THE INVISIBILITY FACTOR: THE LIMITS OF PUBLIC CHOICE THEORY AND PUBLIC INSTITUTIONS

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I. INTRODUCTION

"The most potent effects of [a] story derive not from what is told, what is positively represented . . . but from what is omitted, not told."[1]

Public choice theory, which seeks to apply economic analysis to the political process, is "one of the dominant themes in contemporary legal scholarship."[2] Public choice is not simply a scholarly theory, but is also used frequently in judicial decisionmaking.[3] Therefore, the theory must be carefully examined to expose its flaws.[4]

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1. Jerome M. Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 RUTGERS L.J. 597, 597 (1994) (quoting KARL KROEBER, RETELLING/REREADING: THE FATE OF STORYTELLING IN MODERN TIMES 19 (1990)).

2. Edward L. Rubin, *Public Choice in Practice and Theory*, 81 CAL. L. REV. 1657, 1657 (1993) (reviewing DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991)). *See, e.g.*, Dorothy A. Brown, *Fiscal Distress and Politics: The Bankruptcy Filing of Bridgeport As a Case Study in Reclaiming Local Sovereignty*, 11 BANKR. DEV. J. 625 (1994-95) (applying public choice theory to the recent bankruptcy filing by the City of Bridgeport, Connecticut).

3. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 4 (1991) ("[P]ublic choice theory deserves attention because it has already begun to have an important influnce on the law. Several influential judges—most notably Justice Scalia on the Supreme Court and Judge Frank Easterbrook on the U.S. Court of Appeals for the Seventh Circuit—have drawn on public choice insights in their own writings.").

4. *Id.* ("To ignore public choice is to leave the intellectual battleground in possession of these scholars.").

According to public choice theory, the American political process is dominated by individuals who organize into special interest groups in order to procure legislation for group members.[5] The legislation will transfer wealth from the majority population to the members of the special interest group, even though the majority does not want the wealth transfer and individually opposes the legislation. Public choice theory suggests that only by organizing into special interest groups can individuals influence the political process. Consequently, the wealth transfer occurs because the majority is not organized and cannot oppose the special interest group's legislation, even though on an individual basis, majority members are against the legislation.

Public choice theory has been applied to a variety of legislative enactments.[6] In each instance, according to the public choice theorists, the special interest group that benefitted from the legislation did not find organized opposition from the majority voting population. Although numerous law review articles apply the basic tenets of this economic theory of legislation, those tenets have not been closely examined.[7] This Article examines what public choice theory ignores; specifically, how the unorganized majority *can* thwart a special interest group's legislation.

This Article's thesis is that because public choice theory underestimates the ability of the majority to influence the political process, it is of limited use as a predictive tool. More specifically, this Article suggests that in certain circumstances, public choice theory incorrectly predicts whether a special interest group can successfully pass its legislation. This Article examines this thesis in the context of state education funding reform and

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5. *See, e.g.,* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence,* 98 Q.J. ECON. 371 (1983); Sam Peltzman, *Toward a More General Theory of Regulation,* 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Theories of Economic Regulation,* 5 BELL J. ECON. & MGMT. SCI. 335 (1974); George J. Stigler, *The Theory of Economic Regulation,* 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

6. *See, e.g.,* Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy,* 45 STAN. L. REV. 311 (1993); Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform,* 71 MINN. L. REV. 913 (1987); Peter V. Letsou, *The Political Economy of Consumer Credit Regulation,* 44 EMORY L.J. 587 (1995).

7. *But see, e.g.,* Richard Briffault, *Home Rule, Majority Rule, and Dillon's Rule,* 67 CHI.-KENT L. REV. 1011 (1991) (discussing flaws in the public choice model as applied to local government law); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation,* 79 CAL. L. REV. 685, 701-08 (1991) (discussing flaws in the public choice model as applied to racial minorities, but not how the model's basic tenets may be incorrect); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s,* 139 U. PA. L. REV. 1 (1990) (discussing flaws in the public choice model as applied to tax legislation).

shows that public choice theory would have incorrectly predicted some recent legislative responses in that area.

Part II begins with a brief description of the economic theory of legislation. It then employs the theory to predict what legislative response is expected in the education funding reform context. Part III describes the education funding reform process, emphasizing the process that took place over twenty years in the state of New Jersey. It further describes six New Jersey Supreme Court decisions and the subsequent legislative responses. Part IV demonstrates the limits of public choice theory by comparing the predictions described in Part II with the actual events recounted in Part III. Part IV begins with the key assumptions that underlie public choice theory. It then uses the New Jersey case study to show how each assumption is incorrect and hinders the theory's predictive utility. It describes how a disorganized majority in New Jersey controlled the legislative responses without forming special interest groups because of the common racial bond they held with the majority white legislators. This unconscious unity contrasted starkly with the lack of racial bonding the disorganized majority held with those perceived to benefit from the education funding reform—namely minority inner city schoolchildren. This Article then suggests that special interest groups can only control legislative outcomes where the disorganized majority remains uninformed and uninterested. Part V concludes by suggesting that public choice theory must be retooled if it is to remain a viable theory.

II. PUBLIC CHOICE THEORY

This section describes the branch of public choice theory referred to herein as the economic theory of legislation.[8] It then describes the potential special interest groups in the education funding reform context. It concludes by employing the theory to predict the legislative outcome in the context of education funding reform.[9]

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8. This is an often used pseudonym for public choice theory. *See, e.g.,* Richard A. Posner, *Economics, Politics and the Reading of Statutes and the Constitution,* 49 U. CHI. L. REV. 263 (1982) (advocating judicial acknowledgment of the economic theory of legislation).

9. Education funding reform is a high profile issue, representing the convergence of tax, education and race. *See, e.g.,* George C. Galster, *Polarization, Place, and Race,* 71 N.C. L. REV. 1421 (1993); Sam Peltzman, *The Political Economy of the Decline of American Public Education,* 36 J.L. & ECON. 331 (1993); Note, *Unfulfilled Promises: School Finance Remedies and State Courts,* 104 HARV. L. REV. 1072 (1991). It was chosen to illustrate this Article's thesis that, with respect to certain issues, a disorganized majority will defeat special interest group legislation.

A. Public Choice Theory Explained: The Economic Theory of Legislation

The economic theory of legislation is a model that seeks to explain legislative outcomes. It provides that legislation is not enacted for the public good. Rather, it results from a "legislative auction" where the special interest group with the highest "bid" wins the legislator's services.[10] The special interest group seeks legislation that benefits its group members, who have a high stake in the legislative outcome. The legislator receives the bid, and in turn, the special interest group receives the desired legislation.[11]

The special interest group's "bid" can include campaign contributions, advertising, public relations, votes, and outright bribes for the elected legislator.[12] To secure enactment, a special interest group is willing to incur costs in an amount one dollar less than the expected benefits from the legislation. If the expected benefits do not exceed the costs of organizing, the special interest group will not form.

The special interest group's bid is the excess of resources available from the group less the costs of organizing the group. That excess will be referred to herein as the "net bid." The larger the special interest group, the smaller the net bid; the smaller the special interest group, the larger the net bid. Although this bidding equation seems counter-intuitive, it results from the collective action problems associated with organizing large, diffuse groups.

Organizing any group includes the costs of searching for similarly situated individuals and the monitoring costs to make sure that group members contribute their fair share of those costs.[13] Organizational costs increase with group size for several reasons. First, group members must be

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10. *See* Posner, *supra* note 5, at 335-36. Under the public interest theory of legislation, legislators adopt laws in the best interest of their citizens because they are assumed to be public-spirited individuals. *Id.* Public interest theory explains how legislation is adopted by considering how it improves the public good. *Id.* In recent years, public interest theory has been subjected to considerable criticism by those who support the public choice theory of legislation. *See* Becker, *supra* note 5, at 371; Peltzman, *supra* note 5, at 211. It has even been suggested that "[t]he economic theory of regulation long ago put public interest theories of politics to rest." Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 279 (1984).

11. *See, e.g.*, Letsou, *supra* note 6, at 628-29 (describing how consumers who default on loans benefit from legal limitations imposed on lenders that restrict lenders' ability to collect on defaulted loans, even where those restrictions increase the costs of credit for consumers as a whole).

12. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

13. Peltzman, *supra* note 5, at 212.

identified and located. The greater the number of potential members, as well as the more widely dispersed those members are, the more costly it will be to identify and locate potential group members.

Second, each group member must believe that all other group members are paying their fair share of the costs; otherwise other group members will refuse to pay their fair share. The larger the group membership, the greater the temptation for individual members to try to reap the benefits of the legislation without incurring any of the costs. This problem is frequently referred to as "free-riding."[14] Although potential group members will benefit from the proposed legislation, they do nothing to lobby for its passage in hopes that others will organize the group and/or incur the costs necessary to bid for the legislation. They further hope that the legislation will be enacted and that they will be its beneficiaries even though they failed to contribute to the bid.

In order to ensure that those who reap the benefits will incur the costs, group members will monitor each other. Accordingly, larger groups will incur commensurately greater monitoring costs purely as a matter of numerosity. Because greater organizational costs lower the net bid, larger groups that have higher organizational costs will have lower net bids. When competing with special interest groups with lower organizational costs and higher net bids, large groups tend to lose at the legislative auction. Public choice theory predicts, therefore, that successful special interest groups tend to be relatively small.[15]

Furthermore, special interest groups are able to procure benefits for their group members because those who would oppose the legislation remain unorganized and diffuse. Although a mathematical majority, those who would oppose the special interest group's legislation fall victim to the "collective action problems" previously mentioned.[16] Thus, the special interest group is able to secure legislative enactments even though, individually, a majority of voters opposes such enactments. This result is also a consequence of binary voting, where voters must take into account a wide variety of the candidate/legislator's actions, but can only vote for or

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14. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 16-22 (1971).

15. The smaller the special interest group, the lower the organizational costs, and the greater the "net bid" that can be used to lobby the legislator. As a result of relatively few members, the costs of identifying and locating potential group members, and the costs of monitoring group members decrease. Special interest groups, therefore, have higher "net bids" and are more likely to outbid rivals with higher organizational costs and lower "net bids." *See* Becker, *supra* note 5, at 371; Letsou, *supra* note 6, at 626; Peltzman, *supra* note 5, at 212; & Posner, *supra* note 5, at 336.

16. *See supra* notes 13-15 and accompanying text.

against a candidate/legislator.[17]

Having explained the theory, the next section identifies the potential special interest groups in the context of education funding reform and discusses each group's ability to organize. Part II concludes by using the economic theory of legislation to predict which groups are expected to be more successful at the education funding reform's "legislative auction."

B. Predictions from the Model

In the education funding reform context, the potential special interest groups are the following: (i) property-poor school districts; (ii) property-rich school districts; (iii) middle-wealth school districts; and (iv) all other taxpayers.[18] For the balance of this Article, education funding reform is defined as increased funding for property-poor school districts, by a comparable reduction in the funding for property-rich school districts. In short, if education funding reform is successful, every school district is guaranteed a certain minimum level of funding, regardless of the amount of property taxes generated in the school district.

1. Groups that Benefit from Education Funding Reform

(i) Property-Poor School Districts

Property-poor school districts stand to gain a great deal from education funding reform legislation designed for their benefit. Those who will reap the benefits include the schoolchildren, parents, teachers, and the property-poor school districts. Parents and children stand to gain through increased educational opportunities. Teachers stand to gain salary and benefit increases, and school districts stand to gain as their budgets will increase due to the reform.[19] As a result, they all have a high stake in the reform's

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17. CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW 162 (1994).

18. Parents will divide themselves depending on which school district they live in, and on whether they expect the state to take state aid away from their child's school district and transfer it to another school district. Michael Mintrom, *Why Efforts to Equalize School Funding Have Failed; Towards a Positive Theory*, 46 POL. RES. Q. 847, 850 (1993). In addition, school board members' interests and teachers' interests will converge where both seek increased funding for teachers; they will clash where school board members seek to make increased funding subject to accountability on the part of teachers. WALTER I. GARMS ET AL., SCHOOL FINANCE: THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION 344 (1978)

19. Public choice theory suggests that school districts have incentives to maximize their budget requests without regard to efficiency. Linda A. Schwartzstein, *Bureaucracy Unbounded: The Lack of Effective Constraints in the Judicial Process*, 35 ST. LOUIS U. L.J. 597, 608 (1991) (indicating that

enactment.

