

# SKYBOX SCHOOLS: PUBLIC EDUCATION AS PRIVATE LUXURY

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## ABSTRACT

For the past three decades, plaintiffs in hundreds of state and federal court lawsuits have challenged state laws that fund public schools with the local property tax. As socioeconomic segregation remains at extremely high levels across the country, reliance on a tax that is based on the wealth of the property within a school district's territory produces huge inequality in revenues. As the result of numerous court opinions, legislative reforms, and public pressure, many states have revised their funding formula to shift some of the burden to the state level. However, notwithstanding the wide-ranging statutory amendments and increased state funding, the tremendous gap between wealthy and poor districts remains. In some cases the gap has increased, even in many of those states whose highest courts have invalidated their school finance statutes. This Article asserts that this entrenched inequality stems from two related facts: first, that the local property tax remains the single most important source of public school dollars; and second, that most state finance reforms have left untouched the ability of school districts to raise as much money from the local property tax as the district's property owners will tolerate.

This Article considers the insights of Professor Robert Frank's book *Luxury Fever* and explores the spending patterns of wealthy school districts. It concludes, much like Frank concluded in his analysis of the private consumer market, that unchecked taxing and spending powers have created a pattern of luxury spending by the nation's wealthy school districts. It then evaluates, and rejects, the arguments used by those who support the preservation of unlimited local taxing discretion. Subsequent sections describe the statutory schemes of those few states that have purported to implement caps, showing how the caps themselves typically contain so many exemptions and exceptions that they fail to impose a real limit on wealthy district spending. Suggesting that it is time to reconsider

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the widespread support of the local property tax for school funding, this Article concludes by proposing that states completely replace the local property tax with a statewide tax on real property and narrowly limit the ability of wealthy districts to “overspend.” Although the proposals leave unanswered many difficult questions about educational policy and equal school funding, this Article concludes that a cap on school district taxing powers is a fundamental prerequisite to meaningful school finance reform.

## I. INTRODUCTION

After more than 30 years of school finance litigation in state and federal courts, numerous statutory reform measures, and countless scholarly articles, elementary and secondary education in the United States appears to be stuck in a permanent crisis mode. With some notable exceptions, and notwithstanding continuously increasing levels of school funding,<sup>1</sup> student achievement levels remain unsatisfactory,<sup>2</sup> the disparities between wealthy and poor districts remain,<sup>3</sup> and litigation over school spending continues at a steady pace.<sup>4</sup> It is not for lack of statutory experimentation or novel legal argumentation that American education has not lived up to the standards enshrined in many state constitutional guarantees of “a general, suitable and efficient system [of education]”<sup>5</sup> or “an efficient system of high quality public educational institutions.”<sup>6</sup>

In most states, in spite of widespread litigation and legislative reform, the most important single source of revenue for elementary and secondary schools is still the local property tax.<sup>7</sup> The amount of money generated by

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1. According to one prominent scholar in the debate over school finance, per-pupil spending has risen “from \$164 in 1890 . . . to \$4622 in 1990, roughly quintupling in each fifty-year period.” ERIC A. HANUSHEK ET AL., *MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS* 27 (1994).

2. *See infra* note 23.

3. *See infra* text accompanying notes 10–11.

4. Noting that in 2001, lawsuits were “pending or planned” in 45 states, one author concluded that the issue of school funding “is not going away anytime soon.” David Brunori, *Political, Legal Crises Plague School Finance*, 20 ST. TAX NOTES 339, 340 (2001).

5. ARK. CONST. art. XIV, § 1.

6. ILL. CONST. art. X, § 1.

7. Nationally, local revenues account for 44% of total public school expenditures. U.S. DEP’T OF EDUC., NAT’L. CENTER FOR EDUC. STATISTICS, *FINANCING ELEMENTARY AND SECONDARY EDUCATION IN THE STATES: 1997–98*, at tbl.A-1 (1997). A comparison of individual states, however, reveals a substantial range. New Mexico, whose schools receive a scant 10% of their revenues from local property taxes, approximately, is the state with least dependence on property taxes. *Id.* At the other end of the spectrum, in 1997 New Hampshire generated nearly 67% of its school funds from that source. *Id.* State funding levels, however, are increasing. In 1992, state funding constituted half or more of elementary and secondary education spending in thirty states. Michael F. Addonizio, *Equality*

that tax is a function of two crucial variables: the tax rate levied and the value of the property within the taxing district's boundaries.<sup>8</sup> The results are inevitable: districts with high property value within their borders will be able to generate more revenue, frequently applying a much lower tax rate, than those with less.<sup>9</sup> In numerous lawsuits, plaintiffs have challenged this financial disparity using a variety of legal theories, arguing that something is amiss when the quality of educational opportunity available to America's children crucially depends on the value of the property located in their school districts. Frequently, the differences reach dramatic proportions—in Texas, for instance, the disparity in property values between wealthiest and poorest school districts reflected a 700 to 1 ratio.<sup>10</sup> In terms of dollars spent per pupil, though the numbers are less extreme than those documenting disparity in property values, wealthy districts may outspend poor districts by a factor of two or three.<sup>11</sup>

In response to the so-called “waves”<sup>12</sup> of school finance litigation that have spanned the last few decades, and also in response to public demands for educational improvement, legislators in numerous states have adopted wide-ranging reforms of their school funding schemes. In some states, the

or *Choice? School Finance Reform and the Income-Expenditure Relationship*, 23 J. EDUC. FIN. 22, 22 (1997).

8. RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 317, 548–51 (6th ed. 2004).

9. According to a federal study, on a nationwide basis, “most poor districts tax themselves at higher rates than those in wealthy districts.” U.S. GEN. ACCOUNTING OFFICE, *SCHOOL FINANCE: STATE EFFORTS TO EQUALIZE FUNDING BETWEEN WEALTHY AND POOR SCHOOL DISTRICTS 2* (1998) [hereinafter *STATE EFFORTS*]. In Texas, for instance, in 1985–1986, the 100 poorest school districts had a tax rate that was nearly double the tax rate for the 100 wealthiest districts, yet the poor districts generated less than half the revenue. See *Edgewood Indep. Sch. Dist. v. Kirby* (Edgewood I), 777 S.W.2d 391, 393 (Tex. 1989).

10. *Id.* at 392.

11. See, e.g., *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 92 (Ark. 1983); *Tenn. Small Sch. Sys. v. McWhorter*, 851 S.W.2d 139, 143 (Tenn. 1993); John Schomberg, *Equity v. Autonomy: The Problems of Private Donations to Public Schools*, 1998 ANN. SURV. AM. L. 143, 145 n.12 (citing figures that show that in 1986–1987, the ten highest-spending school districts in New York spent 2.6 times more on a per-pupil basis than the ten lowest). A General Accounting Office study describes how Minnesota plaintiffs showed that, in 1989, the wealthiest 10% of school districts raised on average six times more revenue than the poorest 10% through a particular tax levy, even though the poorest districts' tax rates were about 25% higher. U.S. GEN. ACCOUNTING OFFICE, *SCHOOL FINANCE: THREE STATES' EXPERIENCES WITH EQUITY IN SCHOOL FUNDING 7* (1995) [hereinafter *THREE STATES*]; see also William T. Hartman, *Education Funding Disparities: What Do the Dollars Buy?*, 24 J. EDUC. FIN. 389, 389 (1999) (noting that differences between wealthy and poor school districts by a factor of two or three are “not uncommon”). Overall nationwide data confirms the gap: wealthy districts on average provide 24% more funding per pupil than poor districts. See *STATE EFFORTS*, *supra* note 9, at 2.

12. The term is used frequently in the literature to describe several stages of school finance litigation. The three waves are described in *infra* text accompanying notes 26–54.

legislatures have refused to upset the underlying principles that allocate revenue to schools, preferring instead to adopt modest changes that can be touted in political campaigns as evidence of the legislators' commitment to education.<sup>13</sup> In other states, however, the statutory revisions have produced fundamental overhauls of education funding,<sup>14</sup> adopting new financing mechanisms that attempt to close the gap between wealthy and poor and to guarantee that children in school will in fact be educated during the hours they spend there. Overwhelmingly though, whether the reforms be minimal or substantial, most states have not interfered with the ability of school districts to generate as much money as local property values and local political acceptance of higher tax rates will tolerate. In some districts, the presence of valuable non-residential property means that the property tax will generate high revenues at a low taxing rate; in other wealthy districts, high per-pupil funds depend on the assent of the wealthy residential property owners to tax themselves at high rates. Whatever the source of the revenues, legislators tend to tread very lightly when it comes to interfering with the ability of a local district to generate local revenues for local schools.

For the most part, courts and commentators concur with that prevalent legislative consensus. Widespread support defends the proposition that legislatures should maintain their hands-off policy vis-a-vis the property-wealthy, high revenue-raising districts. Coalescing under the broad rubric

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13. Legislative reluctance to adopt significant reform in the wake of judicial invalidation of existing statutory schemes frequently provokes protracted battles between the legislature and the judiciary. For example, when the Texas Supreme Court invalidated its statutory school funding scheme in 1989, it took six years and three more supreme court opinions for the legislature to produce what the court described as "minimally acceptable." *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 726 (Tex. 1995). In a more recent case involving the same statute, the court noted how the legislature has amended the Education Code during each legislative session between 1993 and 2003, with little change in school funding patterns. *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 572 (Tex. 2003). For a detailed account of the *Edgewood* litigation, see J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607 (1999). More recently, in Ohio, the supreme court issued its fourth opinion in ongoing litigation over school funding. In *DeRolph v. State*, 780 N.E.2d 529, 530 (Ohio 2002), the court overruled its earlier decision to leave the reform of school funding to legislative prerogative, explaining that its decision was prompted by the legislature's failure to respond to the court's mandate of "a complete systematic overhaul" of school funding. *See id.* (quoting *DeRolph v. State (De Rolph I)*, 677 N.E.2d 733 (Ohio 1997)). One commentator speculates that wealthy districts have been quite powerful roadblocks to meaningful legislative reform. Kirk Vandersall, *Post-Brown School Finance Reform*, in STRATEGIES FOR SCHOOL EQUITY 7, 20 (Marilyn Gittel ed., 1998).

14. For instance, one commentator describes the state's legislative response to the Kentucky Supreme Court's ruling in *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989), as perhaps "the most comprehensive . . . statewide education reforms in the nation." Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 485 (1999).

of local control, defenders of the status quo emphasize that wealthy districts have voluntarily, and commendably, assumed the burden of higher taxes in exchange for excellent schools. Even those who litigate on behalf of poor, underfinanced school systems frequently make the strategic decision not to challenge the taxing and spending prerogatives of the wealthiest districts.<sup>15</sup> Limiting spending in those school districts, the common wisdom goes, would have numerous disadvantages.<sup>16</sup>

As a result, it is perhaps not surprising that in most states, school districts retain the ability to set their own upper limits on spending. Though statutory reform may push up the bottom to ensure that all districts receive at least a certain minimum level of per-pupil dollars, only a few states have dared to limit the expenditures at the top.<sup>17</sup> In those unusual states, the cap on school spending is generally accomplished in one of two ways. One approach establishes a cap on the amount of money a district may spend per pupil.<sup>18</sup> The other allows wealthy districts to generate more than a state-mandated amount of per-pupil revenue, but imposes a recapture provision that reallocates those funds that exceed a statutorily determined maximum.<sup>19</sup> In essence, the recapture provisions transfer locally-raised revenues according to state plan, either to a state education fund or directly to poor or low-performing districts.

