, 2002, at 3B (quoting demographic study conducted by Texas A&M University’s Department of Rural Sociology, that indicates raising education levels of Texans over the next 40 years could equate to a \$200 billion dollar increase in collective household income, and that prisons are “overwhelmingly” populated by those who are poorly educated). *But see* Dan Seligman, *The Story They All Got Wrong*, FORBES MAG., November 25, 2002, at 124 (claiming misinterpretation of census data by those who find a cause-and-effect connection between attaining higher levels of education and earning higher incomes).

25. U.S. Census Bureau data shows that in 2001, the proportion of United States residents without health insurance was 14.6%. Of those without insurance, more than one in four, 27.6% did not have a high school diploma. Another 17.4% had no education beyond high school. U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2002, TABLE 1, PEOPLE WITHOUT HEALTH INSURANCE FOR THE ENTIRE YEAR BY SELECTED CHARACTERISTICS (2002).

26. *All Things Considered; Mother-Daughter Program Addresses Special Needs of Latino [sic] Girls in High School* (National Public Radio broadcast Dec. 16, 2002) (examining a successful El Paso, Texas, program involving an extended community in education efforts). According to the piece, one-third of Hispanic girls in the United States do not finish high school. The Dean of Education at University of Texas, El Paso, Josefina Tinajero, states, “When you have the critical mass of a population that is undereducated, it really has some very negative implications for an entire community and entire states.” Transcripts available at <http://www.npr.org> for a limited time following broadcast. Transcript on file with Comment author.

27. See *Wright v. Council of Emporia*, 407 U.S. 451, 469 (1972) (emphasizing the importance society places on having direct control over decisions regarding education of one’s children); *Rodriguez*, 411 U.S. at 49 (citing *Wright v. Council of Emporia*, 407 U.S. at 478, in agreeing local control is vital to schools and education overall).

pend on statewide income taxes. Section II will provide an overview of the organizational structure of American education—a tangle of federal objectives, state mandates, and local politics. Section III delves deeper into the role played by the federal government. Its inability to effectively enforce any education policy enacted conflicts dramatically with the too-powerful local school board’s ability to practically do as it pleases. The result is a “pushme-pullyu”²⁸ education system that wants much, but provides much less. In Section IV, focus shifts to the children themselves, and how community expectations, or lack thereof, can inadvertently set many kids on a path to failure. Finally, Section V suggests actions that can be taken to get the results we want and that every child deserves.

I. MATH CLASS: FORMULAS FOR SCHOOL FUNDING

“Every child in every neighborhood has unique gifts to offer. We must . . . help them develop their talents and abilities, and ensure their healthy development so that they may reach their full potential. Our success in this vital endeavor will affect the direction of their lives and the future strength and vitality of our Nation.”

—President George W. Bush, presidential proclamation of June 2, 2001, establishing National Child’s Day²⁹

Nearly 20% of all direct spending by state and local governments is related to public education.³⁰ In the 1996-97 school year, that amounted to approximately \$292 billion dollars.³¹ The percentages vary, but states and localities are usually each responsible for 45% to 55% of a district’s total annual budget.³² By contrast, the federal government’s share of

28. “Pushme-pullyu” references the story of Doctor Dolittle, a fantasy written in 1967 about a world-traveling veterinarian who spoke animal languages. See generally HUGH LOFTING, *THE STORY OF DOCTOR DOLITTLE*, 68 (The Centenary Edition Delacorte Press 1988) (1920). The pushme-pullyu was one of the exotic creatures the doctor encountered. It was a llama-like animal, with a head at each end. Duck, one character in the book, appropriately wondered, “How does it make up its mind?” LOFTING at 75. Assuming both heads and their respective feet one day might want to move “forward” simultaneously, the pushme-pullyu would have difficulty getting anywhere.

29. Proclamation No. 7446, 66 Fed. Reg. 30,287 (June 6, 2001).

30. See Moser & Rubenstein, *supra* note 10, at ¶ 1 (utilizing data culled from Statistical Abstract of the United States, issued in 1999 and analyzing 1996 data, Table 504).

31. Kramer, *supra* note 15, at 1.

32. U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, *STATISTICS OF STATE SCHOOL SYSTEMS; REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION*, at <http://www.nces.ed.gov/pubs2002/digest2001/ch2.asp> (last visited September 21, 2003).

school funding accounts for only about 7% of all revenue spent on public elementary and secondary education.³³

The origin of the funding is important because it often has a direct influence on the type of educational programs provided.³⁴ Similarly, the proportion of the budget contributed by each funding entity is noteworthy,³⁵ again, because the power to make education policy often follows the money.³⁶

Advocates of maintaining strong local control over school district financing and policy-making use a pay-to-play concept as fuel for their argument.³⁷ They say that relying primarily on money raised locally allows them greater oversight, and increases the likelihood that any given school will reflect the particular distinctiveness of a community, better meeting its unique needs.³⁸ The neighborhood school will thus have the freedom to be an innovator, experimenting with a variety of programs for its pupils.³⁹ In contrast, they contend that greater contributions from the

33. Kenneth K. Wong & Francis X. Shen, *Rethinking the Fiscal Role of the States in Public Education*, GOV'T FIN. REV. 8, ¶ 1, October 1, 2001; Victoria J. Dodd, *A Critique of the Bush Education Proposal*, 53 ADMIN. L. REV. 851, 853 (2001); Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 483 (1998) (noting the growing importance of proceeds from state lotteries, now providing between 2% and 7% in some states). See also T.H. Bell, *Renaissance In American Education: The New Role of the Federal Government*, 16 ST. MARY'S L.J. 771, 772 (1985) (confirming that the role of the federal government in education is to supplement state and local government efforts, which in turn support parents, who have the primary responsibility for educating their children). Bell was a Secretary of Education under President Ronald Reagan.

34. See Husted & Kenny, *supra* note 14, at 285-287. The authors theorize that a state's intensified efforts to equalize funding leaves local districts with less latitude to make decisions affecting school programs and quality. Note that Husted and Kenny oppose easing local control overall however, contrary to the position taken in this Comment. See also Wong & Shen, *supra* note 33, at 8, ¶ 3 ("The larger a state's share [of the total budget]. . . the more influence that state will have each year in determining how [it] will be divided (equity) and what ingredients will be used (innovation)."). However, Wong and Shen determine that while the state has influence by virtue of its financial contribution, there is no direct evidence that the relationship stifles innovation at the local level. See *id.* at *Conclusions and Policy Implications*, ¶ 2.

35. Wong & Shen, *supra* note 33, at *Conclusions*.

36. ROSEMARY C. SALAMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-Brown Era 2* (St. Martin's Press 1986) (describing federal involvement in school funding as "merely stimulating local activity primarily through categorical grants").

37. Alan Peshkin, *The Complex World of an Embedded Institution: Schools and Their Constituent Publics*, in *SCHOOL-COMMUNITY CONNECTIONS: EXPLORING ISSUES FOR RESEARCH AND PRACTICE* 229, 236 (Leo C. Rigsby, Maynard C. Reynolds & Margaret C. Wang, eds. 1995).

38. See *id.*

39. See generally Husted & Kenny, *supra* note 14, at 285-86.

state would hamper innovation.⁴⁰ Yet research consistently demonstrates that innovation at individual schools is not necessarily compromised when state agencies attempt to fund public education more equitably.⁴¹

In fact, there is actually a measurable benefit to obtaining more money from state coffers than local sources: as the percentage of the budget comprised of state funds increases, greater financial equity is achieved among all districts in the state.⁴² Conversely, as the proportion of local dollars goes up, there is a greater likelihood of funding disparities in a region.⁴³

Using state agencies to disburse education funds then, can apparently help close the gap between rich and poor districts. And innovation, it seems, need not be sacrificed in the process. Yet because of the manner in which the local contribution to a district's budget is generated, financial inequities still abound.

Money is raised at the local level most often through property taxes.⁴⁴ Although still in wide use,⁴⁵ property tax-based school financing schemes have been the basis for a litany of lawsuits.⁴⁶ In most of those actions, plaintiffs have alleged property tax-based funding violates the equal protection clause of either the Constitution of the United States or respective

40. Some extend that argument, saying state funding leads to a complete loss of parental choice and control over the education of offspring. Kerry L. Morgan, *REAL CHOICE, REAL FREEDOM IN AMERICAN EDUCATION: THE LEGAL AND CONSTITUTIONAL CASE FOR PARENTAL RIGHTS AND AGAINST GOVERNMENTAL CONTROL OF AMERICAN EDUCATION*, 117 (1997) (contending each parent should pay his own child's way, and that equalized education funding cedes too much control to the state). *See also* Stephen G. Giles, *Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 938 (1996) (asserting court rulings on educational control are too deferential toward permitting state oversight and do not allow for sufficient parental decision-making).

41. Wong & Shen, *supra* note 33, at parts I & II.

42. Moser & Rubenstein, *supra* note 10, at ¶ 4-5 (reporting that more equitable distribution of financial resources occurs in states that have fewer school districts, and when a state provides a higher proportion of a school's budget than does a local entity).