Organizational costs associated with identifying similarly situated group members generally will be high. Property-poor school districts may be spread throughout the state with some rural and some urban districts. Organizing these disparate groups will be costly.

In most cases, however, litigation has already brought these groups together.[20] Assuming that litigation on behalf of property-poor school districts has occurred, search costs decrease dramatically because the litigation has identified similarly situated group members. To that extent, monitoring costs should also decrease as those willing to be a part of the litigation process will be predisposed not to free-ride.[21]

Nonetheless, a question still exists as to whether parents in property-poor school districts have any funds to expend for a bid.[22] If bids were made

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school districts are bureaucracies, and thus public choice theory explaining the behavior of bureaucracies can be applied to understand school districts' behavior). The districts will seek to maximize salary, perquisites, public reputation, power, and patronage, all of which increase as their budgets do. *Id.* at 609. As municipal employees, teachers would otherwise have to compete with other municipal services over a general tax increase. Yet, if a court tells the legislature that it must act for the benefit of education, the general competitive process among municipal employees is circumvented. *Id.* at 610.

20. State educational funding methods have been challenged in courts in a number of states. *See* Shofstal v. Hollins, 515 P.2d 590 (Ariz. 1973); Dupree v. Alma Sch. Dist. No. 30 of Crawford County, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1985); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Blase v. State, 302 N.E.2d 46 (Ill. 1973); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); East Jackson Public Sch. v. State, 348 N.W.2d 303 (Mich. Ct. App. 1984); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, *amended,* 784 P.2d 412 (Mont. 1989); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); Claremont Sch. Dist. v. Governor, 635 A.2d 1375, (N.H. 1993); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973), *on reargument* 306 A.2d 65 (N.J. 1973), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1975); Board of Educ. Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Britt v. North Carolina State Bd. of Educ. 357 S.E.2d 432 (N.C. Ct. App. 1987); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994); Board of Educ. of the City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979); Fair Sch. Fin. Council of Oklahoma, Inc. v. State, 746 P.2d 1135 (Okla. 1987); Olsen v. State, 554 P.2d 139 (Or. 1976); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Northshore Sch. Dist. v. Kinnear, 530 P.2d 178 (Wash. 1974); Buse v. Smith, 247 N.W.2d 141 (Wis. 1976); and Washakie County Sch. Dist. Number One v. Herschler, 606 P.2d 310 (Wyo. 1980).

21. In situations where free-riders are less likely, the monitoring of free-riders is less necessary. Accordingly, monitoring costs decrease.

22. It is documented that such parents tax themselves at very high rates with little yield. HENRY J. RAIMONDO, ECONOMICS OF STATE AND LOCAL GOVERNMENT 91-92 (1992)

solely through capital, property-poor districts would be consistently outbid. Bids, however, can also take the form of votes and publicity—benefits that litigation may provide.

Assuming that litigation has identified similarly situated group members, public choice theory would predict that property-poor school districts would make a net bid for the proposed education funding reform legislation. The group will be relatively small; members will be able to bid in the form of publicity and votes; their stake in the outcome will be relatively high; and their organizational costs will be relatively low.

2. Groups that Lose from Education Funding Reform

(i) Property-Rich School Districts

Property-rich school districts stand to lose a great deal if education funding reform benefits the property-poor school districts at their expense. Stakeholders include the parents, children, teachers, and the property-rich school districts. Parents and children stand to lose as resources flow from their districts to the property-poor districts. Teachers stand to lose as their salaries and benefits remain the same or decrease. School districts stand to lose as their budgets remain the same or shrink. Accordingly, they all have a high stake in preventing the proposed legislation.

Organizational costs associated with identifying similarly situated group members may be high assuming they are not easily identifiable and spread throughout the state. Yet, assuming litigation has occurred, it has already identified the property-rich districts for comparison with the property-poor districts. Accordingly, property-rich school districts will have low search costs because the litigation process has identified group members.

The cost of monitoring will depend upon the size of the group: Larger groups cause more collective action problems, and the potential for free-riding increases. Because property-rich districts usually have relatively few members, monitoring costs will be low.

Further, property-rich districts will have comparatively greater resources available for a bid in the form of votes, campaign contributions, advertising, and outright bribes.

Assuming litigation has decreased search costs, public choice theory predicts that property-rich school districts would make a net bid to prevent the enactment of the proposed legislation. Groups from these districts have a high stake in the outcome, relatively few members, resources available for a bid, and low organizational costs. One would expect their net bid to be greater than that of property-poor school districts, particularly given the

greater resources that are available for campaign contributions and advertising.

(ii) Middle-Wealth School Districts

Middle-wealth districts may win or lose from education funding reform. The amounts expended on their children's education may stay the same, decrease, or increase. Group members want to ensure that the amounts expended on education either remain the same or increase. Accordingly, they have a high stake in the outcome.

Organizational costs associated with identifying similarly situated group members may be high, as this group is likely to be large. Identifying all other group members may prove a difficult challenge, given that litigation, which typically involves only property-rich and property-poor districts, largely ignores middle-wealth school districts.[23] However, middle-wealth school districts could be identified by their failure to be included in either the property-poor or property-rich categories.

Given the relatively large number of group members involved, collective action problems are certain to exist and the temptation to free-ride will be great, particularly if the legislation does not seek to redistribute the group's wealth. For these same reasons, monitoring costs will also be great.

The resources available for bidding include campaign contributions, votes, advertising, and outright bribes. Although the resources available for bidding by middle-wealth districts' are greater than those available in property-poor districts, the middle-wealth district's net bid will be smaller because their organizational costs will be greater. Public choice theory predicts, therefore, that either the middle-wealth districts will be unable to overcome their collective action problems and thus be prevented from organizing, or they will organize, but have a very low net bid for the legislator.

(iii) All Other Taxpayers

Taxpayers stand to lose a great deal if their taxes are increased in order to pay for the education funding reform legislation. Organizational costs associated with identifying similarly situated group members will be high because this group is large and diffuse. Litigation will not help here as the

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23. In the typical litigation strategy, plaintiffs will not compare themselves with middle-wealth school districts, as that comparison does not generate the greatest disparity. Instead, plaintiffs compare themselves with property-rich school districts.

taxpayers are not identified through litigation. Given the size of the group, monitoring costs will be high and collective action problems will exist as well.

However, if it could organize, a group of taxpayers could deliver a bid in the form of campaign contributions, advertising, votes and outright bribes. Yet, given the high organizational costs, public choice theory predicts a very low net bid—assuming the group could organize at all. Public choice theory predicts that an organization of a taxpayer special interest group is unlikely to occur.

3. Predictions from the Model

(i) Property-poor districts and property-rich districts will outbid taxpayers and middle-wealth districts.

Although each group has a high stake in the outcome because it either stands to gain or lose a great deal from the legislation's enactment, there will only be one winner at the legislative auction. Assuming litigation occurred, public choice theory predicts some type of education funding reform legislation to be enacted in response to a court's declaring the current educational funding unconstitutional.

Public choice theory predicts that taxpayers and middle-wealth school districts are unlikely to organize into special interest groups, due to their size and attendant collective action problems. As a result, public choice theory predicts that they will be relatively ineffective in influencing the legislative response. Accordingly, one would expect any wealth transfer to take place at their expense, i.e., those groups are likely to pay for benefits that special interest group members receive. Public choice theory predicts a wealth transfer from middle-wealth school districts and other taxpayers to either property-poor school districts or property-rich school districts due to the latter two groups' ability to organize and offer a higher net bid.

(ii) Property-rich districts will outbid property-poor districts.

It seems questionable whether property-poor school districts will be able to outbid property-rich school districts. Property-poor school districts that are more heavily populated can provide more votes, and the litigation brought on their behalf should provide publicity. Yet, property-rich school districts can provide more campaign contributions, advertising, and outright bribes. Litigation has decreased organizational costs for both groups, but property-rich school districts have greater resources available for bidding.

Therefore, public choice theory predicts that property-rich districts will make a greater net bid for the legislation than the property-poor school districts. Because of their relatively small numbers, high stake in the outcome, and low organizational costs, property-rich school districts should be able to prevent legislation that effects a wealth transfer from their group to property-poor school districts.

III.   EDUCATION FUNDING REFORM: A CASE STUDY

In 1973, in the landmark decision, *San Antonio Independent School District v. Rodriguez*,[24] the Supreme Court foreclosed federal constitutional challenges to education financing under the Equal Protection Clause.[25] The Court held that unequal funding among public school districts as a result of disparate interdistrict property wealth did not rise to the level of a federal constitutional violation.[26] The court held that a rational basis existed for financing education from local property taxes, namely local control.[27] The court thus accepted the state's decision to fund schools locally from a property tax base in order for parents and local school districts to ensure control over their schools.[28] Local control justified the wide disparities caused by local property taxes.[29]

Because of the Court's holding in *Rodriguez*, parties challenging education financing must pursue actions under state constitutional law. In fifteen state challenges, courts have invalidated the state's education financing method.[30] None of those fifteen proved more contentious than

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24. 411 U.S. 1 (1973). For a recent discussion of that decision, see Dorothy A. Brown, *Deconstructing Local Control: Ohio's Contribution*, 24 CAP. U. L. REV. (forthcoming 1996) (on file with author).

25. 411 U.S. at 55.

26. *Id.*

27. *Id.*

28. *Id. Cf.* Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 785-803 (1992) (critiquing the concept of local control).

29. 411 U.S. at 54-55.

30. *See* Shofstal v. Hollins, 515 P.2d 590 (Ariz. 1973); Dupree v. Alama Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973), *on reargument* 306 A.2d 65 (N.J. 1973), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1975); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Seattle Sch. Dist. No. 1 of King County v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980)

New Jersey's challenge.

A. Education Funding Reform: New Jersey's Experience

1. The First Legislative Response

The first legislative response was "enacted" by the New Jersey Supreme Court in *Robinson v. Cahill*,[31] a sweeping decision that invalidated New Jersey's education funding method. Although the court rejected a state equal protection argument, it held that New Jersey's current method of education financing, through local property taxes, violated New Jersey's state constitution.[32] The constitution requires a "thorough and efficient" education for New Jersey students.[33] This clause was violated because the financing method led to great disparities among school districts.[34] The court accepted the notion that the quality of educational opportunity was substantially dependent upon the amounts provided per pupil.[35] However, the court reserved decision on the subject of remedies and sought the further views of the parties.[36] After oral arguments, the court filed an opinion concluding that it would not disturb the statutory scheme unless the state legislature failed to enact remedial legislation prior to December 31, 1974.[37] The court did not provide for a remedy if the legislature failed to act.[38]

By December 31, 1974, no legislation had been enacted.[39] Thus, the court acted, but only with respect to the 1976-77 school year.[40] The court

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31. 303 A.2d 273, *on reargument*, 306 A.2d 65 (N.J. 1973), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973).

32. 303 A.2d at 295.

33. The state's education clause is as follows: "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years." N.J. CONST. art. VIII, § 4 (1947), *quoted in* Robinson v. Cahill, 303 A.2d at 287-88.

34. *Robinson*, 303 A.2d at 288.

35. *Id.* at 277.

36. *Id.* at 298.

37. Robinson v. Cahill, 306 A.2d 65, 66 (N.J. 1973).

38. *Id.*

39. On January 13, 1975, the court acknowledged that although efforts were made, no legislation had been enacted. Robinson v. Cahill, 335 A.2d 6 (N.J. 1973). The matter thus returned to the court for the ordering of appropriate remedies. *Id.* The court did not order any changes for the 1975-76 school year. *Id.* at 7. With respect to the school year commencing July 1, 1976, the court set for oral argument several questions, including the definition of "thorough and efficient"; the power of the court to order relief; the limits of that power; and whether a special master should be appointed. *Id.* at 6-7.