To say that much has been written about school finance reform is a tremendous understatement. Numerous books, articles, appellate briefs, and judicial opinions have documented the extent of the disparity between rich and poor districts, debated the theories of school finance reform, and argued about where school funds should come from and how they should be spent. This Article takes on only one important issue embedded in all of those debates, and urges reconsideration of the prevalent assessments of spending by the states' wealthiest school districts. Specifically, it suggests that public education has fallen prey to the same "Luxury Fever" spending

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15. One account of the drama behind Kentucky's school finance reform details how the proponents "advocated an infusion of funds and 'leveling up,'" and their firm commitment not to "take resources away from any district." Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984-1995*, 26 LAW & SOC. INQUIRY 631, 649 (2001).

16. See *infra* discussion at text accompanying notes 79-103.

17. See John Augenblick, *The Role of State Legislatures in School Finance Reform: Looking Backward and Looking Ahead*, in STRATEGIES FOR SCHOOL EQUITY 89, 93 (Marilyn Gittell ed., 1998) (describing Colorado and Washington as "among the very few states that place limits on how much revenue school districts can choose to raise on their own," and Montana and Wyoming as using a "recapture" method to produce district equality).

18. See *infra* discussion at text accompanying notes 108-45.

19. See *infra* discussion at text accompanying notes 146-203.

patterns identified by Professor Robert Frank in his book by the same name.<sup>20</sup> As a review of school district spending will confirm, the luxury spending phenomenon is discernible in the habits of the country's wealthiest school districts.<sup>21</sup> And as their per-pupil expenditures rise rapidly, other districts are forced to try to keep up.<sup>22</sup> With no meaningful increases in student achievement, however, and with widespread gaps between the top and the bottom, we are left to wonder whether the money

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20. ROBERT H. FRANK, *LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS* (1999). In his analysis of the private consumer market, Frank noted how incomes at the high end have recently skyrocketed, how spending on luxury goods has increased at a disproportionate rate, and how that increase has produced a never-ending upward spiral by lower-end consumers seeking to keep up with the top. *Id.* at 14–32. For instance, the earnings of the highest 1% of the U.S. population have doubled since 1989. The number of people with incomes of more than \$150,000 also doubled between 1980 and 1990. *Id.* at 33; *see also* LIZABETH COHEN, *A CONSUMERS' REPUBLIC* 344, 395–96 (2003) (noting that between 1980 and 2000, the income of the nation's top 5% of families increased from 14.6% to 20.8% of the total national income). On that basis, Professor Frank concluded that “people who had a lot of money to begin with have considerably more now, and there are also many more people with a lot of money than there used to be.” FRANK, *supra*, at 34. This growing disparity between rich and poor extends far beyond the frequently cited gap between the incomes of CEOs and average workers. *Id.* at 33 (noting that in 1973, the average CEO earned 35 times as much as the average worker, while today the CEO's salary outpaces the average workers' by a factor of 200). Another indicator of income disparity is the fact that the top 20% of the population earns 56% of the income. Ray Boshara, *Poverty is More Than a Matter of Income*, N.Y. TIMES, Sept. 29, 2002, at D13. Moreover, in terms of asset accumulation, the top 20% of the population now holds 83% of the wealth. *Id.* In addition, between 1993 and 1998, asset poverty rose 14%. *Id.* Professor Frank found that the excess of disposable cash at the top of the wealth ladder has fueled a remarkable spiral of what Frank has dubbed “Luxury Fever,” in which the amount of money used to buy luxury goods is increasing at four times the rate of overall national spending. FRANK, *supra*, at 267. Seeking to keep up with that frenetic pace, Americans with lower incomes are imitating the spending patterns at the top. As a result, the rate at which Americans save is down by 40% since 1980, credit card debt is up 60% since 1989, and bankruptcy filings in 1997 reached an all time high of 1.4 million, one for every 70 households in the country. *Id.* at 45–48. Bankruptcy filings recently hit the one million mark, and the rate reflects a 400% rise in filings for individuals over recent years. Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOOD HALL L.J. 189, 195 (1999).

21. *See infra* discussion at text accompanying notes 104–255.

22. In his book, Frank suggests an explanation for the continued acceleration of luxury spending. First, he argues, counter to classic economic assumptions, happiness may depend more on an individual's relative position in society than on his or her absolute amount of wealth. FRANK, *supra* note 20, at 109. In his exploration of the incentives that mold patterns of individual consumption, Frank identifies the importance of relative position to individual consumers and the way in which the importance of that position fuels the Luxury Fever spending spiral. *Id.* at 109–11. For example, consider the simple but representative example of luxury watches. If the once trend-setting \$20,000 watch becomes widely consumed and displayed, I will not call attention with a similarly priced watch; only a more expensive watch, say a \$30,000 model, will do. That distinction is temporary, however, as those with \$20,000 watches will then strive to outshine my \$30,000 purchase. As they do so, the impact of their behavior on my spending is completely predictable: to save my position at the top, I must find new, more expensive products that are out of reach for those below me. That “top,” of course, is a moving target, and requires constant upping of the ante to maintain the distinction. *Id.* at 146–58.