43. *Id.* at ¶ 2 (2002); *see also* Wong & Shen, *supra* note 33, ¶ 2 (finding higher percentage of state funding narrows the gap between rich and poor districts).

44. JOHNATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 54 (1991); Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL'Y 483, 486-87, 512, 514 (1998) (explaining relationship between local property taxes and school budget problems); *see also* Moser & Rubenstein, *supra* note 10, at ¶ 3; Judith A. Winston, *Achieving Excellence and Equal Opportunity in Education: No Conflict of Laws*, 53 ADMIN. L. REV. 997, 1006 (2001).

45. *See generally* Robinson, *supra* note 33, at 512.

46. *See generally* Rodriguez, 411 U.S. 1 (regarding Texas' reliance on local property tax revenues and whether that system violates equal protection because of disparities in property values among area districts). *See also* Abbott v. Burke, 575 A.2d 359, 373 n.5-7 (N.J. 1990) (identifying states in which property taxes have and have not been found to be in violation of the state's constitution, and on what grounds).

state constitutions.⁴⁷ The general argument is that more money is generated in areas with high property values; thus, more money is available to educate children who are already privileged to live in property-rich, economically-advanced districts.⁴⁸

While property-rich districts have the good fortune of having more money to spend on schools, the families who live in those advantaged areas receive yet another benefit: property tax burdens that are lighter than those of their cross-town counterparts.⁴⁹ Consider some of the same data the Supreme Court used in *San Antonio Independent School District v. Rodriguez*,⁵⁰ as illustration. The Court compared statistics from two school districts in San Antonio, Texas. One of them had the lowest per-pupil assessed property value in the region, at \$5,960;⁵¹ the other had the highest assessment at \$49,000 per pupil.⁵² With a tax rate of \$1.05 per \$100 of valuation,⁵³ the property-poor district raised \$26 per student.⁵⁴ But the property-rich district, using a lower tax rate of only 85 cents per \$100 in assessed property, generated \$333 per student.⁵⁵ In addition, the percentage of family budget being allocated to property tax in the wealthier district was much smaller, and the return arguably greater, than in the economically disadvantaged district.⁵⁶

The gap between rich and poor districts is further compounded by the different challenges each face in trying to improve the quality of education they provide. For example, because property-poor districts generally have higher tax rates and inferior schools, they in turn have fewer incen-

47. See e.g., Janine M. Sarbak, *New York's Educational Finance Scheme: Should It Be Declared Unconstitutional?*, 10 *TOURO L. REV.* 775, 775-776 (1994) (tracing the history of educational financial equity in New York state courts).

48. See *Serrano*, 557 P.2d at 945 (disagreeing with assertions that school spending is equalized and “not dependent upon the taxable wealth” in a district).

49. See *Rodriguez*, 411 U.S. at 12-13 (dissecting data made the basis of the lawsuit).

50. *Id.* at 11-14.

51. Edgewood Independent School District, with figures culled from school years 1967-1971. *Rodriguez*, 411 U.S. at 12 n.30.

52. Alamo Heights Independent School District, with data from school years 1967-1971. *Rodriguez*, 411 U.S. at 13 n.33 (noting that although the districts of Edgewood and Alamo Heights are similar in size, Edgewood had approximately four times as many children, which also contributes to the lower per-student property value).

53. *Rodriguez*, 411 U.S. at 12.

54. *Id.*

55. *Id.* at 75. More than twenty years later, in 1989, Alamo Heights ISD's per-student property value outranked Edgewood ISD's by a ratio of 700 to 1, at \$570,109 and \$38,854, respectively. *Kirby*, 777 S.W.2d at 392.

56. *Kirby*, 777 S.W.2d at 393. See also *Kozol*, *supra* note 44, at 214 (commenting that the disparity between Alamo Heights ISD and Edgewood ISD in per-pupil spending as noted in *San Antonio Indep. Sch. Dist. v. Rodriguez*, while significant, was not the greatest disparity between rich and poor districts in a Texas city at that time).

tives with which to lure new residents and businesses.⁵⁷ Thus, there is not much opportunity to improve upon the inadequate tax base, and eventually help ease the tax burden. Further exacerbating the problem, the inferior schools in property-poor regions are more likely to have student bodies comprised mostly of children who are members of minority groups.⁵⁸ Therefore, not only do children have access to vastly different educational experiences as a result of the wealth of their community, but, by virtue of de facto economic segregation,⁵⁹ the better opportunities are disproportionately unavailable to children who are poor and more likely to be members of minority groups.⁶⁰ Allowing such disparities to perpetuate is equivalent to practicing wealth-based *and* racial discrimination, however unintentional it may be.⁶¹

To make matters worse, many educators theorize that a dollar in a poor district buys less than a dollar in a wealthy one.⁶² Because the financially struggling districts are disproportionately urban and their students more

57. See generally David W. Bartelt, *The Macroecology of Educational Outcomes*, in SCHOOL-COMMUNITY CONNECTIONS: EXPLORING ISSUES FOR RESEARCH AND PRACTICE, 159, 166-69 (Leo C. Rigsby, Maynard C. Reynolds & Margaret C. Wang, eds., 1995) (explaining the interrelatedness of schools and surrounding communities, including how poor schools impact availability of jobs and other necessary social services); see also Ryan & Heise, *supra* note 3, at 2103 (discussing correlation of high poverty areas and low academic achievement).

58. Winston, *supra* note 44, at 1000 (noting that schools in which minority students are the majority tend to be those in which instruction and facilities are inadequate and achievement scores are below normal). See also Kevin G. Wellner, *Ability Tracking: What Role for the Courts?*, 163 EDUC. L. REP. 2, June 6, 2002, at *Recent Research*, ¶ 6 and *New Developments*, ¶ 1; Ryan & Heise, *supra* note 3, at 2048; Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education is More Than Just a Tort*, 96 NW. U. L. REV. 99, 123-124 (2001).

59. Approximately 30% of all African-Americans live in hypersegregated [sic] conditions, defined as living such that they will not encounter any Anglos in their schools or neighborhoods. Housing segregation also affects a significant proportion of the Latino population in America. This residential segregation correlates with racial and economic segregation. Ryan & Heise, *supra* note 3, at 2093-94; see also James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 273 (1999) (citing statistics that show that in 1995, urban schools educate two-thirds of all African-American students and approximately half of all Hispanic students, but less than one-quarter of Anglo students, although white students made up more than 70% of total public school enrollment).

60. See generally Winston, *supra* note 44, at 1004. A larger proportion of minority students correlates with a larger proportion of students living in poverty. Ryan & Heise, *supra* note 3, at 2096.

61. See generally Ryan, *supra* note 59 (drawing the connection between desegregation litigation and school finance litigation, highlighting how both have been shaped by race and politics, and citing statistics that show urban schools are generally under performing and largely populated by poor, minority students).

62. Robinson, *supra* note 33, at 503.

likely to be members of minority groups,⁶³ or poor,⁶⁴ those districts will often have higher expenses in order to meet the needs of their particular students.⁶⁵ More remedial education classes, and therefore special education teachers, are likely to be required,⁶⁶ and a greater proportion of the total budget will likely be needed to simply maintain older, less efficient facilities.⁶⁷

The money problem affects staffing as well. Struggling districts need good teachers and administrators perhaps more desperately than upscale districts do, yet poor, often urban, schools have as much difficulty attracting⁶⁸ and retaining⁶⁹ them as they do in bringing in more affluent families and growing businesses. Many teachers admittedly prefer to work in districts where students are more likely to maintain solid gains in achievement,⁷⁰ where the poverty rate is lower and there are fewer minority students,⁷¹ and where they can earn higher salaries.⁷² Consequently, teacher migration to better schools is common.⁷³ The ultimate irony is that more than any other single element, the quality and experi-

63. Winston, *supra* note 44, at 1000. See also Ryan & Heise, *supra* note 3, at 2048.

64. Robinson, *supra* note 33, at 503.

65. KOZOL, *supra* note 44, at 37-38; Robinson, *supra* note 33, at 507-508. Students from lower socio-economic backgrounds are more likely to be in need of instruction in English as a second language and remedial "catch-up" instruction to improve "school readiness."

66. Robinson, *supra* note 44, at 507-508.

67. KOZOL, *supra* note 44, at 37-38.

68. See Prince, *supra* note 13, at 6-7 (noting novice teachers with less than three years experience are two times more likely to be assigned to teach in high-minority, high-poverty schools).

69. See *id.* at 6-7 (stating that schools that have difficulty in attracting good, experienced teachers also have higher turnover rates), and at 6, (emphasizing that low-performing schools "invariably" have inexperienced or uncertified teachers). See also Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 469-470 (1991) (citing the influential Coleman Report [Equality of Educational Opportunity, 1966, J. Coleman] correlating teacher salaries with teacher quality; teacher quality to higher student test scores; and higher test scores to higher earning potential later in life).

70. See Ferguson, *supra* note 69, at 483-488. See generally Terrence K. Quinn, *A Forced Transfer: From Affluence to Poverty*, SCH. ADMIN., Aug. 2002, no. 7, vol. 59, at 10-11.