40. *Id.* at 7. *See also* Robinson v. Cahill, 351 A.2d 713, 718 (N.J. 1975).

ordered that previously appropriated monies not be spent according to existing statutes, but in a manner consistent with the court's opinion.[41] The court's decision increased the state-guaranteed minimum per pupil dollar amount for some students and decreased the amount for others.[42] Specifically, the court increased state aid to the urban and rural school districts and decreased state aid to the rich school districts.[43] The court provided a guaranteed equalized assessed valuation per pupil; if the school district's actual assessed valuation was less than the guaranteed valuation, the district would receive state aid to make up the difference. If, however, the actual valuations were more than the guaranteed valuation, no state aid would be given.[44] The court's legislative remedy was scheduled for one year only: 1976-77.[45]

2. The Second Legislative Response

(i) The Unfunded Act

On September 29, 1975, the legislature passed the Public School Education Act of 1975 (the "Act").[46] One observer noted that the New Jersey Education Association threw its full energies behind the Act's passage[47] because most of the money from the Act would go into schools and "inevitably" into teachers' salaries. The New Jersey Supreme Court determined that on its face, the Act was constitutional, provided it was fully funded.[48] The court retained jurisdiction and stated that if the Legislature did not fund the Act by April 6, 1976, it would issue an order to show cause.[49]

As of May of 1976, the New Jersey legislature had not funded the Act.[50] On May 13, the New Jersey Supreme Court took the unprecedented

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41. 351 A.2d at 720.

42. *Id.* at 720-21.

43. *Id.* at 722.

44. *Id.* at 721. Note, however, that state aid included other categories, which went to all districts, including transportation aid and pension fund contributions. *Id.* at 720.

45. *Id.* at 722.

46. Public School Education Act of 1975, N.J. STAT. ANN. § 18A:7A-1 (West 1989), *cited in* Robinson v. Cahill, 355 A.2d 129, 131 (N.J. 1976).

47. RICHARD LEHNE, QUEST FOR JUSTICE: THE POLITICS OF SCHOOL FINANCE REFORM 154 (1978).

48. *Robinson*, 355 A.2d at 139.

49. *Id.*

50. Robinson v. Cahill, 358 A.2d 457 (N.J. 1976), *injunction dissolved by* Robinson v. Cahill, 360 A.2d 400 (1976).

step of enjoining the state and every public officer from spending *any* funds for the New Jersey public school system.[51] The injunction would not take effect if the legislature funded the Act by July 1, 1976.[52] When the legislature refused to act by July 1, the injunction went into effect.[53] The New Jersey public school system was shut down on July 1, 1976.[54]

Pushed to the wall, on July 9, 1976, three years after the court decision declaring New Jersey's method of funding its public schools unconstitutional, the legislature passed a statewide income tax to fund the Act.[55]

(ii) The Fully Funded Act

The Public School Education Act of 1975, when funded, initially increased the state's share of education expenditures from twenty-eight to forty percent of the total, and extended the payment of state aid to districts educating seventy-five percent of the state's students.[56] The Act (i) defined the major elements of a thorough and efficient education;[57] (ii) required the State Board of Education and the Commissioner of Education to establish statewide education goals and standards and required local districts to set goals and standards consistent with statewide goals;[58] (iii) established a system for monitoring district compliance with state and local goals and requirements;[59] and (iv) gave the Commissioner and the State Board of Education broad powers to intervene in local fiscal and education-

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51. *Id.* at 459. The court excluded from the injunction the payment of principal and interest on tax-exempt school bonds and notes; the cost of maintaining and securing school properties; the payment of contractual obligations for capital construction and necessary repairs; contributions towards teachers' pensions; the payment of insurance premiums; and social security. *Id.*

52. LEHNE, *supra* note 47, at 156.

53. On June 30, 1976, with the legislature still not having acted, the New Jersey school districts went to federal district court to have the state court's order overturned. *Id.* at 157. The federal district court voted not to overturn the state supreme court order closing the school system. *Id.* at 158.

54. Approximately 100,000 children normally enroll in summer academic programs in New Jersey. *Id.* at 156. As a result of the shutdown, education employees were laid off and employed parents who needed to make child care arrangements were demanding a solution from the legislature, which subsequently acted. *Id.* at 160-61.

55. *Id.* at 163. The New Jersey Supreme Court issued a subsequent decision that dissolved the injunction that closed the schools. Robinson v. Cahill, 360 A.2d 400 (N.J. 1976).

56. Margaret E. Goertz, Steady Work: The Courts and School Finance Reform in New Jersey 4 (unpublished paper prepared for the Seminar on School Finance Reform, City University of New York, Apr. 25, 1994) (on file with author).

57. Public School Education Act of 1975, L.1975 C.212, N.J. STAT. ANN. § 18A:7A-5.

58. N.J. STAT. ANN. § 18A:7A-2b(3)(a)-(b).

59. N.J. STAT. ANN. § 18A:7A-2a(4).

al decisions when monitoring revealed deficiencies.[60]

On February 5, 1981, in *Abbott v. Burke* ("Abbott I"),[61] another group of plaintiffs filed a lawsuit challenging the Public School Education Act of 1975.[62] The lawsuit alleged that the Act, as funded, did not satisfy the court's earlier decision; it failed to provide a "thorough and efficient" education for all New Jersey public school students.[63]

Almost a decade later, after the plaintiffs had exhausted their administrative remedies,[64] the New Jersey Supreme Court ruled that the Public School Education Act of 1975 was unconstitutional as applied to twenty-eight "poorer urban districts."[65] In 1984-85, seventy-one percent of all minority students in New Jersey were educated in those districts.[66]

The court found that the Act was counter-equalizing in that it did not decrease, but increased funding disparities between the wealthier and poorer urban districts.[67] The court observed that in 1971-72, the spread between the lowest and highest spending districts was $700 to $1,500 per pupil; that

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60. N.J. STAT. ANN. § 18A:7A-15. Three school districts have been taken over by the State under the authority of the Act: Jersey City, Paterson, and Newark. *See* Mary McGrath, *Extension Urged for Jersey City Takeover*, THE RECORD (N.J.), Aug. 3, 1995, at A3.

61. 477 A.2d 1278 (N.J. Sup. Ct. App. Div. 1984), *rev'd*, 495 A.2d 376 (N.J. 1985).

62. *Id.* at 1279.

63. *Id.* In 1985, the New Jersey Supreme Court ruled that the plaintiffs had failed to exhaust their administrative remedies, and the court would not rule until those remedies had been exhausted. Abbott v. Burke, 495 A.2d 376 (N.J. 1985). In 1988, an administrative law judge recommended that the school finance system be ruled unconstitutional. Abbott v. Burke, 575 A.2d 359, 359 (N.J. 1990). Commissioner Cooperman rejected the Administrative Law Judge's findings in February 1989, and the State Board of Education upheld the Commissioner's decision. Goertz, *supra* note 56, at 6. While recommending corrective legislation, the Board concurred that a constitutionally sufficient system was in place. *Id.* The plaintiffs appealed the decision of the State Board of Education to the New Jersey Supreme Court. *Id.* at 7.

64. The New Jersey Supreme Court held that plaintiffs should exhaust their administrative remedies prior to a judicial decision. Abbott v. Burke, 495 A.2d 376. The court noted that under the 1975 Act, the Commissioner of Education had "jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws . . . ." *Id.* at 393. The court stated that an administrative hearing would permit the development of a complete record, which the court would need to determine the question of the Act's constitutionality. *Id.* at 394.

65. Abbott v. Burke, 575 A.2d 359, 363 (N.J. 1990). The court defined "poorer urban districts" as those 28 districts that are classified by the Department of Education as "urban districts" and fall within the District Factor Groups ("DFGs") A and B. *Id.* at 383 n.15. The DFGs A and B are derived from a measure of community social and economic variables such as educational and occupational background of the population, per capita income of the district, and mobility. *Id.* at 385.

66. *Id.* at 387. The court did not apply its ruling to the disparity in other districts throughout the state due to insufficient evidence presented in the record. *Id.* at 363.

67. *Id.* at 406.

is, $800.[68] For the year 1984-85, a conservative estimate showed the disparity to be $2,068 per pupil.[69] Without sufficient funding, the court reasoned that poor urban districts were unable to provide a "thorough and efficient" education.[70] The court noted the poor quality of education provided in those districts,[71] and ordered the legislature to design a different education funding system that would meet criteria the court established.[72]

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68. *Id.* at 382.

69. *Id.* at 383.

70. *Id.* at 408. The Act's definition of "thorough and efficient" included: (i) establishment of educational goals at both the state and local levels; (ii) encouragement of public involvement in goal-setting; (iii) instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational skills; (iv) a breadth of program offerings designed to develop the individual talents and abilities of pupils; (v) programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs; (vi) adequately equipped, sanitary, and secure physical facilities and adequate materials and supplies; (vii) qualified instructional and other personnel; (viii) efficient administrative procedures; (ix) an adequate State program of research and development; and (x) evaluation and monitoring programs at both the state and local levels. *Id.* at 390 (citing N.J. STAT. ANN. 18A:7A-5).

71. *Id.* at 395. For example, the State provided one computer per 58 students in a poorer urban school as compared to one computer per eight students in a rich school. *Id.* Poorer urban schools offered science labs built in the 1920s and 1930s where sinks did not work, and microscopes and other supplies for chemistry or biology classes were unavailable. *Id.* The court also noted a lack of athletic facilities at some poorer urban schools where the track teams practiced in a second floor hallway. *Id.* at 396. In addition, some of the poorer elementary schools had no outdoor play area, and some of the playgrounds had been converted to faculty parking lots. *Id.* In some poorer urban schools, children ate lunch in the boiler room area of the basement, while remedial classes were taught in a former bathroom, and music classes were conducted in storage rooms. *Id.* at 397. The court found most schools in richer suburban districts to be newer, cleaner, and safer, providing an "environment conducive to learning." *Id.* at 397. The court also considered the dropout rates in the poorer urban districts and noted the majority of schools in the poorer urban areas had dropout rates hovering around 50%. *Id.* at 401. The court also noted that in 1985-86, every district but two in the poorest areas failed to meet the state standard for the High School Proficiency Test. *Id.* at 400. Furthermore, every poorer urban district failed to meet the standard. *Id.* In 1985-86, of more than 14,000 ninth graders in the 28 identified poorer urban districts who took the High School Proficiency Test, only 54% passed the reading test, 42% passed the math test, and 43% passed the writing test. *Id.*

By contrast, in the richer suburban districts, of 5,400 ninth graders tested, 97% passed reading, 93% passed math and 95% passed writing. *Id.* Statewide, 83% of students tested passed reading, 72% passed math, and 77% passed writing. *Id.*

72. The court held that:

[T]he Act must be amended to assure funding of education in poorer urban districts at the level of property-rich districts; that such funding cannot be allowed to depend on the ability of local school districts to tax; that such funding must be guaranteed and mandated by the state; and that the level of funding must also be adequate to provide for the special educational needs of these poorer urban districts in order to redress their extreme disadvantages.

Id. at 363.

First, the state must assure that per pupil funding in poorer urban districts is substantially equal to that of property-rich suburban districts.[73] Second, the state must assure that funding for poorer urban districts is not dependent upon the budget or tax decisions of local school boards.[74] Third, the state must provide for the special educational needs of the urban districts in order to redress their disadvantages.[75] Fourth, if the state allows the richer suburban districts to increase their spending, it must similarly increase the funding of the poorer urban districts.[76] Finally, the state was directed to implement the new funding mechanism in the 1991-92 school year.[77]

The court permitted the legislature to phase out the legislation's minimum aid provisions to the richer suburban schools.[78] The court determined that the legislature should remedy the problem and voiced its belief that twenty-eight districts were unconstitutionally underfunded.[79] The court acknowledged that New Jersey spends more dollars per student for education than virtually any other state.[80] The legislature, however, "must assure that these poorer urban districts have a budget per pupil that is approximately equal to the average of the richer suburban districts . . . and . . . sufficient to address their special needs."[81] The court again implored the legislature to act in response to its decision.[82]

3. The Third Legislative Response

In January 1990, Governor Jim Florio, a Democrat, was sworn into office.[83] He ran on a pro-urban platform, pledging to bridge the economic and educational disparities that separated the state's wealthy and poor communities.[84] The Democrats captured both houses of the state legisla-

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73. *Id.* at 408.