we are “throwing”<sup>23</sup> at our most lavishly funded schools is indeed money well spent. Whether the doctrinal rubric of the state’s school finance reform movement be equality, adequacy, or some other legal principle,<sup>24</sup> the contention here is that the unchecked, and ever upward, trajectory of wealthy school district spending has profoundly negative consequences for the future of public school finance. If this insight is correct, the conclusion is inescapable that the vast majority of school funding reform is seriously flawed. Only those few states that have dared to limit revenue raising and spending by the wealthiest school districts are on the right track. However, as later parts of this Article will argue, even those serious reform efforts have defects that compromise their workability.<sup>25</sup>

This Article begins with a brief review of the legal theories that have fueled school finance litigation, a description of the prevalence of luxury spending in public education, and a defense of the Article’s central claim that state law should impose limits on local school district taxing and spending powers. Subsequent sections evaluate the statutory schemes of those few states that purport to check the upward spiral of school spending. The Article then reflects on how current local governmental structures have tolerated, and indeed strengthened, luxury spending in public education. It concludes by suggesting several important ways in which reform efforts should be refocused. Though the conclusion does not presume to offer a magical solution for funding formulas or a definitive

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23. This term is frequently used in the debate over whether states that “throw” money at poor school districts realize any demonstrable benefit from that spending. The work of Eric Hanushek is at the forefront of the literature whose studies of under-achieving districts conclude that “expenditures are not systematically related to student achievement.” Eric A. Hanushek, *The Impact of Differential Expenditures on School Performance*, 18 EDUC. RESEARCHER 45, 50 (1989); see also Eric A. Hanushek, *Throwing Money at Schools*, 1 J. POL’Y ANALYSIS & MGMT. 19 (1981). Defendants in school finance litigation frequently use Hanushek’s claims to argue against increased spending for low achieving districts. See, e.g., Opinion of the Justices, 624 So. 2d 107, 117–18, 139–40 (Ala. 1993); Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 494, 507, 510–11, 520 (N.Y. Sup. Ct. 2001), *rev’d*, 744 N.Y.S.2d 130 (N.Y. App. Div. 2002), *aff’d as modified* by 801 N.E.2d 326 (N.Y. 2003); Hoke County Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at \*56 (N.C. Sup. Ct. Oct. 12, 2000), *aff’d in part, rev’d in part* by 599 S.E.2d 365 (N.C. 2004). Some might find irony in the fact that the same defendants who assert the lack of correlation between student achievement and money vigorously defend the power of rich districts to spend lavishly on their own students. The principle seems to be that it is foolish to throw money at poor schools but not at wealthy ones. Moreover, in recent funding litigation the court noted that Dr. Hanushek testified, not that “money doesn’t matter,” but rather that “money spent wisely, logically, and with accountability would be very useful indeed [to closing the achievement gap].” Montoy v. State, No. 99-C-1738, 2003 WL 22902963, at \*49 (Kan. Dist. Ct. Dec. 2, 2003). In fact, Hanushek concluded by agreeing that “[o]nly a fool would say money doesn’t matter.” *Id.*

24. For a review of the legal theories used in school funding litigation, see *infra* discussion at text accompanying notes 26–54.

25. See *infra* discussion at text accompanying notes 104–255.

resolution of the many disputes over the proper allocation of governmental power in education, it suggests several important components of successful and equitable school finance reform. Specifically, the Article urges abolition of the local property tax for school funding and adoption of a statewide property tax, with revenues allocated on the basis of student educational needs rather than on the basis of district property wealth. In addition, it recommends that states tolerate some luxury spending by local districts in excess of the state equalized formula, but that the spending be steeply taxed, so as to limit the upward trajectory of school district funding patterns.

## II. MONEY AND INEQUALITY IN SCHOOL FINANCE LITIGATION

### A. *A Brief History of School Funding Litigation*

As numerous commentators have explained, school funding litigation is traditionally referred to in waves.<sup>26</sup> The first wave, disappointingly short for its proponents, used the huge disparity between wealthy and poor school districts as the basis of a federal equal protection challenge.<sup>27</sup> The documented inequality was staggering, and the plaintiffs were able to garner judicial concern for their plight.<sup>28</sup> In the end, though, the U.S. Supreme Court's opinion in *San Antonio Independent School District v. Rodriguez*<sup>29</sup> closed the federal courthouse door to those seeking to attack entrenched financial inequality in school district finance. Relying on the importance of local control in public education,<sup>30</sup> and describing its doubts

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26. For some of the vast literature discussing the three waves of school finance litigation, see, for example, Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 571–79 (1998) [hereinafter Heise, *Hollow Victories*]; Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995) [hereinafter Heise, *Third Wave*]; Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507 (1991); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decisions as a Model*, 35 B.C. L. REV. 597 (1994); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990).

27. See *supra* note 26.

28. See William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 721–32 (1992). The author asserts that although the entire United States Supreme Court recognized a "fundamental wrong," inherent in the Texas school funding system, a majority was not persuaded that the remedy sought would be effective. *Id.* at 721 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

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

30. The Court explained the importance of local control to public education:

about the alleged connection between school district spending and quality of education,<sup>31</sup> the Court upheld the constitutionality of a school finance system based on local property taxes.<sup>32</sup>

Rebuffed in federal courts, the second wave brought the equality theory to state courts.<sup>33</sup> In those cases, the plaintiffs continued to highlight the unfairness and inequality inherent in a system in which school funds depended on the wealth of the district in which the school was located. The success rate of the second wave, though better than the first, was mixed.<sup>34</sup> And even when state courts ordered legislative reform targeted at ending the revenue disparity between rich and poor districts, the gaps persisted.<sup>35</sup> In part, the preservation of inequality may be due to the fact that most judicial equalization decrees spurred the passage of legislation that strove to attain “taxpayer equality” rather than equality of school revenues or equality of educational opportunity. In those funding schemes, commonly referred to as “district power equalizer”<sup>36</sup> formulas, every school district that taxed at the state-specified levy was assured of state supplementation to bring its revenues up to a guaranteed level of funding.<sup>37</sup> At the same time, though, wealthy school districts were left free to continue to generate higher levels of property tax revenue. As a result,

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In part, local control means . . . the freedom to devote more money to the education of one’s children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. . . . No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

*Id.* at 49–50.