71. Prince, *supra* note 13, at 9.

72. *Id.* at 8. See also Cynthia D. Prince, *Higher Pay in Hard-to-Staff Schools: The Case for Financial Incentives*, at http://www.aasa.org/issues_and_insights/issues_dept/higher_pay.pdf.

73. KOZOL, *supra* note 44, at 51 (highlighting studies that show teachers transfer to better schools as soon as they are able). See also Prince, *supra* note 13, at 8 (regarding teacher mobility studies conducted in Pennsylvania, California, and Texas, and indicating as much as 50% of all teacher turnover can be attributed to moves to more desirable schools; furthermore, the neediest schools often have the most staff vacancies).

ence of a teacher significantly influences not only a child's ability to learn,⁷⁴ but also affects even his future earning potential.⁷⁵

Considering the significance of money in securing at least the opportunity to get an education, it is easy to see why so many lawsuits have been filed to determine whether using property taxes, the "arcane machinery by which we finance public education,"⁷⁶ to generate the local component of a school district's budget is fair to all children. It also explains why a number of states are currently experimenting with alternatives to property tax-based funding.⁷⁷ The remainder of this section will briefly recap the litigation history and introduce some of the newer, more innovative financing schemes.

The first education finance case to be considered by the United States Supreme Court also turned out to be the only one.⁷⁸ Originating in Texas, *San Antonio Independent School District v. Rodriguez*⁷⁹ challenged the property tax-based system of funding schools there,⁸⁰ and alleged violation of the equal protection clause of the Fourteenth Amendment.⁸¹ Before considering whether property tax-based school funding is equitable, The Court had to determine the appropriate degree of scrutiny to use in evaluating the facts.⁸² This initial analysis turned on two key concerns: first, whether education is a constitutionally-protected fundamental right and thus, an issue deserving of the Court's consideration under the highest level of scrutiny; and second, whether the group most affected by the

74. Stephen L. Gessner, *The Dangers of Fashionable Education Reform*, 11 STAN. L. & POL'Y REV. 235, 240 (2000). See also Husted & Kenny, *supra* note 14, at 298; Ferguson, *supra* note 13, at 469; Prince, *supra* note 13, 6 (asserting "evidence indicates that teacher quality is the single most important school variable affecting student achievement"). See also ROBERT ROSENTHAL & LENORE JACOBSON, *PYGMALION IN THE CLASSROOM: TEACHER EXPECTATIONS AND PUPILS' INTELLECTUAL DEVELOPMENT*, 25-6 (1968) (describing results of behavioral expectation studies).

75. Ferguson, *supra* note 13, at 469-70.

76. KOZOL, *supra* note 44, at 54.

77. New Hampshire, for example, uses a state-wide property tax. All revenue collected goes into an education fund, from which the state disburses monies to schools. Buzuvis, *supra* note 8, at 674-675.

78. See generally *Rodriguez*, 411 U.S. 1 (delivering the first Supreme Court decision regarding education finance). The Supreme Court has, however, heard other matters pertaining to education. See e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 at 663 (2002) (finding voucher programs not in violation of the Establishment Clause).

79. See generally *Rodriguez*, 411 U.S. 1.

80. *Id.*

81. U.S. CONST. amend. XIV, § 1.

82. *Rodriguez*, 411 U.S. at 17. See also BLACK'S LAW DICTIONARY 670 (Second Pocket Ed., 2001) (defining strict scrutiny as applying to equal protection and due process issue analysis, and requiring a state to establish that it has a compelling interest that justifies the action in question in order to pass constitutional muster).

challenged action was constitutionally-protected as a suspect class.⁸³ That too would have mandated use of strict scrutiny.⁸⁴

Finding that education is not a fundamental right⁸⁵ and that the relative wealth of a particular group is not a characteristic that gives them special status as a suspect class, the Court decided that strict scrutiny was not the appropriate level of analysis⁸⁶ for *Rodriguez*. Instead, the Court opted to use the much less rigorous rational-basis test,⁸⁷ and ultimately ruled that despite the financial disparities between public school districts' budgets, even within the same city, the inequities did not violate students' rights to equal protection.⁸⁸ San Antonio's property tax-based school funding program was thus held to be constitutional.⁸⁹

Had the Court ruled otherwise on the scrutiny issue, one can speculate the eventual outcome of *Rodriguez* would have been much different; as it stands, though, the *Rodriguez* holding effectively eliminated the federal court system as an option for future litigation pertaining to education finance reform.⁹⁰ Henceforth such matters were dealt with in state courts.⁹¹ Disparate rulings there, however, have done little to clarify matters.⁹²

The state court legislation took two tacks: one, that funding inequities violated students' state-guaranteed equal protection rights,⁹³ and two, that states' failures to fund equally adequate educational experiences and opportunities for all students violated the education clauses of state con-

83. BLACK'S LAW DICTIONARY 685 (defining suspect class as a classification based on race, national origin, or alienage and thus subject to strict scrutiny analysis in answering questions of equal protection).

84. *Rodriguez*, 411 U.S. at 17.

85. *Id.* at 35.

86. *Id.* at 28-29.

87. BLACK'S LAW DICTIONARY, *supra* note 82, at 582 (defining the rational-basis test as a standard of analysis in which a law will be held valid if it "bears a reasonable relationship to the attainment of some legitimate governmental objective.").

88. *But see Rodriguez*, 411 U.S. at 62 (Brennan, J., dissenting); *id.* at 63 (White, J., Douglas, J., & Brennan, J., dissenting); *id.* at 70 (Marshall, J., & Douglas, J., dissenting).

89. *Id.* at 1.

90. Buzuvis, *supra* note 8, at 651; Dayton, *supra* note 12, at 947; Moran *supra* note 16, at 1090; Rebell & Hughes, *supra* note 2, at 172.

91. Moran, *supra* note 16, at 1090 (remarking that like lawsuits on equitable school financing, actions regarding school desegregation also persist in state courts).

92. *See Robinson*, *supra* note 33, at 490-91.

93. Kramer, *supra* note 15, at 6-7 (commenting that as of January 2002, of sixteen challenges, seven state courts struck down the educational financing system on equal protection grounds and nine upheld their state's funding scheme).

stitutions.⁹⁴ As of January 2002, lawsuits on the matter had been brought in 43 states⁹⁵ on one or both bases, with 19 courts finding their states' education financing methods unconstitutional and ordering changes.⁹⁶

In revamping their systems, states have not entirely abandoned the local property tax as a fund-raising mechanism; rather, they have developed hybrid schemes that still incorporate assessments based on property values but distribute the money in new ways. Both Vermont and New Hampshire, for example, utilize a statewide property tax.⁹⁷ In each, portions of local property taxes are converted to state property taxes, and paid into a general fund for education.⁹⁸ The two states' methods differ in significant ways, however. In its effort to assure literal financial equity, Vermont's plan penalizes districts that independently raise more than a pre-determined amount of money per-pupil.⁹⁹ The scheme has met with a significant amount of passionate protest.¹⁰⁰ New Hampshire residents have apparently had a more positive experience. The improved educational finance plan in that state is adequacy-based.¹⁰¹ Instead of aiming for equal spending, it attempts to result in equal outcome. Each school community starts with the same state-set allotment of funds per pupil, but is free to raise over and above that amount if it so chooses.¹⁰² Vermont property owners have protested the way school funding is handled in their state;¹⁰³ meanwhile, there is no high-profile organized protest movement in New Hampshire to date.

Other states have tinkered with school funding in a variety of ways, some of which are still the subject of continuing litigation. For instance, Ohio's experimental school voucher program went all the way to the United States Supreme Court, where it was found constitutional.¹⁰⁴ New

94. *Id.* at 7 (stating the adequacy tack has proven more successful for plaintiffs, with thirteen of twenty-one suits resulting in state education funding systems being found improper as of January 2002).

95. *Id.* at 6.

96. *Id.* See also Ryan, *supra* note 3, at 254.

97. Buzuvis, *supra* note 8, at 648.

98. *Id.*

99. *Id.*

100. A number of Vermont tax-payers have gotten behind efforts to repeal the state's school finance law, Act 60. See Act 60—What You Should Know, <http://www.act60.org/ers2k.htm> (last visited Sept. 30, 2003) (indicating the Act has received scant attention from the media). See also H.710 at <http://www.leg.state.vt.us/docs/1998/bills/intro/H-710.HTM> (last visited Sept. 15, 2002) (publishing the text of the proposed new bill); see also Rebell & Hughes, *supra* note 2, at 183.

101. Buzuvis, *supra* note 8, at 648.

102. *Id.*

103. See Act 60—What You Should Know, <http://www.act60.org/ers2k.htm> (last visited Sept. 15, 2002) (indicating Vermonters have never supported Act 60).

104. *Zelman*, 536 U.S. at 644.