74. *Id.*

75. *Id.*

76. *Id.* at 410.

77. *Id.*

78. *Id.* at 407.

79. *Id.* at 408. The court excluded the Atlantic City School district since its tax base for 1989-90 is well in excess of the statutory guaranteed tax base. *Id.*

80. *Id.* at 412.

81. *Id.* at 409.

82. *Id.* "After all the analyses are completed, we are still left with these students and their lives. They are not being educated. Our constitution says they must be." *Id.* at 412.

83. Margaret E. Goertz, *The Rocky Road to School Finance Reform*, CEPA NJ NEWSL. (Center for Educ. Policy Analysis, New Brunswick, N.J.), Jan. 1993, at 2.

84. *Id.*

ture, maintaining control of the Senate and regaining control of the General Assembly.[85]

Governor Florio created a small working group to organize his education reform package.[86] The governor announced the results on March 15, 1990.[87] The proposed legislative solution, the Quality Education Act ("QEA"), was enacted in June and signed into law on July 3, 1990.[88] The legislature increased by five percent the foundation amount for the poorer urban districts.[89] Every wealthy district was guaranteed a 6.5% increase over its 1990-91 aid.[90] The QEA imposed the responsibility for teacher retirement payments on the property-rich school districts and established a new "at-risk" category of state aid that would be allocated on the basis of poverty, not student test scores.[91] The QEA sought to benefit school districts serving eighty-five percent of the state's schoolchildren.[92] The public perception of the QEA, albeit an incorrect one, was that the law directed most of the new state aid dollars into the state's poorer urban

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85. *Id.* The governor, upon taking office, faced three urgent fiscal problems. *Id.* First, the 1990-91 budget had a $600 million deficit, and the 1991-92 budget had a projected $1 billion deficit. *Id.* Second, the state obligations under the Public School Education Act of 1975 were growing faster than state revenues could absorb. *Id.* The Act had only been fully funded two times—in 1978 and 1985. Margaret E. Goertz, The Development and Implementation of the Quality Education Act of 1990, 5 (Nov. 1992) (unpublished manuscript, on file with author). State aid was funded at 93% of cost in fiscal year ending 1990, and projected to be funded at 83% in fiscal year 1991. *Id.* Third, local property taxes were beginning to rise to pre-1976 levels. The enactment of the income tax in 1976 reduced reliance on the property tax from 57% of all state and local taxes to 40% in 1987. By 1989, property taxes represented 43% of all state and local taxes, an increase of three percentage points in two years. *Id.*

86. *Id.* at 3. Governor Florio assumed that the Public School Education Act of 1975 would be held unconstitutional by the New Jersey Supreme Court and acted in anticipation of that decision. Goertz, *supra* note 56, at 12. The working group, which was headquartered in the state treasurer's office, included the state treasurer, the treasurer's deputy for budget and finance, the governor's education policy advisor, and school finance experts from both the state Office of Management and Budget and the state Department of Education. *Id.* at 12-13.

Policy makers from the State Department of Education, however, were not included in the small working group. *Id.* at 13. Neither were representatives from the teachers' union, the New Jersey Education Association, or members from the New Jersey School Boards Association included. *Id.* Their exclusion was due to their anticipated opposition to some of the group's proposals, particularly those that called for the funding of pension payments to be shifted from the state to local school districts. Goertz, *supra* note 83, at 3. Similarly, legislative aids were not brought into the process until one month before the bill was introduced into the legislature. Goertz, *supra* note 56, at 13.

87. Goertz, *supra* note 83, at 3.

88. *Id.* at 1.

89. *Id.* at 3.

90. *Id.*

91. Goertz, *supra* note 56, at 13-14.

92. *Id.*

districts; undoubtedly, this perception was fueled by the fact that minority children from poorer urban districts were plaintiffs in the litigation.[93]

4. The Fourth Legislative Response

The QEA quickly became a victim of politics.[94] Those opposed to it included the state's largest teachers organization, the New Jersey Education Association, and a grass-roots organization, Hands Across New Jersey, which led a taxpayer revolt against increases in state taxes.[95] Wealthy school districts were opposed to the local assumption of teacher retirement costs under the QEA and to the new "at-risk" category of state aid that would be allocated on the basis of poverty, not student test scores.[96] Fearful about their fate in the upcoming election, in which the entire state legislature would be up for re-election, Democratic legislators sought to amend the QEA before it could take effect.[97] Consequently, less than six months after enactment, the QEA was amended by the Quality Education Act II ("QEA II").[98]

The QEA II, however, did not fare much better than its predecessor. Taxpayer pressure and school budget defeats, not the QEA II, reduced the average rate of budget growth in several wealthy suburban communities.[99] Although the QEA II somewhat narrowed the spending gap between the poorer urban districts and the wealthiest districts, large disparities still remained.[100]

Once the dust settled, only $287 million, or thirty-five percent of the

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93. Goertz, *supra* note 83, at 25.

94. *Id.* at 13.

95. *Id.* at 14.

96. *Id.*

97. Goertz, *supra* note 56, at 14. The major amendments to the QEA were as follows: (i) reduced state aid from $1.15 billion to $800 million with an allocation of the $350 million difference to municipalities for tax relief; (ii) reduced the base foundation level by nearly $200 per student; (iii) provided an alternative method for calculating the local fair share for special needs districts that was based on the state average school tax rate; (iv) eliminated the provision that required districts to tax at their "fair share" in order to receive full foundation aid from the state; (v) reduced "at risk" aid; (vi) reduced annual increases in total state education aid by 20%; (vii) established more restrictive budget caps and applied them to a district's total budget, rather than to its budget for the regular education program; and (viii) delayed the local assumption of teacher pension and social security costs for a two year period. *Id.* at 14-15. These changes were designed to force more dollars into local property tax relief and to win back the support of the teachers union.

98. *Id.* at 14.

99. Goertz, *supra* note 83, at 2. School budgets in the State of New Jersey are voted on by the public.

100. *Id.*

$800 million in new state aid, went to the state's poorer urban school districts.[101] Sixty percent of the aid went to other school districts, including poorer rural communities, and middle- and high-wealth suburbs.[102] The share of state aid held by urban districts—thirty-seven percent—remained unchanged during the first year of the QEA II.[103] The QEA II resulted in poorer urban districts bearing a significant portion of the subsequent reductions.[104] The poorer urban districts absorbed two-thirds of the QEA II aid cut.[105] Further, the imposition of budget caps required the poorer urban districts to use much of their new state aid dollars for property tax relief.[106]

Although the poorer urban districts were given $287 million in additional aid, their budgets were capped at an increase of $195 million, with $151 million allocated through categorical aid formulas without district discretion.[107] Therefore, out of an $800 million increase in total state aid in 1991-92, the poorer urban districts only received $44 million to benefit their educationally disadvantaged students.[108] That amount represented three percent of the aggregate 1990-91 regular education budgets.[109]

The QEA II increased state education aid by nearly twenty-five percent, yet it alienated every major education group in the state, turning them against the governor and Democratic legislators.[110] As a result, the Republicans gained control of the state legislature in the November 1991 election.[111] Many Democrats lost their seats,[112] leaving the Democratic party with a minority of seats in both the Assembly (twenty-two to fifty-

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101. William A. Firestone et al., *Where Did The $800 Million Go? The First Year of New Jersey's Quality Education Act*, CEPA NJ NEWSL. (Center for Educ. Policy Analysis, New Brunswick, N.J.), Apr. 1993, at 1.

102. *Id.*

103. *Id.*

104. Goertz, *supra* note 83, at 26.

105. *Id.* Reductions in the base foundation amount and the "at-risk student" categorical aid weighing, coupled with the imposition of spending caps, lowered the amount of foundation aid and at-risk aid that the poorer urban districts were entitled to under the QEA. *Id.*

106. *Id.* at 28.

107. *Id.*

108. *Id.* Although the court identified 28 poorer urban districts, the legislation went farther and defined 30 districts as poorer urban districts. The two additional districts are the Plainfield and Neptune Township districts. *Id.*

109. *Id.*

110. Goertz, *supra* note 83, at 3.

111. Mintrom, *supra* note 18, at 852.

112. *Id.*

eight) and in the Senate (thirteen to twenty-seven).[113]

Given the voter's sharp rejection of Democrats at the polls, the state legislature wanted to satisfy those who were still unhappy with the QEA II. The middle income districts wanted changes.[114] The Republican legislators introduced a constitutional amendment in June 1992 that would replace the current "thorough and efficient" clause[115] with a funding formula that would eliminate any requirement of substantial parity between poorer urban and wealthy suburban districts.[116] That amendment was opposed by all major education and advocacy groups.[117] The Republicans dropped their plan to put the amendment on the November 1992 ballot but introduced a new funding law that incorporated many of the proposed changes to the constitution.[118]

5. The Fifth Legislative Response

In response to the threatened constitutional amendment, the major education groups—groups representing urban districts, middle-wealth districts, high-wealth suburban districts—and plaintiff's attorneys—proposed a compromise plan for the 1993-94 school year.[119] The plan increased state aid by $292 million and included $75 million for teacher pensions and social security.[120] The legislature enacted the plan as the Public School Reform Act in December of 1992.[121] The Public School Reform Act provided that (i) $115 million of increased state aid would be given to the poorer urban districts, and other districts would receive increased state aid of $46 million; (ii) categorical aid, which included special education, at-risk, and bilingual education aid, was frozen at 1992-93 levels for each school district; (iii) a $4 million increase in transportation aid would be provided to all districts; (iv) a $50 million capital needs fund was established for the poorer urban districts in 1993-94; (v) wealthier districts could not receive less aid than they received in 1992-

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113. *Id.* at 858.

114. Goertz, *supra* note 56, at 17. The middle wealth districts have filed their own lawsuit, charging that the allocation formula in the QEA II discriminates in favor of the wealthy school districts because their school tax rates are lower than those of the middle wealth districts. Goertz, *supra* note 83, at 32.

115. Goertz, *supra* note 56, at 17.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Public School Reform Act, ch. 7, 1993 N.J. Laws 14.

93; (vi) the same budget caps as in 1993-94 would be applied; (vii) the state was responsible for funding teacher pensions and social security payments; and (viii) an Education Funding Review Commission would develop long-term revisions to the QEA II and issue a report.[122]

6. The QEA II Is Declared Unconstitutional

On August 31, 1993, in *Abbott v. Burke* ("Abbott II"),[123] a New Jersey Superior Court declared the amended QEA II unconstitutional because it did not equalize spending between the state's poorer urban and wealthy suburban school districts.[124] The court further found that the QEA II failed to sufficiently address the needs of at-risk students in the poorer urban districts.[125]

In July 1994, the New Jersey Supreme Court upheld the Superior Court's decision and declared the QEA II unconstitutional.[126] It based its decision on the Act's failure to assure equality of educational expenditures between the twenty-eight poorer urban districts and the more affluent districts.[127] The court, however, retained jurisdiction and declined to enter any orders, noting that the approximately $700 million increase in state aid since its 1990 decision showed a commitment on the part of the New Jersey legislature to satisfy the court's demands.[128]

The court stated that it would not intervene if the special educational needs of children in poorer districts were met and if substantial parity of expenditures between the twenty-eight poorer urban districts and the more affluent districts was attained for the 1997-98 school year.[129] The court did state, however, that if the disparity—now at sixteen percent—was not further addressed in the 1995-96 and 1996-97 school years, or if procedures for substantial equivalence approximating one hundred percent for the 1997-98 school year were not in place by September 1996, it would

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122. *Id., cited in* Goertz, *supra* note 56, at 17-18.