31. The Court noted the “unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it.” *Id.* at 23–24.

32. *Id.* at 47.

33. The terms “equality” and “equity” have been used interchangeably to refer to the doctrinal basis of this second wave of school finance litigation. See William E. Thro, *Judicial Paradigms of Educational Equality*, 174 ED. L. REP. 1, 30–31 n.107 (2003).

34. According to one count, of the 20 equality cases brought in state court, only seven were successful. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 267 nn.74–75 (1999) [hereinafter Ryan, *Race and Money*].

35. One study of Texas school finance noted that in 1996–1997, years after the Texas Supreme Court had ordered equalization, the gap between wealthy and poor districts in terms of per-pupil funds was still tremendous, ranging from \$4000 to over \$10,000. Liz Kramer, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC. 1, 30 (2002).

36. For an explanation of the district power equalizer, see Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 110–11 (1995); and Vandersall, *supra* note 13, at 17, 22 n.1.

37. Enrich, *supra* note 36, at 111.

much inequality typically fell beyond the reach of state legislative responses to judicial equalization orders.

In the 1980s, concurrent with many of the second wave equality lawsuits, a third wave of school finance litigation took shape. Raising the so-called adequacy challenge, this third wave shifted its focus away from the inequality of per-pupil and per-school expenditures, embracing in its stead the argument that all children are entitled, not to an equal educational experience, but rather to an adequate one. Focusing on specific state constitutional guarantees of educational quality, litigants were able to point to the documented failures of many schools as evidence that children were receiving an inadequate education.<sup>38</sup> Coinciding with the ascendancy of the call for standards and accountability in U.S. schools, adequacy appealed to those who sought to articulate clear expectations for school performance and to define assessment mechanisms for evaluating achievement.<sup>39</sup>

The doctrinal shift from equality to adequacy, which allowed school reformers to use “failure in the classroom . . . [to achieve] success in the courtroom,”<sup>40</sup> can be traced to a number of forces and considerations. First, the sheer cost of equalizing school funding, if equalization were understood to mean that all schools should receive the amount spent by the state’s wealthiest districts, would be astronomical. In the case of Texas, for instance, the state Attorney General estimated that it would require an amount equal to four times the total state budget to bring all districts up to the top.<sup>41</sup> Adequacy would be less expensive to achieve because it focuses not on leveling up to the top but on making sure that all public education meets some minimum mandated standard. Second, judicial reluctance to adopt the equality norm for school district funding may have reflected the courts’ concern that the same reasoning could be extended to cover claims

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38. Continuing to build on the wave metaphor, Professor James Ryan has identified an incipient “fourth wave” of litigation that seeks desegregation of the public schools and redistricting to achieve integration. Ryan, *Race and Money*, *supra* note 34, at 307–10; *see also* Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts’ Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867 (1998).

39. *See* Molly McUsic, *The Law’s Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 117–19 (Jay P. Huebert ed., 1999) [hereinafter McUsic, *The Law’s Role*]; Michael Heise, *Equal Educational Opportunity and Constitutional Theory: Preliminary Thoughts on the Role of School Choice and the Autonomy Principle*, 14 J.L. & POL. 411, 428 (1998) [hereinafter Heise, *Equal Educational Opportunity*]; Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL’Y 633, 634–35 (2002) [hereinafter Heise, *Unintended Consequences*].

40. *See* Heise, *Unintended Consequences*, *supra* note 39, at 634.

41. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 495–96 (Tex. 1991).

to equality in a wide range of municipal services.<sup>42</sup> Adequacy claims, in contrast, are precisely and narrowly tailored to the specific education clauses in state constitutions. Third, the wealthy districts' strenuous opposition to any reform that sought to limit local spending is frequently cited as an important reason behind the shift to adequacy.<sup>43</sup> Adequacy theories typically do not seek to disturb the ability of wealthy districts to generate funds that far exceed the revenues of the poorer districts in the state. Thus, adequacy does not require the decisionmakers to sacrifice spending on their own children's education in order to provide others with educational opportunities.<sup>44</sup> Fourth, implementation of the equality norm is complicated because the term itself has so many definitions<sup>45</sup>—it could refer to equality of funds, equality of educational services, equality of educational outcomes, or equality of revenue raising ability.<sup>46</sup> Fifth, some

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42. See Enrich, *supra* note 36, at 161. The United States Supreme Court suggested this concern in its *Rodriguez* opinion. See *Rodriguez*, 411 U.S. at 54. Several state courts have also explicitly recognized the same concern. See, e.g., *Shofstall v. Hollins*, 515 P.2d 590, 593 (Ariz. 1973); *Thompson v. Engelking*, 537 P.2d 635, 646–47 (Idaho 1975); *Robinson v. Cahill*, 303 A.2d 273, 281 (N.J. 1973).

43. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 328–29 (1991) [hereinafter McUsic, *The Use of Education Clauses*]; see also Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1, 16–17 (2002) (noting how adequacy claims are far less threatening, and thus more acceptable, to wealthy school districts). One description of Kentucky school reform describes how proponents were “mindful of the need to reassure wealthier school districts and the public generally that they themselves were, as they put it ‘anti-Robin Hood.’” Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984–95*, 26 LAW & SOC. INQUIRY 631, 649 (2001). In reality, the wealthy districts have little to fear from school equalization decrees. Most have not resulted in legislation that takes away funds or limits taxing and spending by the state's wealthiest districts. See *supra* text accompanying notes 13–16.