York enacted a plan that will turn over operation of New York City schools to the state, abolishing the local boards originally established to govern in each of thirty-two community school districts.¹⁰⁵ The plan, however, will only be implemented if it receives approval from the United States Department of Justice.¹⁰⁶ And Texas, home of the early school funding debate lawsuits, now finances education through the so-called “Robin Hood” plan.¹⁰⁷ Unpopular with voters, it is still a matter of contention in Texas state courts,¹⁰⁸ and the need to revamp the way the state pays for education became a major theme in the 2002 gubernatorial election.¹⁰⁹

The much-maligned Robin Hood program attempts to equalize spending by setting a guaranteed-minimum foundation tax base of per-pupil district wealth.¹¹⁰ The actual formulas by which the minimum amounts are calculated are quite complex. Simply stated, Texas will use funds from its education foundation to make up the difference for a local district that is unable to generate the minimum prescribed funding amount through property taxes; districts that are able to earn only slightly more than the minimum may keep the surplus.¹¹¹

The portion of the Texas education funding scheme that is most despised though, is a recapture component that forces the wealthiest districts to send money to the poorest.¹¹² Critics contend that it is not an effective equalization plan because the recapture funds are not redis-

105. Catherine Gewertz, *New York City Mayor Gains Control Over Schools*, June 19, 2002, EDUC. WK. available at 2002 WL 10873872 (reporting boards are to be abolished by June 2003, if approval from the United States Department of Justice is received).

106. *Id.* As of this writing, January 6, 2003, approval had not yet been granted.

107. It is not known who first used the term “Robin Hood” in regard to Texas’ school financing scheme, or when; however, it is widely used in derisive fashion, and makes reference to the fairy tale character Robin Hood. Robin Hood stole from the rich to give to the poor. See Kramer, *supra* note 15, at 30 (describing the Robin Hood plan in Texas).

108. Most recently, a Texas appellate court affirmed a lower court ruling on a case that challenged the education financing system as an unconstitutional ad valorem tax. The court found that the plaintiffs failed to state a justiciable cause, of action and that the matter was unripe for challenge. *West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 78 S.W.3d 529, 537 (Tx. App.—Austin 2002, pet. filed).

109. See Lucy Hood, Article, *Perry, Sanchez Avoid School Funding Specifics; Gubernatorial Rivals Address System Officials*, SAN ANTONIO EXPRESS-NEWS, Sept. 30, 2002, at 1B, available at 2002 WL 100209194 (explaining school systems still struggle to alleviate funding allocations).

110. § 41.001-.257; Kramer, *supra* note 15, at 29-32.

111. Kramer, *supra* note 15, at 30.

112. *Id.* at 30-31.

tributed throughout the state; the lack of even a pretense of impartial state oversight riles many state residents.¹¹³

In contrast to the Texas experience, the state of Kentucky is oft-praised for its reform process and upheld as a model to be emulated.¹¹⁴ The Kentucky legislature determined that it did not want to take money from property-rich districts simply to re-distribute it to poorer ones, and bravely acknowledged that in order to improve financial equity in education, the state would simply have to spend a lot more.¹¹⁵ Lawmakers then explicitly defined the characteristics of an adequate and efficient education,¹¹⁶ and declared that the right to receive such is fundamental under the state's constitution.¹¹⁷ The Kentucky system takes into account the particular needs of each district in establishing per-pupil minimum funding levels, and mandates that all districts use the same minimum local equalized property tax rate.¹¹⁸ Any difference between the per-pupil amount raised in property-poor districts as compared to wealthier ones is made up with state funds.¹¹⁹

Most of the controversy over education finance lies with the states. The federal government is not obligated to provide a free, public education;¹²⁰ therefore, neither is it responsible for deciding who should pay for public schools, or how.¹²¹ Consequently, federal entities contribute the smallest portion of all entities that pay in to the overall school funding pot.¹²² The federal government then, may not establish binding education policy, or even tell states how to pay for the education they pledge to

113. *Id.* at 31. See also Morgan, *supra* note 58, at 142-43 (asserting that taxpayers feel betrayed by Robin Hood recapture plans because the funding schemes work against the American tradition of independence and self-sufficiency, and because well-off Americans want to retain their advantage).

114. Buzuvis, *supra* note 8, at 670. But see Kramer, *supra* note 15, at 36-37 (questioning whether Kentucky deserves all the praise it receives).

115. Kramer, *supra* note 15, at 23.

116. An education must provide: written and verbal skills, knowledge of economic and political systems, understanding of community issues, and knowledge of arts and culture. *Id.*

117. *Id.*

118. Buzuvis, *supra* note 8, at 671.

119. Kramer, *supra* note 15, at 24-25.

120. *Rodriguez*, 411 U.S. at 35 (reiterating that education is not among the rights explicitly protected in the Constitution); *Id.* at 36 (drawing a parallel to the right to vote, which, like education, is a "goal[] to be pursued by a people whose thoughts and beliefs are freed from governmental interference . . . not values to be implemented by judicial instruction into otherwise legitimate state activities.").

121. U.S. CONST. amend. X (identifying powers retained by the state and the people as those "not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

122. SALAMONE, *supra* note 36, at 2.

provide their citizens. However, it may still significantly influence state action. By making funding available to local school districts that choose to participate in specific, identifiable federal programs designed to achieve particular objectives, national government entities can gently coerce compliance with federal objectives.¹²³ Schools may tap into federal funds for math, science and foreign language programs, for example, through the National Defense Education Act.¹²⁴ It was established to keep the United States from falling behind other countries in science, technology, and space exploration.¹²⁵

In summary, the foregoing discussion presents the primary dilemma in the matter of paying for public education. First, it is difficult, if not impossible, to raise money on the local level in a way that will ensure uniform per-pupil funding across district lines. Second, as the responsibility for funding at the local level grows, so too does the likelihood that the gap in per-pupil spending among districts will widen. Contrarily, as the proportion of state dollars committed to education increases, per-pupil spending across district lines throughout the state becomes more uniform. Third, the federal government is willing to pay for education programs. With so many different ways to nudge education funding toward a more equitable system of distribution, why are so many children still being cheated out of equal educational opportunities by virtue of where they live?

As it pertains to school financing, one theory contends taxpayers feel betrayed by education funding plans like Robin Hood.¹²⁶ There is backlash, because the schemes work against two deeply held American traditions: independence and self-sufficiency.¹²⁷ By extension, well-off Americans who have an advantage over others, whether by birth or hard work, want to retain it.¹²⁸ They by nature resent being told by the state

123. The federal government's ability to condition payment of funds to states on the individual states' cooperation in meeting federal objectives has been upheld as a valid use of the spending power of Congress. *South Dakota v. Dole*, 483 U.S. 203 (1987) (permitting the federal government to withhold funding for highways from states that did not adopt the federally-preferred minimum drinking age of twenty-one).

124. National Defense Education Act, 20 U.S.C.A. §§ 401-591 (West 2000).

125. *Id.*

126. Morgan, *supra* note 58, at 142-43.

127. *Id.*

128. *Id.* See also SALAMONE, *supra* note 36, at 1 (presenting the dilemma in the American school system as a contrast between the good of the community and individualism, in which society values an educated citizenry but also sees education as an "effective vehicle for [individual] social mobility").

to hand over the fruits of their labor, imperiling the edge they have obtained.¹²⁹

This Comment takes the position that we are perhaps too proprietary when it comes to our neighborhood schools, and unwilling to see how providing equal opportunity to obtain a comparable education to rich and poor alike helps us all.¹³⁰ Further, the self-interest of the more affluent can be perceived as a put-down by students who attend economically-disadvantaged schools.¹³¹ They know they are seen as being lower on the educational food chain, and that expectations for their success are correspondingly lower too.¹³²

129. KOZOL, *supra* note 76, at 178-79 (quoting a mother whose child attended school in a poor Boston neighborhood as saying “children . . . know very well the system is unfair. . . they know some people were given something extra . . . they see it as a message: ‘you don’t much matter . . . you are dirty so it will not hurt to pack you into dirty places’.”); at 222-223 (“equity in education represents a formidable threat to other values held by many affluent Americans . . . [a subject] so profoundly rooted in American ideas about the right and moral worth of individual advancement at whatever cost to others who may be less favored by the accident of birth. . .” and “There is a deep-seated reverence for fair play in the United States, and in many areas of life, but this is not the case in education, health care, or inheritance of wealth. . . [i]n those elemental areas we want the game to be unfair and we have made it so. . .”). *See also* Morgan, *supra* note 58, at 142-43.

130. *See generally* Leo C. Rigsby, Maynard C. Reynolds, & Margaret C. Wang, *Preface* to SCHOOL-COMMUNITY CONNECTIONS: EXPLORING ISSUES FOR RESEARCH AND PRACTICE at xiv (Leo C. Rigsby, et al., eds., 1995) (emphasizing the interrelatedness of schools and communities, and how expectations of parents, local businesses, cultural groups, and social agencies influence the effectiveness of schools). *See also* Bartelt, *supra* note 57, at 159 (commenting on community-school interrelatedness and stating changes in communities form the context of local schools).

131. Daniel Stuempfig, *Person-Environment Matches in Educational Settings*, in CULTURE, CHILD, AND SCHOOL: SOCIOCULTURAL INFLUENCES ON LEARNING, 176, 180-83 (Martin L. Maeher & William M. Stallings, eds., 1975) (applying expectation theory to learning and how disadvantaged children are prone to be highly self-critical; the tendency is exacerbated when external criticism becomes part of the mix).