123. No. 91-C-00150, 1993 WL 379818, at *1 (N.J. Super. Ct. Ch. Div. Aug. 31, 1993), *aff'd*, 643 A.2d 575 (N.J. 1994).

124. *Id.* at *14.

125. *Id.* In November 1993, Governor Florio was defeated for reelection by Christine Todd Whitman in a very close race. *See* Joseph F. Sullivan, *New Jersey Democrats Drop Effort to Overturn Whitman's Election*, N.Y. TIMES, Nov. 30, 1993, at A1.

126. Abbott v. Burke, 643 A.2d 575, 576 (N.J. 1994).

127. *Id.*

128. *Id.*

129. *Id.*

entertain motions from plaintiff's attorneys.[130]

The court explained that a "law assuring substantial equivalence" was one that would automatically achieve substantial equivalence without depending on the discretionary actions of any officials.[131] The QEA II failed to assure substantial equivalence between the poorer urban districts and the affluent ones for several reasons. The QEA II directed the Commissioner of Education to calculate annually an equity spending cap permitting an increase in the budgets of each poorer urban district.[132] Such increase, if sustained through the 1995-96 school year, would result in the poorer urban districts' per pupil budgets equalling the average per pupil budgets of the richer districts.[133] However, the equity spending cap was permissive, not mandatory.[134]

The court noted that the basic flaw in QEA II was that the amounts required to bring poorer urban districts equal to rich districts could only be obtained through the actions of the governor and the state legislature.[135] Further, the court observed that neither the governor nor the state legislature had ever exercised such discretion.[136] Accordingly, the court held that QEA II was unconstitutional and in violation of its earlier admonition that education funding levels not be dependent "on the ability of the local school districts to tax."[137]

The court noted some additional concerns that the state needed to address. First, there was no accountability concerning additional funding made available to the poorer urban districts.[138] The QEA II required each poorer urban district to establish an educational improvement plan to be approved by the Commissioner, and that the Commissioner verify that each district's budget had adequate resources to implement the plan. However, the record was devoid of any evidence to suggest that the poorer urban districts were ever held accountable to the state for the additional funding received, or for the implementation of their respective educational improvement plans, or that the additional funding was sufficient to

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130. *Id.* at 577.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. 643 A.2d at 578 (citing Abbott, 575 A.2d at 363).
138. *Id.*

implement their plans.[139] The state was under a continuing obligation to make sure that the children in poorer urban districts attain the quality of education to which they are entitled.[140]

Second, the court noted the failure of the legislature to make additional funding available for the "special educational needs" of the poorer urban districts that its earlier decision in *Abbott I* mandated. Not only must the legislative response be designed to ensure equality with the richer districts, but additional funds must be allocated to address those "special educational needs."[141] The court stated that although QEA II did provide for amounts for at-risk pupils, there was no determination whether, if at all, those amounts would be sufficient to satisfy those "special educational needs."[142] The court noted that its primary concern was academic achievement in poorer urban districts,[143] which in its view could not occur without a serious state effort specifically targeted to the poorer urban districts.[144]

The court noted that children in poorer urban districts faced extreme disadvantage that should not be compounded by the state through its provision of an inferior education.[145] The state is responsible for the educational disparity, and it is up to the state to correct it.[146] Through the state's laws, "a system of education exists that is neither thorough nor efficient" for the students in poorer urban districts.[147]

IV. THE LIMITS OF PUBLIC CHOICE THEORY AS A PREDICTIVE TOOL

This section examines a previously ignored flaw in public choice theory: how a special interest group's influence in the political process can be thwarted by a disorganized majority.[148] This section begins with a brief

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139. *Id.* at 579.

140. *Id.*

141. *Id.*

142. *Id.* The court noted "although legislation was enacted specifically to require the Commissioner [. . .] to undertake a study of the programs and services to be implemented for disadvantaged students, including their costs, for use in preparation of the Department's budget request for the 1993 fiscal year, that study [. . .] ha[d] not been completed." *Id.*

143. *Id.* at 580.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *But see* Shaviro, *supra* note 7, at 76-104 (identifying the following six areas that public choice theory omits: (i) voters; (ii) politicians; (iii) organized interest groups; (iv) the media; (v) ideas and ideology; and (vi) political rules and structures).

summary of New Jersey's five legislative responses and then describes what public choice theory accurately predicted. It concludes by describing what public choice theory did not predict. Because public choice theory ignores the political influence of the disorganized majority, it could not accurately predict New Jersey's legislative responses to the issue of educational funding reform.

A. Legislative Summary

1. The First Legislative Response

The New Jersey Supreme Court proposed the first legislative response.[149] The poorer districts were scheduled to receive additional state aid, and the rich districts were to receive less state aid.[150] Public choice theory would not predict this result; it would predict that the rich districts would be able to outbid the poorer districts and defeat such proposals. Yet, this legislative response came from the judiciary, not the legislature.

2. The Second Legislative Response

The Public School Education Act of 1975, when fully funded, increased state aid to seventy-five percent of the students in New Jersey public schools.[151] When the New Jersey Supreme Court declared the Act unconstitutional, one of the reasons given was that the Act increased the disparity between poorer urban districts and wealthier school districts,[152] leading one to speculate that some of the wealthier school districts received increased aid.

3. The Third Legislative Response (QEA)

The QEA would have increased state aid for school districts serving eighty-five percent of the state's schoolchildren.[153] Each property-poor school district was guaranteed more state aid than it had received in the 1990-91 school year.[154] The QEA required that property-rich school

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149. Robinson v. Cahill, 303 A.2d 273 (N.J. 1973). *See supra* notes 31-45 and accompanying text.

150. Robinson v. Cahill, 351 A.2d 713, 722 (N.J. 1975).

151. *See supra* note 56 and accompanying text. There is no information available on the composition of the 25% that did not receive increased aid.

152. Robinson v. Cahill, 575 A.2d 359, 382-83 (N.J. 1990) (noting that the disparity increased from $898 per pupil to $1135 per pupil in 10 years).

153. *See* Goertz, *supra* note 56, at 13-14.

154. *See supra* note 89 and accompanying text.

districts assume the cost of their teachers' retirement payments.[155] The QEA also allocated a portion of state aid on the basis of poverty, not student test scores.[156]

4. *The Fourth Legislative Response (QEA II)*

The QEA II sought to provide property tax relief by reducing the increased state aid that otherwise would have been raised through additional taxes. It reduced state aid targeted to the poorer urban students.[157] Thirty-five percent of the $800 million in new state aid went to the state's poorer urban school districts.[158] Sixty percent of the money went to the other 570-odd school districts in the state, including poorer rural school districts as well as middle- and high-wealth school districts.[159] The poorer urban districts absorbed two-thirds of the cuts in state aid as a result of the QEA II.[160] The QEA II, which repealed the QEA, took away the majority of the benefits for the poorer urban districts and provided tax relief to the wealthy districts.[161] Further, the budgeting cap provisions of the law required the poorer urban districts to use much of their new state aid for property tax relief.[162]

5. *The Fifth Legislative Response*

The Public School Reform Act of 1992 increased state aid to poorer urban districts as well as to other districts.[163] It guaranteed that the wealthier school districts received no less aid than they had received in the immediately preceding school year.[164] It continued to apply budget caps and returned the responsibility for funding teacher pensions to the state.[165]

B. *What Public Choice Theory Accurately Predicted*

In deliberating changes to school funding, state legislators must balance the political strength of each of the groups mentioned above. Support for

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155. *See supra* note 91 and accompanying text.
156. *See supra* note 91 and accompanying text.
157. *See supra* notes 94-118 and accompanying text.
158. *See supra* note 101 and accompanying text.
159. *See supra* note 102 and accompanying text.
160. *See supra* note 105 and accompanying text.
161. *See supra* note 106 and accompanying text.
162. *See supra* note 106 and accompanying text.
163. 1993 N.J. Laws 14. *See supra* note 123 and accompanying text.
164. *See supra* note 123 and accompanying text.
165. *See supra* note 123 and accompanying text.

school finance reform generally comes from the education lobby and from parents in property-poor school districts.[166] Opposition to school finance reform generally comes from those who are benefitting from the current financing system: parents and taxpayers in middle-wealth and property-rich school districts.[167]

1. Legislative Response Occurred

Initially the legislature did not act. However, when the court intervened in *Abbott I*,[168] the special interest groups opposed to the court's intervention went to work.[169] The court's decision heightened public awareness of the issue and increased pressure on the state legislature. Public choice theory predicts such pressure would result in a legislative solution.

2. Property-Rich School Districts Outbid Other Special Interest Groups

The initial inaction of the legislature could be attributed largely to the property-rich school districts' desire to maintain the current system and their ability to outbid the property-poor school districts. The property-poor school districts bid for educational reform while the property-rich school districts prefer the status quo. The legislature's failure to act could be attributed to its acceptance of the higher bid of the property-rich districts over the lower bid of the property-poor districts. Public choice theory would predict this result.

Moreover, except for the short-lived QEA—which added the funding requirements for retirement payments to property-rich school districts—each of the legislative responses included increased funding for the property-rich districts, or at least a guarantee that their funding would not decrease.[170]

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166. *Cf.* GARMS, *supra* note 18, at 343.

167. *Id.* at 344.

168. 575 A.2d 359 (N.J. 1990).

169. LEHNE, *supra* note 47, at 156-61.

170. The Public School Education Act of 1975 was declared unconstitutional because it increased the disparity between property-poor and property-rich school districts. *Abbott I*, 575 A.2d at 363. The QEA guaranteed each property-rich school district at least as much state aid as was received in the previous year. *See supra* note 90 and accompanying text. The QEA II afforded property tax relief for property-rich school districts. *See supra* note 106 and accompanying text. The 1992 Act provided that property-rich school districts received at least as much state aid as they had received in the previous year. *See supra* note 122 and accompanying text.

The only time that the property-rich districts were outbid was when the court ordered that they receive less state aid. *See supra* note 41 and accompanying text. The economic theory of legislation does not include in its analysis the possibility that the judiciary will exercise legislative jurisdiction.

3. *Education Lobby Outbid Taxpayers*

The failure of the legislature to tie any tax increase to accountability suggests that taxpayer input was not taken into account. Taxpayers were unable to outbid the rival teachers' lobby or the school district lobby for increased funding. The teachers' lobby would not want any provision that makes salary increases dependent on accountability for student performance. Taxpayers, however, would want any such tax increase to be conditioned on improved student performance. The fact that none of the four legislative responses included any accountability provisions suggests that taxpayers were not a special interest group that had any role in the legislative process.

Public choice theory can explain why taxpayer concerns regarding accountability are not reflected in the legislation: The education lobby had a per capita stake in the outcome of any provision requiring educational accountability higher than any other similarly organized group, such as taxpayers, who wanted accountability for their tax dollars.[171] Under QEA II, taxes were increased, but the law had no monitoring mechanism, nor were the funds tied to any level of achievement or accountability on the part of the school districts receiving the additional funds.

Public choice theory might suggest this result. Taxpayers compose a diffuse group: Because their stake in the outcome is very limited, individual taxpayers have little incentive to influence legislation or inquire about teacher performance. Thus, although they may hope other taxpayers perform these functions, individual taxpayers will not act to monitor. Note that later, as a result of the taxpayers' revolt, taxes went down.[172] However, the strength of the teachers' union and school districts was so strong that they did not permit any accountability language in the QEA II.

Public choice theory can also explain why, after the dust settled, the QEA II provided significant benefits for the education lobby. Public choice theory would have predicted that legislation would have been enacted to increase school districts' funding at the expense of the taxpayers, with

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171. The New Jersey Supreme Court noted the lack of accountability in QEA II for how districts with increased state funding spent those additional dollars. Abbott v. Burke, 643 A.2d 575, 579 (N.J. 1994).