44. As one commentator has noted, the adequacy theory tends to “validate the values and choices of the decision-making elites, affirming the priority they place on quality education, by recognizing it as a universal good to which all children should be entitled.” Enrich, *supra* note 36, at 169.

45. Commentators frequently use the terms horizontal equity, vertical equity, and fiscal neutrality to describe different conceptions of equity. Horizontal equity treats all students equally, thus requiring equal per-pupil expenditures. Vertical equity recognizes that equality must be sensitive to the specific, special needs of students, and that some students will require more services. Fiscal neutrality treats taxpayers equally, insuring that equal taxpayer efforts will generate equal funds. See STATE EFFORTS, *supra* note 9, at 5.

46. See Enrich, *supra* note 36, at 143–55. A related argument is that some believe that adequacy is easier to monitor and evaluate than equality. See Helen Hershkoff, *School Finance Reform and the Alabama Experience*, in STRATEGIES FOR SCHOOL EQUITY 32 (Marilyn Gittell ed., 1998). Not all would agree that adequacy is an easier term for judicial implementation. See Heise, *Unintended Consequences*, *supra* note 39, at 633 (tracing the development of the standards movement in education and its incorporation by the judiciary, and concluding that courts are not well suited to define and monitor educational policy); James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 549 (1999) (noting how judicial definition of adequacy is idiosyncratic and subjective). One author has argued that in several important ways, equalization is a more manageable judicial norm than adequacy because it keeps the court out of the difficult inquiry about how much

saw adequacy as more properly reflecting the broader right of society to an educated citizenry, whereas equality more narrowly focused on an individual student's rights.<sup>47</sup> Finally, adequacy was often seen as a more attractive theoretical basis for relief for large urban districts, many of which actually receive more than the average per-pupil funds in their states yet continue to underperform.<sup>48</sup>

Like the equality litigation it has tended to replace, the success of adequacy litigation in the courtroom has been mixed.<sup>49</sup> Though both

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money must be spent on schools. Equality orders, in contrast to adequacy orders, say nothing about how much money is needed, but rather insist that "the same kind of decision be made for all the children in the state—a decision free from the influence of local wealth . . . . The core of the wrong . . . is not the deprivation of any particular level of education but the deprivation of a fair decision about the spending level." Clune, *supra* note 28, at 721–32.

47. See Hershkoff, *supra* note 46, at 32.

48. See Heise, *Unintended Consequences*, *supra* note 39, at 648; James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2062 (2002). In reality, the per-pupil expenditure figures for children in large urban school districts are likely to be misleading. They do not take into account the fact that those school districts spend far more than average on services such as special education and bilingual education. New York City, for instance, spends 22% of its total budget on special education. See McUsic, *The Law's Role*, *supra* note 39, at 106. A study of the Hartford school system found that though the city was first in the region in overall per-pupil expenditures, when amounts spent on special education and other special needs programs were excluded, the district fell to last in the region. *Id.* at 111. Large urban districts, with high numbers of poor children, suffer from many other costly deficiencies: "high mobility of students, unqualified and burned-out teachers, students with untreated serious health problems, developmental disabilities, hunger, family disruption, and violence. They often have higher security costs. Their buildings are usually much older than in more recently developed suburban areas . . ." *Id.* at 106. Thus, comparison of per-pupil expenditures may be a meaningless measure in the search for equality in educational opportunity.

The courts of Kansas and Wyoming, among the most firmly committed to equalization of school finance, make clear that equality cannot mean equal dollars per pupil. Rather, in the view of the Wyoming courts, a constitutional school funding formula ". . . will be quite complex. More money may be needed in one school district to achieve quality education than in another because of, e.g., transportation costs, building maintenance costs, construction costs, logistic considerations, number of pupils with special problems, et cetera." *Campbell County Sch. Dist. v. State (Campbell I)*, 907 P.2d 1238, 1246 (Wyo. 1995) (quoting *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 315 n.3 (Wyo. 1980)). Similarly, the Kansas court has stated: "Obviously, educational needs, and concomitant costs, will vary from child to child and from place to place. The mandate is to furnish each child an educational opportunity equal to that made available to every other child. To do so will unquestionably require different expenditures at different times and places." *Montoy v. State*, No. 99-C-1738, 2003 WL 22902963, at \*10 (Kan. Dist. Ct. Dec. 2, 2003). As understood by these courts, the equality norm applies to the educational opportunity of the state's children, and does not require equal dollars per student irrespective of needs and circumstances.

49. Courts upholding adequacy claims include: *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Sec'y 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); *Reform Educ. Fin. Inequities Today v. Cuomo*, 655 N.E.2d 647 (N.Y. 1995); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *DeRolph I*, 677 N.E.2d 733; *Edgewood I*, 777 S.W.2d 391. *But see* *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d

theories continue to surface in state court litigation,<sup>50</sup> and though the differences between the two may be more theoretical than real,<sup>51</sup> most commentators seem to agree that the adequacy approach is preferable.<sup>52</sup> This support sometimes comes reluctantly, as it carries with it a recognition that success in an adequacy lawsuit may leave in place the significant inequality that led to the school funding challenges in the first place.<sup>53</sup> The debate about the relative merits between the two theories may be largely academic, however, as some studies suggest that relative rankings among the states have changed little, if any, irrespective of judicial decrees.<sup>54</sup>

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1178 (Ill. 1996); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170 (Kan. 1994); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995). Superimposed on the academic debate about the relative merits of equity and adequacy is the also unresolved debate about the effect of litigation. Research has yet to establish a conclusive link between the success of school finance litigation and the improvement of school funding in the state where the litigation was filed. Patricia F. First & Barbara M. De Luca, *The Meaning of Educational Adequacy: The Confusion of DeRolph*, 32 J.L. & EDUC. 185, 187 n.6 (2003); see also Bradley W. Joondeph, *The Good, the Bad, and the Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform*, 35 SANTA CLARA L. REV. 763, 809 (1995) (concluding that interdistrict disparities in school funding remained unchanged across the nation, but were reduced somewhat in states with successful school finance litigation). Professor Joondeph also concluded, however, that overall education spending increases in those states were slower than in the rest of the country. *Id.* at 810.