132. KOZOL, *supra* note 44, at 57 (asserting “children. . . don’t understand at first that they are being cheated. . . [t]hey come to school with a degree of faith and optimism. . . it is sometimes not until the third grade that their teachers start to see the warning signs of failure. . . by the fourth grade many children see it too.”). *See also* Betty H. Watts, *Increasing Achievement Aspirations and Motivation Through Teaching*, in CULTURE, CHILD, AND SCHOOL: SOCIOCULTURAL INFLUENCES ON LEARNING, 229 (Martin L. Maeher & William M. Stallings, eds., 1975) (speculating that positive change in the effectiveness of schools will come about only as the community, parents, and “parental surrogates” begin to contribute more to the educational experiences of children). *See also* ROSENTHAL & JACOBSON, *supra* note 74, at 25-26 (explaining the expectation theory and self-fulfilling prophesy theory as applied to classroom experiences).

As will be discussed in more detail in the next section, that is the reason why local control of education funding is clouding our collective vision as to what is best for the children who attend our public schools.¹³³

II. CIVICS CLASS: THE POLITICS OF PUBLIC SCHOOLS

“We believe education is a national priority and a local responsibility . . .”

—President George W. Bush,
promoting the No Child Left Behind Act of 2001¹³⁴

On January 8, 2002, President George W. Bush signed into law the No Child Left Behind Act of 2001 (NCLBA).¹³⁵ The new Act purported to “redefine[] the federal role in K-12 education”¹³⁶ and “help close the achievement gap between disadvantaged and minority students and their peers.”¹³⁷ In contrast to the minimal role federal funding plays in the overall education scheme, the sheer volume of education-related legislation generated at the federal level is astounding.¹³⁸ NCLBA is only the latest in a string of attempts to establish a national education policy.¹³⁹

133. KOZOL, *supra* note 44, at 67 (citing a 1989-90 Chicago Tribune report showing that by a ratio of 9:1, suburban residents overwhelmingly voted against redistribution of school funding).

134. U.S. DEPARTMENT OF EDUCATION, NO CHILD LEFT BEHIND: WHAT TO KNOW, at <http://www.ed.gov/nclb.html> (last visited October 1, 2003). *See also* No Child Left Behind Act of 2001, 20 U.S.C.A. §§ 6301-6578 (1994 & Supp. 2002) (rewriting the Elementary and Secondary Education Act of 1965 and amending Title I, Improving the Academic Achievement of the Disadvantaged).

135. *No Child Left Behind Act*, available at <http://www.ed.gov/nclb/landing.html>, (last modified July 11, 2002) (last visited October 1, 2003).

136. *Id.*

137. *Id.*

138. For example, the text of the No Child Left Behind Act of 2001 is 669 pages long, excluding committee deliberations and other aspects of the Act's legislative history. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 2001 U.S.C.A.N. (115 Stat. 1425) 1425-2094.

139. *See, e.g.*, Goals 2000: Educate America Act, 20 U.S.C.A. §§ 5801-6084 (West 1994); Department of Education Organization Act, 20 U.S.C.A. §§ 3401-3510 (West 2000) (now codified as amended at 20 U.S.C.A. §§ 1221, 5899) (establishing the Department of Education); Elementary and Secondary Education Act of 1965, 20 U.S.C.A. §§ 241a *et seq.* (West 2000) (now codified at 20 U.S.C.A. 6301) (establishing grants to fund school libraries and strengthen state departments of education); Economic Opportunity Act of 1964, 42 U.S.C.A. §§ 2701 (West 2000) (authorizing grants to elementary and secondary schools for programs targeted to children of low-income families, including Head Start and Upward Bound); National Defense Education Act, 20 U.S.C.A. §§ 401-591 (West 2000) (providing assistance to state and local schools for more math, science, and foreign language programs). *See also* NAT'L CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS: 2001, FEDERAL EDUCATION LEGISLATION, available at <http://nces.ed.gov/>

Although spirited and ambitious, NCLBA will, like its predecessors, likely fail to have significant impact on rectifying the inequities that are inherent in our educational system. There are two reasons. First, as discussed in the preceding section, when it comes to education, the federal government is impotent—it has no power to enforce the education policy it would like to implement.¹⁴⁰ Second, the NCLBA seems to try too hard to appease those who are in favor of strong local control of school matters, in effect, further hampering the federal government’s ability to provide overall guidance.¹⁴¹ We will take up each of these limiting factors in turn.

A. *NCLBA and Its Predecessors*

American children are not entitled to an education.¹⁴² You will find no guarantees promising such in the Constitution, Bill of Rights, or any United States statute.¹⁴³ Yet as a nation we hold dear the concept of free public schools, and we are outraged when those schools fail to provide what we deem to be (at minimum) adequate training. For that reason, at first glance, NCLBA appears to be a positive development. Instead, it is new clothing for the same old body of unenforceable policy.

The stated purpose of the Act is to hold American schools accountable, measuring the success of a school by the achievements of its students.¹⁴⁴ Using “the President’s four basic education reform principles,”¹⁴⁵ NCLBA as touted will help to ensure that graduates of public schools in the United States will emerge adequately prepared to function in, and contribute to, society.¹⁴⁶ In actuality, NCLBA is but a re-working of the Elementary and Secondary Education Act of 1965, plus subsequent amendments, which itself was an outgrowth of the Economic Opportu-

pubs2002/digest2001/ch4.asp (last visited September 29, 2003) (offering detailed history of education-related federal legislation and expenditures for most recent fiscal period).

140. See *Rodriguez*, 411 U.S. at 35 (reiterating that education is not among the rights explicitly protected in the Constitution, and thus, providing equal access to equivalent educational opportunity is not a federal responsibility).

141. THE ACHIEVER, internet-based newsletter Vol. 1, No. 6, Dec. 1, 2002, disseminated by U.S. DEPARTMENT OF EDUCATION, NO CHILD LEFT BEHIND, available by contacting NoChildLeftBehind@inet.ed.gov.

142. *Rodriguez*, 411 U.S. at 35. The Court describes education as being neither explicitly, nor implicitly, protected as a constitutional right.

143. See generally U.S. CONST.; 20 U.S.C.A. § 7 *et seq.* (West 2000).

144. *No Child Left Behind, What to Know: Introduction*, at <http://www.ed.gov/nclb/overview/intro/index.html> (last visited September 29, 2003).

145. *Id.* The “four basic education reform principles” are “stronger accountability for results, increased flexibility and local control, expanded options for parents, and an emphasis on teaching methods that have been proven to work.”

146. See *Id.*

nity Act of 1964 and before that, Title VI of the Civil Rights Act of 1964.¹⁴⁷

The No Child Left Behind Act and other education-related federal legislation support specific, narrowly-drawn programs that pertain to education in one way or another,¹⁴⁸ and do not establish an enforceable federal standard for educational institutions and processes in this country. The one pronouncement that came closest to setting a national benchmark regarding an education issue came not from the legislature, but instead from the nation's highest court.¹⁴⁹

In *Brown v. Board of Education of Topeka (Brown I)*, the Supreme Court held that maintaining separate but equal schools for children of different races was unconstitutional, violating the equal protection clause of the Fourteenth Amendment, and ordered racial desegregation as the remedy.¹⁵⁰ Because the case was presented as a constitutional question, the resolution in *Brown* reverberated through schools nationwide. Although the change did not come quickly, the holding of the *Brown* Court was far more powerful in creating change in education than was any federal regulation.¹⁵¹

Even though the nation's highest court handed down a decision in the school desegregation case, it left the matter of deciding how to enforce its *Brown* holding to state and local authorities.¹⁵² In *Brown v. Board of Education of Topeka (Brown II)*,¹⁵³ the Court reasoned that local governments and administrators could best determine how to desegregate their own schools, and if they encountered difficulties, those problems could be appropriately dealt with in the federal district courts.¹⁵⁴ School district compliance would be evaluated based on whether good faith efforts to integrate had been made.¹⁵⁵ So, on a critical matter of national importance, the Court maintained deference to local control of schools. It did as much again decades later in its *Rodriguez* decision.¹⁵⁶

The confidence of the Court in the wisdom of local entities may have been misplaced; subsequent litigation on how to achieve racial integra-

147. See Moser & Rubenstein, *supra* note 44, at 63.

148. See National Defense Education Act, 20 U.S.C.A. §§ 401-591 (West 2000).

149. See *Brown v. Board*, 347 U.S. 483 (holding that states must develop ways to racially integrate public schools, and maintaining separate schools for black youth violated the Constitution).

150. See *id.*

151. U.S. CONST. art. III. (The United States Supreme Court has exclusive jurisdiction to hear cases arising under the Constitution, and its decisions are binding).

152. See *Brown v. Board*, 349 U.S. at 299.

153. See *id.* at 294.

154. *Id.* at 299-300.

155. *Id.* at 300-301.