172. *See* Mintrom, *supra* note 18, at 852. Mintrom notes that, "[s]oon after the tax program was passed, faced with strong public opposition, several Democratic senators proposed to trade off some funding increases for property tax relief. This was viewed as an attempt to make Democratic candidates more attractive to suburban homeowners prior to the November 1991 legislative elections." *Id.*

additional funding going to the organized teachers' union. That is exactly what happened. Public choice theory would also have suggested that the provision in the QEA mandating local funding of pensions would be eliminated. The forceful opposition of the teachers union, a group with the ability to organize cheaply and carry out threats to oust state legislators, ensured that elimination.[173] Public choice theory might even explain why Governor Florio sought a solution that would apply to school districts other than the twenty-eight poorer urban districts that the New Jersey Supreme Court originally designated.[174] By expanding the budgets of all school districts, Florio could secure the future support of the education lobby.

As a result of the legislation, all school districts saw their budgets increased, union members saw their pay increased and taxpayers saw their taxes increased, notwithstanding the property tax relief in the QEA II. Public choice theory suggests that the education lobby was able to organize better than the taxpayers. As a result, the education lobby influenced the legislature to increase taxes for their benefit. The Public School Reform Act of 1992 returned the responsibility for funding retirement payments to the state.[175]

4. Property-Poor Districts Outbid Taxpayers

The QEA provided that state aid would be awarded on the basis of poverty, not student test scores.[176] As a result, taxpayers paid increased taxes for increased aid to property-poor school districts. Thus, in accor-

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173. According to Goertz,

[o]n the day of the Assembly passage of the QEA, members of the New Jersey Education Association marched on the State House to protest the shift in teacher pension and social security costs from the state to local school districts. While the teachers worried publicly that this shift would endanger the stability of the pension system, a private concern was that local assumption of the cost of the pensions would have a negative impact on the size of future salary contracts.

Goertz, *supra* note 83, at 13.

174. The New Jersey Supreme Court declared the Act unconstitutional with respect to poorer urban school districts. Abbott v. Burke, 575 A.2d at 363. Although the court left "it to the Legislature, the Board and the Commissioner to determine which districts are 'poorer urban districts,' [i]t appears to [the court] that twenty-eight of the twenty-nine school districts designated by the Commissioner as 'urban districts' . . . should qualify." *Id.* at 408.

Although the poorer urban districts' share of state aid to education represented thirty-seven percent of the $800 million in new state aid, sixty percent of the money went to the other 570 school districts. CEPA, *supra* note 101, at 1.

175. *See supra* note 122 and accompanying text.

176. Mintrom, *supra* note 18, at 848-51; Goertz, *supra* note 83, at 16-17 ("[QEA] payments are based upon the number of public school pupils eligible for the federal free lunch or free milk program; eligibility thus reflects household income.").

dance with public choice theory, the smaller and well organized property-poor school districts effected a wealth transfer at the expense of taxpayers.

C.   What Public Choice Theory Did Not Predict: The Influence of the Middle-Wealth Districts

Public choice theorists suggest that legislation will always be captured by special interest groups with relatively small memberships, and that large groups, such as taxpayers and middle-wealth districts, will be unable to prevent the wealth transfer from their group members to a special interest group. This section analyzes how the opposite occurred in New Jersey and how basic assumptions of public choice theory must be re-examined in light of such analysis.

1.   Middle-Wealth Districts Outbid Taxpayers and Property-Poor Districts

The Public School Education Act of 1975 increased aid to seventy-five percent of New Jersey students.[177] Accordingly, middle-wealth districts received increased funding, which was paid for by increased taxes imposed upon taxpayers. Additionally, the Act increased the disparity between wealthy and property-poor school districts.[178] Similarly, the QEA increased aid to eighty-five percent of the students, again to be paid for by increased taxes imposed upon taxpayers.[179] In addition, the QEA allocated sixty percent of state aid to middle-wealth and property-rich school districts.[180]

Public choice theory cannot explain why parents and taxpayers in middle-wealth and suburban districts would oppose the QEA, an act designed to benefit their children. Perhaps that opposition arose because of public perception that the sole beneficiaries of the QEA were children in the poorer urban school districts, where the vast majority of students are minorities.

Public choice theory similarly cannot explain why Governor Florio even proposed as sweeping a bill as the QEA. With New Jersey suffering from a budget deficit, an arguably simpler political solution would have been to increase funding in only the poorer urban districts that the court had

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177. *See supra* note 56 and accompanying text.
178. *See supra* note 67 and accompanying text.
179. Either as a result of increased taxes or decreased services, the state was increasing its share of educational expenditures. *See supra* note 92 and accompanying text.
180. *See supra* note 102 and accompanying text.

declared unconstitutionally funded. Those districts represent only twenty-five percent of the children in New Jersey public schools. Surely that would have been less costly than the QEA package that helped eighty-five percent of New Jersey's schoolchildren. As New Jersey legislators discovered in November 1991, equalization is a dangerous electoral strategy, particularly where taxpayers believe their tax dollars are going to the benefit of poorer urban districts.[181]

Through the QEA, Governor Florio sought sweeping educational finance reform that would benefit eighty-five percent of the students in New Jersey. Yet, by significantly increasing available resources for poorer urban districts, he created the opportunity for the middle-wealth and suburban districts, and for taxpayers, to fight the proposal. That fight resulted in passage of the QEA II.

2. Taxpayers Outbid Property-Poor Districts

The QEA II provided property tax relief while reducing state aid to poorer urban students.[182] The poorer urban districts absorbed two-thirds of the state aid reductions from the QEA to the QEA II. These funds went into property tax relief that benefitted taxpayers in middle-wealth and property-rich districts.[183]

Public choice theory cannot explain how, in New Jersey, property tax relief came at the expense of those in poorer urban districts that, due to their small size and low organizational costs, should have been able to collectively lobby the state legislature.[184] Public choice theory cannot explain why a bill designed to benefit eighty-five percent of the students would have been repealed, and why those legislators who voted for the bill were not re-elected.[185] Approximately two-thirds of the $800 million in additional state aid was earmarked for districts other than poorer urban

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181. Mintrom, *supra* note 18, at 859.

182. *See supra* note 106 and accompanying text.

183. *See supra* note 106 and accompanying text.

184. *Id.* QEA II applied to 85% of New Jersey schoolchildren and included property tax relief. When QEA was amended it took away the "at-risk" state aid designed specifically to assist poorer urban districts. *See supra* note 106 and accompanying text.

185. *Cf.* Kent L. Tedin, *Self-Interest, Symbolic Values, and the Financial Equalization of the Public Schools*, 56 J. POL. 628 (1994) ("The indicators of racial hostility also play a major role in explaining the level of support for the reform of school financing.") *Id.* at 638 ("[A] dislike of blacks . . . increase[s] opposition to school equalization . . . [even though other groups] will be much greater beneficiaries of school equalization . . . ."). *Id.* at 639.

districts.[186]

D. How the Disorganized Majority Influences Legislative Responses

Public choice theory largely ignores the circumstances under which large and diffuse groups such as taxpayers and middle-wealth districts can influence the political process.[187] That is true because public choice theory ignores how ideology and the media influence the political process. This section examines the influence that ideology and the media had in uniting New Jersey's taxpayers and middle-wealth districts.

1. The Role of Ideology in the Legislative Process

Public choice theorists have a great deal of difficulty acknowledging the significant role that ideology plays in politics.[188] Because public choice theory makes several assumptions about the legislative process, it largely ignores factors that can unite a disorganized majority. The first assumption is that legislators are ideologically neutral and therefore will only enact legislation to benefit their own interest. This in turn theoretically results in legislators enacting legislation that the special interest group with the highest "net bid" desires. This first assumption is incorrect for several reasons.

First, empirical evidence suggests that legislation can best be explained by considering the ideology of the legislator.[189] Legislators are not re-election driven, ideologically neutral slates upon which any special interest group can obtain any legislation for the right price.[190] Studies show that ideology is a better predictor of legislative voting behavior than economic

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186. *See supra* note 101 and accompanying text.

187. *Cf.* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY 83 (1994) (describing how "subgroups within the majority can activate the rest of the majority" to act on simple issues with low information costs but high stakes).

188. *See* Shaviro, *supra* note 7, at 98.

189. FARBER & FRICKEY, *supra* note 3, at 28-33.

190. In addition, politicians have motives other than seeking re-election, and, for example, are also concerned with influence, ideology, and the implemention of good public policy. Shaviro, *supra* note 7, at 82-94. A politician can gain status by introducing ideas that become widely discussed, whether or not the ideas are enacted. *Id.* at 84. In the struggle for power and prestige, interest groups can help a member by providing political support, or ideas that can win political support. *Id* at 85. Yet, interest groups can provide more support in fundraising. *Id.* at 85-86. Ideas, for example, emanate far more often from government insiders and academics than from interest groups. *Id.* Recall in New Jersey, Governor Florio created a small working group of government insiders and education policy experts to draft the QEA. *Supra* note 86 and accompanying text.

variables.[191]

Second, the assumption that legislators are ideologically neutral is invalid because it rests on the idea that legislators cannot share any ideas with their constituents. According to public choice theory, in order for constituents to have influence in the political process, they must organize a special interest group "auction" and enter a bid for legislation. There exists no unifying principle that aligns the interests of the legislator and her voters. If, however, there is a unifying principle between the legislator and the unorganized masses, a special interest group is less likely to "capture"[192] the legislative process. This Article suggests racism can be such a unifying principle.

Third, the assumption that legislators are neutral, and thus will only enact legislation to benefit their own interests, rests on the incorrect premise that all groups who lack the resources to purchase legislation are treated equally. Under public choice theory, if you have no bid or are outbid, you will be unable to influence the legislative process. However, public choice theory ignores the possibility that legislators and voters without bids may be unified by common beliefs and principles. These unifying factors may cause the legislator to enact legislation to help voters without bids, or refuse to enact legislation that would hurt them—even in the face of a special interest group willing to provide benefits to the legislator for different legislation.

A final reason the assumption is invalid is its premise that any discrete and insular minority can capture the legislature.[193] Public choice theory takes a colorblind approach to the political process. By ignoring both racial politics and the fact that we do not live in a colorblind society, the theory suggests that all minorities, commonly referred to as special interest groups, need simply to organize to get legislation in their favor. Public choice literature treats all minorities equally and suggests they all have the ability to capture the legislature. It ignores that certain groups cannot capture the legislature because the legislation supported by those groups may cause an otherwise disorganized and disinterested majority to organize and oppose

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191. FARBER & FRICKEY, *supra* note 3, at 28-33; Letsou, *supra* note 6, at 652.

192. *See supra* notes 10-17 and accompanying text.

193. For an example of literature based upon this assumption, see Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (using public choice theory to suggest that racial minorities are uniquely positioned to "capture" the legislative process and procure legislative enactments for the benefit of group members). *But see* FARBER & FRICKEY, *supra* note 7, at 701-08 (responding to Ackerman's thesis).

the legislation. The disorganized majority's perception may be that a valuable right is diminished by the legislation.[194]

The valuable right is whites being comparatively advantaged when compared to blacks—not equal to but better than.[195] Assuming that there are a finite amount of resources available for education, then resources flowing to blacks are those resources that might otherwise be allocated to whites. Accordingly, the disorganized white majority's perception may be that a valuable right is diminished by any legislation that seeks to reallocate funding from white students to black students. By enacting legislation that seeks to transfer resources to a minority group away from the majority, the majority's racism may cause the majority to believe that they are losing a valuable right—namely whiteness as property—and with that the right to be comparatively advantaged.[196] Resources that would otherwise go to majority students will instead be allocated to the nonwhite inner city poor.

Public choice theory further incorrectly assumes that legislators will implement perfectly the will of the special interest group with the highest net bid. This assumption ignores one of the basic tenets of law and economic theory, agency costs.[197] Agency costs are the costs incurred when the principal—here the special interest group—instructs her agent—here the legislator—to pass a specific bill. Economics literature suggests that agents rarely perform exactly as the principal would like.[198]

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194. The assumption also ignores that certain racial minority group members may be more likely to be disaffected by the political process than others due to their particular socio-economic conditions. *See, e.g.,* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12 (1992) (noting the general reversal in income and housing gains made by African-Americans during the 1960 and 1970s); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 12-15 (1993) (describing difficulties affecting African-Americans' quest for equal housing opportunities).