156. *Rodriguez*, 411 U.S. 1.

tion in schools clogged the courts for years after *Brown*.¹⁵⁷ Similarly, lawsuits pertaining to education financing continue to make their way through state courts in the post-*Rodriguez* years.¹⁵⁸

The Supreme Court has taken up other issues related to education, and has not hesitated to establish guidelines for enforcing its decisions in those cases. The lawsuits dealt, as did *Brown*, primarily with constitutional freedoms and questions of infringement on fundamental rights. For that reason the *Brown* Court, in its initial deference to local policy-makers, appears to have been a relatively rare exception.

Generally, when the Court rules on education matters it also discusses how best to implement its rulings. For example, decisions have been handed down regarding free speech on campus,¹⁵⁹ school sports programs' discrimination on the basis of gender,¹⁶⁰ whether schools may dictate the teaching of both evolution and creationism theories,¹⁶¹ the abilities of school administrators to censor student publications,¹⁶² whether extra-curricular religion-based student clubs must be granted access to school facilities equal to that granted non-religious clubs,¹⁶³ whether school tuition vouchers violate the separation of church and state,¹⁶⁴ and the permissibility of student-initiated prayer.¹⁶⁵ In all likelihood, the list will grow; a recent 9th Circuit decision that determined in-

157. See generally Ryan, *supra* note 96, at 258-66.

158. See *id.* at 266-72.

159. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that school administrators not permitted to ban non-disruptive student speech on First Amendment grounds).

160. *O'Connor v. Board of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1306 (1980) (denying petition and refusing to vacate appellate court stay allowing school to prevent female students from playing on boys' basketball team, essentially permitting gender-based classification in school sports).

161. *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding act that required teaching of both evolution and creationism science unconstitutional under Establishment Clause).

162. *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260 (1988) (stating that a school is not a public forum, and therefore school administrators' censorship of student-written newspaper did not violate First Amendment right of free speech).

163. *Good News Club v. Milford Cent. Schs.*, 533 U.S. 98 (2001) (determining schools must offer religion-based student clubs access to school facilities if such access is offered to clubs that are not religion-based); *Board of Educ. of Westside Cmty. Sch. v. Mergens*, By and through Mergens, 496 U.S. 226 (1990) (stating that if schools permit non-religious, non-curriculum related student club to meet on school grounds outside of school hours, same opportunity must be available to religious non-curriculum student clubs).

164. *Zelman*, 536 U.S. 639.

165. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (calling student-initiated and led prayer before football games impermissibly coercive and unconstitutional).

cluding the words “under God” in the Pledge of Allegiance violates the Constitution and is a prime candidate for appeal.¹⁶⁶

Obviously, the Court has made significant rulings pertaining to the fundamental rights aspects of education, yet it has failed to find that the right to an education itself is fundamental. It follows that because education is not a constitutionally-protected right,¹⁶⁷ the federal government is left without authority to make and enforce legislation that could improve the American education system and make it more effective.

Federal legislators have done what they can, working within what is permitted by law. For example, in order to ensure that schools do not discriminate on the basis of race, religion, or nationality, Title IV of the Civil Rights Act of 1964 prohibits those that do from receiving any federal funds.¹⁶⁸ It is an effective carrot-and-stick approach. The Act also authorized research into the factors that contribute to disparities in educational opportunity.¹⁶⁹ The Elementary and Secondary Education Act of 1965 targeted “at-risk” youth, and freed up more federal money.¹⁷⁰ Again, it is important to note that Congress could not use the Act to set education policy. Rather, legislators could only restrict availability of federal funding *unless* states or districts chose to implement the course of action preferred by the federal government.¹⁷¹ The struggle to achieve fiscal equity in education, as noted earlier, thus plays out at the state and local levels.

It is now well-settled that the responsibility for setting education policy and determining how to pay for academic programs is not properly a federal function. But perhaps it should be. The next section of this Comment explores why the idea of elevating education to fundamental-right status is deserving of reconsideration. Texas will again be used as an illustration.

B. *The Problem With Local Control*

The Texas Education Code specifically assigns responsibility for making the most important decisions regarding education to local school district personnel.¹⁷² For example, the Code identifies the superintendent of

166. *Newdow v. U.S. Congress*, 292 F.3d 597 (Ca. 9th Cir. 2002) (stating required classroom recitation of the words “under God” in Pledge of Allegiance violate Establishment Clause).

167. *Rodriguez*, 411 U.S. at 35.

168. Victoria Rivkin, *School Funding Scheme Struck: System Found to Violate Basic Education Rights; Reforms Left to Albany*, N.Y.L.J., January 11, 2001, at 1.

169. Moser & Rubenstein, *supra* note 10, at 64.

170. *Id.*

171. *See* discussion, *supra* note 122.

172. TEX. EDUC. CODE ANN. §§ 4, 7, 11 (Vernon 1996 & Supp. 2002).

a school district as “the educational leader and the chief executive officer” of the district.¹⁷³ Each campus within a district has a principal, who is the “instructional leader of the school.”¹⁷⁴ The school districts themselves are assigned “primary responsibility for implementing the state’s system of public education and ensuring performance.”¹⁷⁵ Translated, this all means that a district’s board of trustees, informally known as a school board, is entrusted with implementing state policy.¹⁷⁶ The problem is, the specifics of what constitutes “state policy” and what qualifies an individual for membership on a “board” leave a lot to be desired.

According to the Code, an Independent School District has the “exclusive power and duty to govern and oversee the management of the public schools of the district.”¹⁷⁷ The board members, or “trustees,” are to be elected.¹⁷⁸ And there is only one prerequisite for eligibility to hold a position on a school board in Texas: the candidate must be registered to vote.¹⁷⁹ No education credentials are necessary; nor are there requirements that a trustee be a parent, have management or planning experience, or even reside within the district.¹⁸⁰

The extraordinary degree of responsibility entrusted by statute to a school board and the minimal requisite qualifications of its members seem to be at odds. Yet this lopsided power arrangement is court-approved.¹⁸¹ As interpreted by the United States Court of Appeals for the Fifth Circuit, Texas education law permissibly vests final policymaking authority with school district boards of trustees.¹⁸²

Policy to be enforced by the boards is also defined in less than specific terms. The Code provides that the mission of the Texas state education plan is to:

173. TEX. EDUC. CODE ANN. § 11.201 (Vernon 1996 & Supp. 2002).

174. TEX. EDUC. CODE ANN. § 11.202 (Vernon 1996 & Supp. 2002).

175. TEX. EDUC. CODE ANN. § 11.002 (Vernon 1996 & Supp. 2002).

176. TEX. EDUC. CODE ANN. §§ 11.011, 11.051 (Vernon 1996 & Supp. 2002).

177. TEX. EDUC. CODE ANN. § 11.151 (Vernon 1996 & Supp. 2002).

178. TEX. EDUC. CODE ANN. § 11.061 (Vernon 1996 & Supp. 2002).

179. TEX. EDUC. CODE ANN. § 11.061 (Vernon 1996 & Supp. 2002).

180. TEX. EDUC. CODE ANN. § 11.002 (Vernon 1996 & Supp. 2002).

181. *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1245 (5th Cir. 1993) (holding that under Texas law, ultimate authority in policymaking rests with independent school district’s board of trustees).

182. *Id.* The question presented in the original suit was whether a school superintendent’s transfer of a black principal was racially motivated and therefore in violation of federal civil rights statutes 42 U.S.C.A. §§ 1981 and 1983. The 5th Circuit held that the school district could be held liable for the action if such discrimination actually occurred and if the superintendent had final policymaking authority. Under Texas law, the Court found that authority rested solely with the board of trustees.

ensure that all Texas children have access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation. . . a general diffusion of knowledge is essential for the welfare of this state and for the preservation of the liberties and rights of citizens.¹⁸³

On the state level, the Texas Education Authority (TEA) has responsibilities enumerated in equally vague language. TEA is to: establish pilot programs, manage investment capital, monitor compliance with federal law, and provide drivers' education.¹⁸⁴

Should so much power rest with state and local authorities? Consider the important role a school board has in the complex interplay between students and teachers, the administration and the community, parents and the state. David Bartelt, a sociologist who specializes in urban studies and schools, believes it is important to see the interrelationship of these entities.¹⁸⁵ Calling the system a "school ecology," he compares the connection between schools and communities to Russian nesting dolls.¹⁸⁶ The school is nestled within the ecology of the city, the city rests in a relationship to other cities, and all are interrelated and "embedded in a network of social processes."¹⁸⁷ The clear implication is that education is more "a part of a larger urban ecology" than we think, and we would do well to approach it as such.¹⁸⁸ The question is, whether local boards are suited to adequately deal with such far-ranging concerns.

A school board or board of trustees charged with exclusive power to govern the schools in a given district is likely to be concerned with the daily minutiae of running a business, when it instead should be considering how best to provide opportunity for its students. For instance, boards will have to consider contracts with bus drivers, whether to require uniforms, and whether the public address system at the athletic field should be replaced this year or next.¹⁸⁹ This is obviously necessary busi-

183. TEX. EDUC. CODE ANN. § 4.001 (Vernon 1996).

184. TEX. EDUC. CODE ANN. § 4.001 (Vernon 1996).

185. Bartelt, *supra* note 57, at 161.

186. *Id.*

187. *Id.*

188. *Id.* at 160.

189. A search of legal database WestLaw, using the terms "school board" and "school trustee," excluding the term "injury," and restricted to the most recent thirty-day period retrieved more than 400 cases pertaining to some of the matters school boards contend with on a daily basis. The subject matter ranged from violation of open meetings laws in *Pinellas County Sch. Board v. Suncam, Inc.*, 829 So.2d 989, 990 (Fla. Dist. Ct. App. 2d Dist. 2002), to restrictions on participation in athletics for more than eight semesters in *Grabow v. Montana High Sch. Ass'n*, 59 P.3d 14, 15 (Mont. 2002), and contract disputes with teachers in *Ector County TSTNA/NEA v. Alanis*, No. 03-02-00056-CV, 2002 WL 31386861, at *1

ness. But the sheer volume of matters needing immediate attention makes it difficult for a board to find time to consider how intricately tied the futures of a district's students are to the fortunes of the larger community. This disconnect can hardly be benign.

Because board members and trustees are elected or appointed, the political nature of the position can appeal to individuals who hope someday to hold higher elected offices.¹⁹⁰ Conceivably, these persons may not be at all concerned with education, and may simply be using the experience as a jumping-off point to further their aspirations.¹⁹¹

On the other hand, school board members can also be too intimately involved in district business. Such a situation can be as dangerous to a school system as entrusting it to those who are not sufficiently vested in the futures of district students can be. Short-sighted favoritism on a board is no better than board members who are only seeking their next political opportunity.¹⁹²

At least one state is taking a small step to make sure neither favoritism nor political opportunism will control the schools in its largest metropolitan area. New York has targeted the boards that run New York City's community school districts for abolition in mid-2003.¹⁹³ The boards were introduced during the civil rights movement in order to give residents more say in how their neighborhood schools would be run.¹⁹⁴ Boards will still oversee New York City schools, but their responsibilities will be narrower, in an effort to clean up corruption and micro-mismanagement.¹⁹⁵ Day-to-day management of district business will no longer be the province of the school board.¹⁹⁶ Perhaps most importantly, the composition of the boards will change, as will the manner in which representatives are chosen. In the past, board members were appointed by New York City borough presidents and by the city's mayor; the system was rife with the possibility of cronyism.¹⁹⁷ The new plan will still permit borough presidents to make appointments, but stipulates that those persons be parents

(Tex. App.—Austin, Oct. 24, 2002). It seems likely that this is a representative sample of litigation involving school boards.

190. See Gewertz, *supra* note 105, at 26 (quoting a New York City political science professor who acknowledges former school board members move on to higher elected office).

191. See generally Rebell & Hughes, *supra* note 2, at 106-7 (discussing the political nature of school boards).

192. See *id.* at 105-7.

193. See Gewertz, *supra* note 105, at 2.

194. *Id.*

195. *Id.* at 9, 11. The proposal, signed into law in June 2002, is subject to approval from the United States Department of Justice.

196. *Id.* at 9.

197. See *id.* at 8, 15, 18-19.

of a child in a New York City public school.¹⁹⁸ It is hoped that the changes will allow continued local involvement while simultaneously eliminating some of the political favoritism and local protectionism that can prevent all students in an area from having access to equal educational opportunity.

The New York solution is similar to another method suggested for improving education reform. The dialogic approach¹⁹⁹ suggests that the best option lies midway between federal and local control, a compromise between centralization and decentralization.²⁰⁰ It is further founded on the theory that most attempts at school reform, be they in regard to education or fiscal policy, fail because they do not change the power relationships inherent in entities of school governance.²⁰¹ Dialogic approaches to instituting major changes in some ways mimic alternative dispute resolution techniques (ADR).²⁰² ADR employs neutral mediators who help negotiate contentious matters. By incorporating neutral parties as mediators, those who are vested in the success of area schools, but disagree on how best to run them, can find compromise without engaging in a power struggle.²⁰³ Participants are thus able to work passionately on reform attempts that will benefit them individually, yet are guided in focusing also on what will be best for the school district as a whole.²⁰⁴ Taken one step further, the community dialogic approach might help eliminate some of the disparities between rich and poor districts. Dialogic groups comprised of members of competing districts could perhaps work together on inter-district and mutual concerns. With members of each district acting as a stakeholder in a group comprised of several districts, there might be less of a tendency to try to obtain advantages for one at the expense of the others, and less of a need to maintain good-school-versus-bad-school or rich-school-versus-poor-school distinctions.

It is apparent that committed educators, involved parents, and successful managers and administrators are all necessary to the success of schools. They no doubt all have valuable ideas regarding education policy, funding, and objectives to bring to the table. The key is to structure oversight of schools in a way that permits community involvement, but limits the potential for cronyism and favoritism.

198. *Id.* at 8.

199. *See generally* Rebell & Hughes, *supra* note 2.

200. *Id.* at 102.

201. *Id.* at 104.

202. *Id.* at 117.

203. *Id.* at 120-21.

204. *Id.* at 121.

III. HISTORY CLASS: THE CONSTITUTIONAL COMPONENT

[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

—Former Supreme Court Chief Justice Earl Warren²⁰⁵

Although the federal government produces reams of education-related initiatives, the Constitution and the Supreme Court's interpretation of constitutional provisions in *Rodriguez*²⁰⁶ effectively serve as barriers to implementation. As already discussed in preceding sections, the *Rodriguez* ruling not only sent proponents of financial equity in education to the state courts to seek relief, it also has limited the ability of the federal government to set and enforce national education goals and objectives. It is time to make a change. Education should be declared a fundamental right.²⁰⁷

There is precedent for reversal of Supreme Court decisions.²⁰⁸ When it becomes apparent that times and values have changed, the Court can and has seen fit to rule again on matters it has already considered, and adjust its holdings to reflect any societal shift.

Much has changed in the thirty years since *Rodriguez* was decided. For one thing, the population of the United States is much more mobile. Thus, education programs designed to suit people who will continue to live in a particular locality for their entire lives will not provide sufficient preparation for living in today's world. This movement to a more global, interconnected society in turn should be reflected in education policy. A reconsideration of *Rodriguez* would be timely at this juncture.

Even if the Court does not see fit to eventually overrule *Rodriguez* and declare education a fundamental right, it could follow a parallel line of cases and achieve a similar outcome. In *Plyler v. Doe*, the Court held that

205. *Rodriguez*, 411 U.S. at 493.

206. *Id.*

207. Others contend the change in perspective should be even more drastic, and we should come to consider education to be a basic human right. See James A. Gross, *A Human Rights Perspective on U.S. Education: Only Some Children Matter*, 50 CATH. U. L. REV. 919, at 919 (2001) (holding that education is more than a fundamental right; that it is a human rights issue).

208. One particularly poignant example is the issue of child-labor laws. In the early 1900s, Congress attempted to set national standards for working conditions for children. Using its constitutional power to regulate interstate commerce, Congress barred any manufacturer that violated child labor provisions from engaging in interstate commerce. The Supreme Court held the act unconstitutional. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Some decades later, the subject of child labor was taken up again, with different results. See *United States v. Darby*, 312 U.S. 100 (1941).

the state of Texas could not deny undocumented immigrant children from Mexico the right to attend free public schools.²⁰⁹ The state's interest in reserving education funds for its legal residents was found unjustifiable in light of the harm inflicted on the children.²¹⁰ The Court reasoned that the children, having been brought to the United States by their parents, did not have any choice in their status as illegal aliens.²¹¹ Holding innocent children "accountable for their disabling status"²¹² would impose a lifetime hardship and essentially, keep them from later contributing to the nation's economy.²¹³ Is the problem we face currently, economic segregation and inferior education for poor and minority children, so different?

IV. PSYCHOLOGY CLASS: THE SELF-FULFILLING PROPHECY

"[I want to] go home and play video games."

"Oh! Miss! I might go to high school!"

—elementary school student responses to being asked what they hoped to do meaning "be," as in, choice of career) when they "got out of school."²¹⁴

A ground breaking psychological study may provide the key to what is lacking in the school funding debate.²¹⁵ In debating whose responsibility it is to pay for education, develop curriculum, and set policy, we tend to overlook the impact that can be made by people and entities not directly connected with schools. A school's "reputation" is to a great degree, developed *outside* the school. That perception of a school's quality can enhance what happens within the school. And it can also place tangible limitations on progress. It is in essence, part of a self-fulfilling prophecy.

Noted Harvard researcher Robert Rosenthal found that expectations can be as key to an individual's achievement as can resources, and perhaps even more so.²¹⁶ Rosenthal demonstrated that elementary school students whose teachers have higher expectations tend to meet and even exceed those expectations.²¹⁷ Similarly, children whose instructors have

209. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

210. *Id.* at 227.

211. *Id.* at 220.

212. *Id.* at 223.

213. *Id.*

214. Conversation with a 5th grade class at Southside Heritage Elementary, Southside Independent School District, Bexar County, Texas (November 14, 2000).

215. *See generally* ROSENTHAL & JACOBSON, *supra* note 74.

216. *Id.* at Preface, vii.