195. *See* Cheryl I. Harris, *Whiteness as Property,* 106 HARV. L. REV. 1707 (1993). In her article, Harris describes how whiteness is a valuable right legally protected in our society. *Id.* Because real power and wealth never have been accessible to more than a narrowly defined ruling elite, many whites only experience the benefits of whiteness as property in relation to people of color. *Id.* at 1758. *See also* Derrick Bell, *The Racism is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide,* 22 CAP. U. L. REV. 571, 576 (1993) (indicating that the top two million income earners in this country earn more than the next one hundred million). Whiteness retains its value in terms that not all whites must win, but they will not lose, if losing is defined as being on the bottom of society. Harris, *supra,* at 1758-59.

196. *Id.* at 1758-59.

197. For the seminal work in this area, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. FIN. ECON. 305 (1976).

198. FARBER & FRICKEY, *supra* note 3, at 27 ("Economists have a well-developed theory of agency. This theory suggests strongly that the behavior of agents is unlikely to correspond perfectly with the preferences of their principals.").

As a result, the special interest group will incur monitoring and bonding costs.[199] Economic theory, therefore, would suggest that legislators do not exactly comply with all of the desires of the special interest lobby with the highest net bid because the group cannot effectively monitor the legislator's every action.

(i) Ideology can unite the disorganized majority

Although the majority of the children who were helped by the QEA were white, there was no specific lobby for white children. Because many perceived the QEA to be designed solely to benefit predominantly poorer minority urban districts, the disorganized white majority school districts opposed the act.[200] Even though reality differed from perception, the disorganized majority of taxpayers and of middle-wealth and property-rich school districts united to defeat the QEA and to ensure that minority schoolchildren would not reap a greater share of benefits.[201]

(ii) Ideology can cause a legislator to enact a bill on behalf of the disorganized majority without their having to bid on it

Public choice theory suggests that because they were unable to organize into a special interest group, middle-wealth districts would not have benefitted from education funding reform. Yet, the opposite occurred. Each of the New Jersey State Legislature's legislative responses increased aid to at least seventy-five percent of the student population. The conclusion that must be drawn is that either the middle-wealth districts were somehow able

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199. Bonding costs are any expenses incurred to ensure against the agent behaving in a manner that the principal does not want. For example, if an insurance policy could be written in the event that the agent acts in a manner differently than the principal would like, the costs of obtaining such insurance would be considered bonding costs. *See* LARRY RIBSTEIN & PETER LETSOU, BUSINESS ASSOCIATIONS 4 (1996).

200. First, the court's decision in *Abbott I*, 575 A.2d 359 (N.J. 1990), was applicable to the predominantly minority poor urban districts. *See supra* note 63. Second, the media portrayed the act in a similar manner. *See infra* notes 221-47 and accompanying text. Third the racial composition of the schools suggest that the poorer urban districts contained over 70% of the state's minority children. *See supra* note 66 and accompanying text.

201. For commentary on why this may happen, see Tedin, *supra* note 185, at 639. Tedin argues that,

[i]t seems clear that blacks and Hispanics evoke a different set of feelings with regard to race-based redistributive policies, with a dislike [by whites] of blacks (but not Hispanics) increasing opposition to school equalization . . . . [T]he findings are consistent with arguments that blacks have a unique status among American minority groups in the reactions they generate among whites.

Id.

to overcome collective action problems, to organize into a special interest group and outbid the smaller, property-rich districts or that their interests were represented by another legislative player—the legislator.

When the legislature's enactment of the QEA caused such an uproar, the legislators took the signal. They passed the QEA II, which provided tax relief to taxpayers. Even though, according to the theory, taxpayers constitute a group too large and diffuse to overcome collective action problems and other organizational costs, they did influence the legislative process.

Upon becoming aware of their constituents' ideas concerning the QEA, legislators promptly enacted the QEA II. Not only did taxpayers benefit from the QEA II, but middle-wealth districts benefitted as well. They, too, received tax relief from the QEA II. Further, that tax relief came in the face of a well-organized special interest group, specifically the property-poor school districts. Two-thirds of the property tax relief came in the form of reduced aid to property-poor school districts, the very districts that the court declared unconstitutionally funded.

(iii) Ideology can minimize collective action problems and other organizational costs of large groups

If taxpayers or middle-wealth district members have a high enough stake in the outcome—in New Jersey, a belief that their children were deprived by minority children benefitting—free-riding becomes less pervasive. First, the injection of race into the process makes identification of group members easier. Accordingly, search costs decrease. Group members become all New Jersey white voters, and it is fairly easy to identify members on that basis. Second, with a higher stake in the out-come—because white parents believe they are losing a valuable right[202]—the cost-benefit analysis changes. Specifically, group members have a sufficiently high stake in the outcome to transcend the inertia problem that public choice theorists assume generally cannot be overcome.

2. The Role of the Media in the Legislative Process

An additional assumption public choice theory makes is that voters remain rationally ignorant because it is not cost-effective to become

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202. *See* Harris, *supra* note 195.

informed of the issues.[203] That assumption is incorrect because it ignores the ability of voters to passively obtain information from the media.[204] Not only is the media a conveyor of information to voters who passively absorb the information at minimal cost, but the media is a biased conveyor of such information.[205]

By failing to consider the media as a factor, public choice theory ignores that certain issues are important enough to voters that they will either take the time to become informed, or will perceive the issue a certain way and react based on that perception.[206] Public choice theory works best when it analyzes legislative issues that are not important to the majority of voters. Voters can only vote "yes" or "no" on a candidate, and if an issue is low profile, it will not cause the disorganized masses to organize and vote against an issue.[207]

In addition, by treating all voters as equally incapable of overcoming collective action problems, public choice theory ignores how racism can unite voters from a disorganized majority to a hostile and organized voting block as well as the media's role in uniting that block. For example, where legislation addresses racially charged issues, media coverage of that issue may also be racially charged. The media's coverage can eliminate problems of free-riding if whites believe they are losing a valuable right.[208] As a result, whites will oppose legislation where they believe that it benefits non-whites because it removes their competitive advantage. Racism fueled by the media's characterization of the legislation serves as a consensus

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203. Shaviro, *supra* note 7, at 76. One of the favorite criticisms of public choice theory is that it fails to identify why voters even vote, given the minimal difference that one vote makes. Letsou, *supra* note 6, at 652; Shaviro, *supra* note 7, at 77. A rational person would simply choose not to vote—yet people do vote. Furthermore, the evidence indicates that the better-educated, and presumably more rational, vote in higher numbers than the less educated. FARBER & FRICKEY, *supra* note 3, at 24-25. Those wishing to maintain the status quo therefore have a high stake in keeping people uneducated so that they will not vote and thus be unable to oppose the status quo.

204. Shaviro, *supra* note 7, at 74-75.

205. HOWARD KURTZ, MEDIA CIRCUS 8 (1993); S. ROBERT LICHTER ET AL., THE MEDIA ELITE, 110-11, 129 (1986); Adeno Addis, *"Hell Man, They Did Invent Us:" The Mass Media, Law, and African-Americans*, 41 BUFF. L. REV. 523 (1993); Shaviro, *supra* note 7, at 96.

206. Certain public choice theorists recognize, however, that many people vote because it is a symbolic or expressive behavior. Shaviro, *supra* note 7, at 77. Voters in effect "buy" ideological, emotional or moral satisfaction in fulfilling their civic duty at a very low cost. *Id.* The satisfaction is derived from the vote itself, not from the voters' ability to influence the outcome. *Id.* Accordingly, voting is unaffected by a profit-maximizing perspective as well as collective action problems. *Id.*

207. Nevertheless many state and local issues are separately put to a vote, i.e., school tax levies, debt limits, and tax limits.

208. *See supra* notes 194-95 and accompanying text.

builder within the white community and, in the context of education funding reform, will cause whites to oppose the legislative solution.[209] As Professor Lawrence has noted, racism often operates subconsciously and is based upon assumptions made about others.[210] A necessary corollary is that whiteness is valuable because all whites win when compared to blacks, who have been placed at the bottom of society.[211] As Professor Harris has described the phenomenon, their whiteness is valuable property.[212] White voters' racist fears can be further fueled when receiving information regarding the legislation from the predominantly white news media.[213]

Public choice theory also ignores that legislators seek to create a favorable image and welcome media attention.[214] The pursuit of media attention can cause a politician who knows that certain legislation has no chance of being enacted to propose it nevertheless.[215] The theory further ignores a legislator's ability to take a public position for the benefit of the voters.[216] A politician can increase her support among voters without taking a substantive position, but by simply saying what people want to hear.[217] This behavior can lower the political cost of proposing ideas

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209. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331, 1369-70. Crenshaw argues that racism "helps to define and privilege membership in the white community, creating a basis for identification with dominant interests. Racism serves a consensus-building hegemonic role by designating Black people as separate, visible 'others' to be contrasted in every way with all other social groups." *Id.* (citations omitted).

210. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987) ("[R]acism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. . . . It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities.").

211. Harris, *supra* note 195, at 1758-59. Harris argues that:

Because real power and wealth never have been accessible to more than a narrowly defined ruling elite, for many whites the benefits of whiteness as property, in the absence of legislated privilege, may have been reduced to a claim of relative privilege only in comparison to people of color. Nevertheless, whiteness retains its value as a 'consolation prize': it does not mean that all whites will win, but simply that they will not lose, if losing is defined as being on the bottom of the social and economic hierarchy—the position to which Blacks have been consigned.

Id. (citations omitted).

212. Harris, *supra* note 195, at 1710.

213. *See* KURTZ, *supra* note 205, at 69-93. "The plain fact is that newspapers reflect the mood and values of white, middle class society. . . . Just over 9 percent of all newspaper editors and reporters are minorities. Half the nation's newsrooms have no minority employees." *Id.* at 71-72.

214. Shaviro, *supra* note 7, at 77.

215. *Id.* at 90.

216. *Id.* at 89.

217. *Id.* at 90.

opposed by interest groups, by purchasing voter goodwill. Such goodwill can be more valuable than lost future campaign contributions.[218] Finally, to obtain media attention, legislators can take credit for an action that the public thinks is desirable.[219] Although public choice theory does not acknowledge the news media's importance in influencing the political process, politicians understand the importance of the media and display an obsession for press coverage.[220]

The media is not a "passive purveyor of information."[221] Its reporting tends to have various predictable biases.[222] The racial composition of the media is one of the explanations for its inherent biases.[223] In addition, the media tends to focus more on personalities than on ideas.[224] The media often portrays politicians as unprincipled power-seekers and prefers to challenge front-runners and incumbents.[225] The media loves political scandals, supports the "little guy" over the establishment, and makes

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218. *Id.* at 91. In New Jersey, for example, politicians thought they were purchasing voter goodwill by enacting the QEA, which was designed to improve schools. However, the plan backfired and the opposing interest groups, namely the teachers' union and taxpayers, voted many politicians out of the state legislature. Perhaps the voter response could be explained by observing that the message of helping all schools was not the one that the voters received. If the message received was that the QEA was designed to help minority students, it is perhaps easier to understand why the majority voters opposed the QEA.

219. *Id.* at 89.

220. *Id.*

221. *Id.* at 96. *Cf.* Culp, *supra* note 1, at 594. This Article will focus primarily on the print media.

222. Journalists are as prone to bias as anyone else. LICHTER ET AL., *supra* note 205. However, a journalist's bias can interfere with how they report the news to the public. *Id.* Journalists are predominantly white and male. *Id.* at 21; *see also* KURTZ, *supra* note 205, at 71-72. Moreover, journalists will generally portray the news in a homogeneous manner. LICHTER ET AL., *supra* note 205, at 23. As a result, it is not surprising that news stories contain the majority white reporters' racial biases.