217. *Id.* at 98.

lowered expectations regarding academic performance tend not to disappoint, living “down” to expectations.²¹⁸

Rosenthal’s study was conducted in a scientifically valid manner,²¹⁹ and his results confirmed earlier studies that had been conducted by leading researchers in the field of education.²²⁰ In the Rosenthal series, children in a selected school were chosen at random and assigned to one of three groups.²²¹ Although intelligence tests indicated all of the students were at about the same intellectual level developmentally,²²² they were assigned to groups in which the members either had: “high” IQs and a higher-than-normal ability to learn quickly; “normal” IQs and average ability to learn; or slightly below normal IQs and a possibility that the student would need a little extra attention in order to keep up with the rest of the class.²²³ The teachers were aware of the classifications, but the students and their parents were not. At the end of the survey period, the students who were expected to make greater progress did so. In fact in many cases, those students’ IQs went up by a statistically significant amount.²²⁴ The control group students, classmates of the “high achievers” with the same teacher and the same lessons in the same room, did not do as well.²²⁵ Some of those in the group that was expected to need a little extra attention actually met those lowered expectations, performing at a level that was inferior to that of their randomly “encouraged” peers.²²⁶ Teachers also set lower standards for the children who were identified as being from the poor part of town; higher goals were established for those children who were expected to gain more ground intellectually.²²⁷

The psychological impact of another’s belief in one’s ability to succeed is startling. The implications are even more so. If a teacher, who is trained to treat all students equally and believe in the possibility inherent in each child, can still communicate at a subconscious level to a particular child that he or she is “special” and expected to do great things, what

218. *Id.* at 25-6, 28.

219. *See id.* at 68-71 (describing methodology and variables).

220. *Id.* at 52-3.

221. *Id.* at 70.

222. *See id.* at 68-71.

223. *Id.* at 70.

224. *Id.* at 99-107.

225. *Id.*

226. *Id.* at 107-8.

227. *Id.* *See also* Ferguson, *supra* note 13, 466-67 (theorizing that because teachers drastically impact student achievement, education reformers should strive for more money to attract better teachers, rather than seek equal per-pupil allocations of funds).

happens when the message is more overt?²²⁸ What happens when the message comes from parents, community members, students at other schools, and is a recurring theme in media?

There are children born to poverty who succeed against all odds, and broadcast and print media journalists relish sharing such up-by-the-bootstraps stories.²²⁹ True, these success-story profiles are encouraging and inspiring. However, they can also unintentionally help perpetuate the inequities that the lauded impoverished students fought so hard to escape. By reaffirming what we all want to believe, that with hard work *any* and *all* children can improve their status in life, the positive profiles allow us to become complaisant. They allow us to look the other way and convince ourselves that poor children are not suffering any discrimination, that no equalization of education funds is necessary. They let us hold fast to the belief that kids who do not make the most of their educational opportunity and use it to break out of poverty simply must not have wanted to do so badly enough.

Publicity about efforts to make education financing more equitable can also fan the flames of retaliation. As was noted earlier in this Comment, parents who can afford to will go to great lengths to maintain an educational advantage for their child's school district. It is common now to hear of parents using their own financial resources to pay for services at the public schools where their children are students.²³⁰ They have hired teachers to fill positions that were cut because of insufficient budgets,²³¹ paid for playground equipment,²³² and bought computers.²³³ While it appears to be harmless to give if you are able, many education policy analysts hold that in the long run, parental fundraising makes matters worse.²³⁴ Permitting parents to make financial gifts to only one school within a district, or to one classroom within a school, promotes a new inequity. Now instead of inter-district gaps, there are intra-district and

228. See Winston, *supra* note 44, at 1011 (remarking on how both students and teachers perceive a community's lower expectations for their success).

229. See e.g., Alison Beshur, Feature, *Scholar Sets Off to Meet His Future: Lanier Grad Used Poverty, Frequent Moves to Advantage, Impressing Many Educators*, SAN ANTONIO EXPRESS-NEWS, July 6, 2002, at 1B, available at 2002 WL 23791308 (profiling a high school student born to a single mother, living in a housing project in a neighborhood where drug deals were common, who worked hard and earned a full scholarship at Duke University).

230. See Andrew Stark, *What's Wrong with Private Funding for Public Schools?*, in *Dissent*, BELL & HOWELL INFORMATION AND LEARNING COMPANY, at 2-3, Jan. 1, 2001.

231. Stark, *supra* note 20, at 7.

232. *Id.*

233. *Id.*

234. *Id.* at 2.

even intra-school differences between the have-mores and the have-nots.²³⁵

Even the corporate neighbors of financially well-endowed parents are getting into the act. In one property-rich Texas district, a grocery chain works in tandem with individual schools to help them recoup some of the property tax revenue the state forces them to share with impoverished schools in property-poor districts.²³⁶ Parents may purchase coupons through their child's school for \$100, and use them to obtain \$100 worth of groceries. The market then makes a contribution to the identified school in return.²³⁷

V. GRADUATION: CONCLUDING THOUGHTS

"I figured since you adults have passed the 6th grade you all don't care about 6th graders today, but now I know it's not true."

—E.M., sixth grade student,
Kirby Middle School, San Antonio, Texas²³⁸

It is uncomfortable. It is unfortunate. But it is not unavoidable. The economically segregated school system we have created and perpetuated can and must be changed. Poor children have the right to equal opportunities for education and advancement. The rest of us do not have the right to assure our superior socio-economic status by withholding it.

Whether or not you have children in the public school system, your future depends, in part, on how well we care for all of our children. Today's students are tomorrow's work force. Tomorrow's caretakers and juries. Tomorrow's contributors to Social Security. Tomorrow's teachers. Tomorrow's leaders. Just as easily, they can become tomorrow's unemployables. Tomorrow's criminals. Tomorrow's generation of young adults with chips on their shoulders who think the world owes them something. Does it? Do we?

This Comment has tried to make the case for centralizing oversight of education policy, encouraging scholastic interdependence, and especially,

235. *Id.* at 5.

236. Program details were contained in an e-mail school newsletter, on file with author. Specifics were also gleaned in an interview with parent of children in Alamo Heights ISD, in San Antonio, Texas (Oct. 30, 2002) (also on file with author).

237. Program details were contained in an e-mail school newsletter, on file with author. Specifics were also gleaned in an interview with parent of children in Alamo Heights ISD, in San Antonio, Texas (Oct. 30, 2002) (also on file with author).

238. Letter from Erika Maldonado, sixth grade student, Kirby Middle School, Judson Independent School District, Bexar County, Texas, to Debra Ireland, radio announcer, KXXM, San Antonio, and volunteer literacy advocate (December 4, 2000) (on file with author).

elevating education to fundamental right status. Perhaps it does not go far enough. James A. Gross, Professor of Industrial and Labor Relations at Cornell University, holds that education is more than fundamental. It is a *human* right; the birthright of every child on the planet.²³⁹ Gross finds the system a “scramble to disown responsibility” for the fact that the benefits and burdens of life are not equally distributed.²⁴⁰ Students living in the poorest school districts in the country have access to education that is separate and unequal.²⁴¹ States Gross:

“[C]hildren. . . concentrated in the most poverty-stricken school districts in the country. . . still receive an education that is separate and unequal. . . There is no reason that can justify the perpetuation of human rights violations to education: not transparent appeals to the democratic principle of local control. . . an not the federal government’s evasion of the duty by hiding behind the myth that education is exclusively a state and local matter in this country.”²⁴²

However you choose to view it, we need to make a brutally honest assessment. Look at the schools in your community, the schools your children attend. If economic segregation exists, even if it is unintentional, you will know it when you see it.²⁴³ Think about how those discrepancies devalue poor children. By conceding that underprivileged children will just have to make do with inadequate facilities, we silently communicate our assessment of their relative worth.

If we do indeed treat students differently in accordance with the relative wealth of the district in which they reside, and offer them lesser quality because of it, we must act. In the words of former Supreme Court Chief Justice Warren, we must make corrections and we must make them “with all deliberate speed.”²⁴⁴

You have brains in your head.

You have feet in your shoes.

You can steer yourself
any direction you choose.

You’re on your own. And you know what you know.

239. Gross, *supra* note 207, at 941.

240. *Id.*

241. *See id.*

242. *Id.* at 946, 955.

243. Referencing the now famous opinion of Supreme Court Justice Potter Stewart on pornography and obscenity, “I know it when I see it.” *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964).

244. *Brown v. Board*, 349 U.S. at 301 (commenting on the pace at which schools should pursue mandated racial desegregation).

And YOU are the guy who'll decide where to go.²⁴⁵
With your head full of brains and your shoes full of feet,
you're too smart to go down any not-so-good street.²⁴⁶
And will you succeed?
Yes! You will, indeed!
(98 and $\frac{3}{4}$ percent guaranteed.)
KID, YOU'LL MOVE MOUNTAINS!²⁴⁷

—Dr. Seuss

245. DR. SEUSS, OH, THE PLACES YOU'LL GO!, not paginated (Random House Inc., New York) (1990).

246. *Id.*

247. *Id.*