In a recent survey, 80 percent of journalists surveyed believed strongly in affirmative action for blacks. *Id.* at 29. Yet the racially segregated newsrooms that they work in tell another story. *See* Deirdre Carmody, *The Media Business: Magazines Try to Fill a Void in Minority Hiring*, N.Y. TIMES, July 18, 1994, at D6 (describing that 10.49% of journalists at daily newspapers in 1993 were African-American, Hispanic, Asian-American, or Native American); William Glaberson, *Minority Journalists Gather to Share Hopes and Concerns*, N.Y. TIMES, July 29, 1994, at A12. Racial themes are reported in many forms including stories about discrimination, racial pride, and minority advancement in white society. LICHTER ET AL., *supra* note 205, at 83. A frequently reported theme is the effort by minorities to overcome racial discrimination. *Id.* at 84. As one can see, education funding reform is a story made in journalist heaven. The reporter can portray the poorer minorities as innocent victims who need help in the form of additional educational funds in order to overcome racial discrimination. What isn't as easy for journalists to come to terms with is that white students are innocent victims who also need a revamped educational system in order for them to achieve to their fullest potential.

223. *See supra* note 222.

224. Shaviro, *supra* note 7, at 97.

225. *Id.*

trouble for special interest groups whenever possible.[226] The media can be a powerful ally of those who take positions that appear to oppose special interest groups.[227]

(i) The media can unite large groups by providing information, causing them to have higher stakes in the outcome

The media portrayed educational problems in New Jersey as an urban poor problem. Several newspaper stories were written when the QEA and QEA II were being considered. One story described how the New Jersey Education Association commissioned a study that adjusted test scores to reflect student race and economic background information.[228] The study showed that with the race and economic background adjustments, New Jersey students ranked fourth in the nation in reading and math.[229] The study showed that in New Jersey, black and Hispanic students on average scored lower than white and Asian students in math and reading; states with few minorities had higher average test scores.[230] Another story reported that Robert Scott, president of Ramapo College, said that "racial and ethnic diversity contributed to New Jersey's inability to meet the national [SAT] average in 1994."[231] That same story indicated that the national average SAT score in 1994 was 479 for math and 423 for verbal, and that New Jersey students had a math average of 475 and a verbal average of 418, well below the national average.[232] Ann Buckley, a College Board spokeswoman, suggested that the drop in verbal scores had been "driven by the high number of immigrants who now take the test."[233]

Although the story mentioned that in New Jersey, blacks scored 206 points lower than whites on the verbal and math portions combined, it

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226. *Id.*

227. *Id.* at 98. Perhaps the media encouraged the passage of the QEA by stating that the teachers' lobby was opposed to the bill. Perhaps that incorrectly lulled the politicians into thinking that everyone considered the teachers to be acting against the majority's interest, when the hidden story was that the majority and the teachers were opposed to the bill. Instead of supporting the QEA's opposition to the teachers' union, the majority supported killing the bill. *See supra* notes 94-98 and accompanying text.

228. Tom Topousis, *Higher Grade for N.J. Schools State Ranked 4th Instead of 14th*, THE RECORD (N.J.), Apr. 15, 1994, at A03.

229. *Id.*

230. *Id.*

231. Devin Leonard, *SAT Verbal Scores Drop: Math Scores Rise. Disparity Between N.J. City, Suburban Schools*, THE RECORD (N.J.), Aug. 25, 1994, at A01.

232. *Id.*

233. *Id.*

failed to note that since 1976, blacks had outperformed whites in their overall improvement on SAT exams.[234] The average score of white students in 1993 was 494 for math and 444 for verbal.[235] These figures represent a seven point verbal decrease, and only a one point math increase since 1976.[236] However, during that same period, black students' average rose twenty-one points on the verbal test and thirty-four points in math.[237]

Another story discussed the poor showing among eighth-graders on the 1994 basic skills test, but emphasized school officials' optimism.[238] Although fewer than thirty percent of the students who took the test were judged fully competent in math on the statewide skills test, half met the standard for reading, and forty percent met the standard for writing.[239] With respect to the thirty poorest districts, under seven percent met state standards for math.[240] No statistics were even given for reading and writing.[241]

Moreover, although the articles discussed the statistics for poorer districts, *no similar breakdown* was provided for any other group, such as the wealthiest, or the middle districts. The media in New Jersey focused on the scores of the students in poorer districts, made a plea for equalization of education spending, and ignored the sad state of public education for the majority of students attending New Jersey's schools.[242]

(ii) Media bias affects the information it provides

Although much of the scholarly literature since the late 1960s has emphasized that funding levels do not influence student achievement,[243]

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234. Karen De Witt, *S.A.T. Scores Improve for 2d Consecutive Year*, N.Y. TIMES, Aug. 19, 1993, at A16.

235. *Id.*

236. *Id.*

237. *Id.* The story did not give statistics on Hispanic or Asian students. Nor did it emphasize that although New Jersey boasts the fourth highest percentage of SAT takers in the nation, fewer students took the test in 1993. Leonard, *supra* note 231, at A01.

238. Mary McGrath, *Educators Optimistic Despite Low Scores*, THE RECORD (N.J.), June 3, 1994, at A03.

239. *Id.*

240. *Id.*

241. *Id.*

242. Topousis, *supra* note 228, at A03 (quoting the president of the New Jersey Education Association as saying, "the results point up the need to equalize education spending in rich and poor districts").

243. *See, e.g.,* Sam Peltzman, *The Political Economy of the Decline of American Public Education*, 36 J. L. & ECON. 331 (1993) ("[V]irtually every available measure of student performance shows lower performance in 1980 than in 1960."); U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL

there is widespread public perception that resources do matter.[244] The media has helped fuel that perception. After adjusting for inflation, the cost of an average year of public education more than doubled between 1970 and 1990 without any improvement in test scores.[245] In fact, SAT scores for white students have dropped nearly eighty points during the past thirty years,[246] and since 1976, SAT scores have improved fifty-five points for black students.[247]

(iii)   Elected officials use the media to disseminate information designed to affect a certain outcome

If the goal in enacting the QEA was to help poorer urban districts, emphasizing their low scores was important to evoke sympathy. However, legislators—with assistance from the media—ignored a much larger problem by failing to address the educational problems of the majority of New Jersey students.

About ten percent of all public schools are as outstanding academically as the nation's most prestigious private schools.[248] As a result, ninety percent of public schools are not as outstanding academically as the nation's most prestigious private schools. That means that ninety percent of American schoolchildren—who are predominantly white—are attending school systems in need of academic improvement. Yet the litigation strategy of suing on behalf of inner city poor allows the American public to continue making the assumption that it is only nonwhite inner-city schoolchildren who receive an inferior education. That media coverage leaves the American public without the larger story. Most children—including white children—attend academically inferior public

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RELATIONS, THE STRUCTURE OF STATE AID TO ELEMENTARY AND SECONDARY EDUCATION 3 (Dec. 1990) ("In one sense, it may be surprising—perhaps even alarming—that while average scores on standardized exams have declined in recent years, the amount of resources dedicated to education has grown substantially").

244. Mintrom, *supra* note 18, at 860.

245. Peter Passel, *Economic Scene: After Years of Trying to Fix Education, Why Isn't It Fixed?*, N.Y. TIMES, Oct. 13, 1994, at D2.

246. Charles Murray & R.J. Herrnstein, *What's Really Behind the SAT-Score Decline?* PUB. INTEREST, Winter 1992, at 32, 47 ("Neither race, class, parental education, nor gender can explain this decline of approximately 50 points on the verbal score and 25 points on the math for the white SAT-taking population.")

247. Leonard, *supra* note 231, at A01. *See also* De Witt, *supra* note 234, at A16 (noting that since 1976, blacks outperformed whites in their overall improvement on SAT exams).

248. Denise M. Topolnicki, *Why Private Schools Are Rarely Worth the Money*, MONEY, Oct. 1994, at 98. About ten percent of all private school students attend the most prestigious private schools. *Id.* at 100.

schools.

None of the New Jersey stories examined mentioned the decline in white SAT score results. The *New York Times* barely mentioned that fact in reporting the 1993 results.[249] That article was entitled *S.A.T. Scores Improve For 2d Consecutive Year.*[250] Although that title is correct, it hides a key fact: The average white SAT taker is no better off today than in 1976 on the verbal portion, and barely better off on the math portion.[251] Yet American public school classes have never been smaller, and teachers have never been better educated or better paid.[252] With the exception of Switzerland, the United States spends more on education per student than any other nation in the world.[253]

In a story describing the new SAT that students would be taking in March 1994, the author notes that the average combined SAT score of students admitted to Princeton and Harvard was 1425.[254] The author then notes that the national average SAT combined score was 902 in 1992-93, and in New Jersey, it was only 892.[255] That was the end of the local application of national results. Yet, the story within a story is that even though New Jersey spends more per pupil ($9,159) than any other state, the average New Jersey student does not have a chance of getting into Harvard or Princeton.[256]

(iv) Special interest groups use the media to disseminate information designed to support their legislative efforts

The education lobby, with assistance from the media, would have us continue to spend more money on schools while de-emphasizing the lack of educational improvement despite that increased funding. If parents were informed of this, the public outcry would be so great that schools would have no choice but to make improvements in their accountability to parents

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249. De Witt, *supra* note 234, at A16. The New York Times reported that Asian-Americans increased their verbal scores in 1993 by 1 point to 415, below the national average, and their math scores by 17 points, to 535, which is above the national average. *Id.*

250. *Id.*

251. *Id.*

252. PETER J. FERRARA, ISSUES '94: THE CANDIDATE'S BRIEFING BOOK 165 (1994), *available in* LEXIS, News Library, Curnws File.

253. *Id.*

254. Mary McGrath, *New SAT Will Be Put to the Test Rite of Passage Gets a Revision*, THE RECORD (N.J.), Mar. 15, 1994, at A01.

255. *Id.*

256. FERRARA, *supra* note 252, at n.23.

and taxpayers. However, the nature of bureaucracies is to grow,[257] and the nature of taxpayers is often to remain passive.[258] Accordingly, without more involvement of parents, and taxpayers, school district budgets will grow with no corresponding improvement in educational achievement for America's schoolchildren.

If a more complete picture of the harm being done to America's schoolchildren could emerge, parent and taxpayer involvement would naturally occur. If the media confronted white parents with the reality that their children are not in one of the ten percent of academically outstanding public schools, and that it is not only the nonwhite inner-city schoolchildren who are receiving an inadequate education, majority white parents and taxpayers would be more likely to intervene. Unfortunately, given the media's racial composition, its bias will most likely continue to influence the reporting of the severity of the problem for majority students.[259]

As the litigation strategy is currently constituted, it allows majority white parents to feel better about their children's education because they can believe that it is at least better than that being received by the non-white inner-city students; at least to that extent their child will have a competitive advantage. Their whiteness again becomes a valuable property right, where simply being white means their child is not receiving the worst education. As such, the litigation strategy provides comfort—where there should be none. Racism serves to maintain the status quo in the education context, to the detriment of all children.

V. CONCLUSION

Public choice theory, which ignores ideology and media influence on the legislative process, cannot predict the political influence that large and diffuse groups have in the legislative process. The ideological bonding between legislators and large and diffuse groups gives those groups political power. Further, the media supports the maintenance of the status quo by often ignoring the larger issues. In order for public choice theory to remain viable, it must take into account all factors that may allow large, diffuse groups to dominate the political process, particularly where racial division is involved.

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257. Schwartzstein, *supra* note 19, at 608-13 ("Public choice scholars have shown that bureaucrats have incentive to maximize their budget requests . . . . ").

258. *Id.* at 608 ("Voters' incentives to monitor performance [of the bureaucrats] are often weak.")

259. KURTZ, *supra* note 205 ("The plain fact is that newspapers reflect the mood and values of white, middle-class society, and that society, by the early '90s had simply grown tired of the intractable problems of the urban underclass.").