50. The high courts of two neighboring states, Vermont and New Hampshire, both recently invalidated state school funding schemes. The holding in the Vermont case, *Brigham v. State*, 692 A.2d 384 (Vt. 1997), was based most directly on an equal protection analysis, while the New Hampshire court, *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997), relied more specifically on adequacy.

51. Notwithstanding the clear theoretical distinctions between adequacy and equality, the reality is somewhat less dichotomous. In fact, one commentator has shown how courts using adequacy as the doctrinal basis of their decision repeatedly focus on inequality as evidence of inadequacy. See Enrich, *supra* note 36, at 130–31, 133–34, 140. The convergence is not surprising. Large gaps between the top and the bottom are powerful images for claims of inadequacy. Similarly, inadequate school districts are generally poor and can point to huge funding and spending disparities with wealthy districts. See generally BRIFFAULT & REYNOLDS, *supra* note 8, at 417–32. Irrespective of the theory, plaintiffs in all of these cases seek to end the substandard, indeed shocking, conditions and outputs of the nation's lowest performing schools. For example, consider the conditions described by the Ohio Supreme Court in *DeRolph I*, 677 N.E.2d 743–44.

52. McUsic, *The Use of Education Clauses*, *supra* note 43, at 307; see, e.g., McUsic, *The Law's Role*, *supra* note 39, at 90–92; Enrich, *supra* note 36, at 166–83; Heise, *Third Wave*, *supra* note 26; Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 495–501 (1998).

53. See Clune, *supra* note 28, at 728–29; Enrich, *supra* note 36, at 158–59.

54. See Michele Moser & Ross Rubenstein, *The Equality of Public School District Funding in the United States: A National Status Report*, 62 PUB. ADMIN. REV. 63, 70 (2002). Others have disputed those claims, arguing that those states whose courts invalidated school funding schemes in fact made greater gains in terms of equity of spending. See, e.g., William N. Evans, Sheila E. Murray & Robert Schwab, *Schoolhouses, Courthouses and Statehouses After Serrano*, 16 J. POL'Y ANALYSIS & MGMT. 10 (1997); Joondeph, *supra* note 49, at 774.

### B. *Throwing Money at Wealthy Districts*

Social scientists have long debated the extent to which “money matters” in school reform. In the courts, that controversy has raged since the first school finance challenges were litigated in the 1970s.<sup>55</sup> It continues unabated.<sup>56</sup> Countless studies have reached contradictory conclusions. On one side, the economist Eric Hanushek is today the undisputed leader of those whose statistical analyses purport to establish that “there is no systematic relationship between school expenditures and student performance.”<sup>57</sup> In the legal literature, Professor Ronald Ferguson’s research is frequently cited as support for the opposite claim—that is, that spending is positively correlated with enhanced educational achievement.<sup>58</sup> Another group of scholars takes the middle position that

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55. The Supreme Court essentially gave up on trying to answer that question, concluding that the question whether increasing school revenue would produce enhanced educational achievement was “unsettled and disputed.” *Rodriguez*, 411 U.S. at 23. In contrast, the New Jersey and Wyoming Supreme Courts asserted that the extensive disparity in school funding has a direct relationship to the quality of education. See *Robinson v. Cahill*, 303 A.2d 273, 278 (N.J. 1973); *Washakie*, 606 P.2d at 334.

56. One tally revealed that the courts of nine states explicitly concluded that school funding is correlated with student achievement. Denise C. Morgan, *The New School Finance Litigation: Acknowledging that Race Discrimination in Public Education is More Than Just a Tort*, 96 NW. U. L. REV. 99, 179 n.373 (2001). Other courts have disagreed. See *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1018 (Colo. 1982); *Leandro*, 488 S.E.2d at 260; Morgan, *supra*, at 179 n.373; see also Heise, *Unintended Consequences*, *supra* note 39, at 656 (noting judicial willingness to assume or deny the correlation, notwithstanding “significant social scientific uncertainty surrounding the nature and contour of the relation between resources and achievement . . .”); *id.* at n.148 (listing some of the most prominent literature on both sides of that debate).

57. Eric A. Hanushek, *When School Finance “Reform” May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 425 (1991). The original impetus for the huge body of research was a study published as the Coleman Report, named for the lead author, the sociologist James Coleman. JAMES S. COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966). The Coleman report concluded both that the amount of school funding had very little effect on student achievement, and that the two most important determinants of a child’s educational achievement were the family’s status and the socioeconomic level of the child’s classmates. For some of the numerous other studies that tend to concur with Hanushek, see, for example, CHRISTOPHER JENCKS ET AL., *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972); Jonathan Klick, *Do Dollars Make a Difference?: The Relationship Between Expenditures and Test Scores in Pennsylvania’s Public Schools*, 44 AM. ECONOMIST 81–87 (2000). Various law review articles summarize the literature and the debate over the extent to which money matters. See, e.g., Lloyd Cohen, *A Study of Invidious Racial Discrimination in Admissions at Thomas Jefferson High School for Science and Technology: Monty Python and Franz Kafka Meet a Probit Regression*, 66 ALB. L. REV. 447, 448 n.4 (2003); Dyson, *supra* note 43, at 10–11 (discussing the results of many studies that dispute Coleman’s and Hanushek’s claims); Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court’s Empirical Legacy*, 59 WASH. & LEE L. REV. 1309, 1326–28 (2002) [hereinafter Heise, *By the Numbers*]; Ryan & Heise, *supra* note 48, at 2102–03.

58. Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 488 (1991) (concluding that students’ academic achievement can be shown to depend significantly on teacher achievement, teacher experience, and class size). For

only some types of expenditures are positively correlated with enhanced student achievement.<sup>59</sup> Still others are basically agnostic on the issue, noting the “essential indeterminacy of the cost/quality relationship . . . .”<sup>60</sup>

What, then, do the statistics reveal about spending in America’s school districts? For the most part, they confirm that wealthy school districts have long been partaking of a luxury spending spree. At least three observations are relevant. First, the spending by wealthy districts has increased steadily.<sup>61</sup> Second, and notwithstanding the huge increases in state aid for education, the gap between wealthy and poor districts has continued unabated.<sup>62</sup> Though the difference has been reduced in some of those states whose courts have invalidated school funding systems, on a nationwide basis, the range still reveals stark differences.<sup>63</sup> In fact,

some of the literature that concurs with Ferguson’s claims, see, for example, Matthew M. Craft, Note, *Lost and Found: The Unequal Distribution of Local Option Sales Tax Revenue Among Iowa Schools*, 88 IOWA L. REV. 199, 211 n.99 (2002) (citing sources disputing Hanushek’s claims); Richard J. Murnane, *Interpreting the Evidence on “Does Money Matter?”*, 28 HARV. J. ON LEGIS. 457 (1991). The Alabama Supreme Court explicitly accepted Professor Ferguson’s conclusion that there is a positive correlation between student achievement levels and certain types of expenditures. Opinion of the Justices No. 338, 624 So. 2d 107, 140 (Ala. 1993).

59. See, e.g., Elizabeth A. Harter, *How Educational Expenditures Relate to Student Achievement: Insights from Texas Elementary Schools*, 24 J. EDUC. FIN. 281, 282 n.7 and 292–93 (1999).

60. Clune, *supra* note 28, at 727; see also Susan Pace Hamill, *An Argument for Tax Reform Based on Christian-Judeo Ethics*, 54 ALA. L. REV. 1, 34 n.102 (2002) (describing conflicting results in the social science literature); Hartman, *supra* note 11, at 390 (describing conflicting results as “inconsistent and inconclusive”).

61. One study of Pennsylvania school district spending determined that wealthy district per-pupil expenditures increased from \$4298 in 1984 to \$8032 in 1993. Hartman, *supra* note 11, at 394. That study also noted that property value and average citizen income per student rose at faster rates for the high spending districts. *Id.* at 396. One commentator describes similar inequality in Vermont prior to its school funding litigation. Thomas Downes, *School Finance Reform and School Quality: Lessons from Vermont*, in *HELPING CHILDREN LEFT BEHIND* (John Yinger ed., forthcoming 2004). Between 1989 and 1995, wealthy district spending increased at an annual rate of nearly 4%, while increases at the bottom of the range was under 2%. *Id.*

62. A federal analysis of school spending nationwide has concluded that even in states that have adopted statewide equalization efforts, wealthy districts frequently continue to preserve or exacerbate the gap. STATE EFFORTS, *supra* note 9, at 30–44. In fact, only those states that have capped spending by wealthy districts saw a substantial narrowing of the gap. *Id.*; see also McUsic, *Law’s Role*, *supra* note 39, at 88–89 (criticizing unfunded federal mandates, state and local government structures, and government subsidy of private schools as important forces in the preservation of school inequality). In fact, in some districts, the gap between wealthy and poor districts is increasing. Professor Martha Minow referred to a report in the popular press describing how the gap between wealthy and poor districts in terms of per-pupil expenditures on Long Island increased from \$400 in 1982 to \$1500 in 1991. Martha Minow, *School Finance: Does Money Matter?* 28 HARV. J. ON LEGIS. 395, 398 (1991).

63. One author notes that the gap remains, and in some cases has widened, even in states whose courts have ordered equalization. See Enrich, *supra* note 36, at 102–03 and n.6. Another concludes that overall intrastate equality in school funding improved slightly between 1992 and 1995. See Moser & Rubenstein, *supra* note 54, at 70. Yet another analysis of school funding patterns concluded that state judicial orders produced some reduction in interdistrict disparities, but that on a nationwide basis, interdistrict differences within a state remain significant. See Joondeph, *supra* note 49, at 809. The

increased state funds for the poorest districts may do little to reduce the gap between poor and wealthy districts in the absence of concurrent restrictions on taxing and spending by wealthy districts.<sup>64</sup> Third, at the international level, the United States' per-pupil expenditures are at the top,<sup>65</sup> yet student achievement is not.<sup>66</sup> When compared to many other nations, the U.S. consistently outspends and underperforms.<sup>67</sup> In the words

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more difficult question of whether judicial equalization orders have resulted in enhanced student achievement is also unresolved. See Hamill, *supra* note 60, at nn.102, 134.

64. See STATE EFFORTS, *supra* note 9, at 6–7, 32–42. The report analyzed spending data for four states that changed their school finance systems by adopting state level equalization schemes. *Id.* Two of the states, Oregon and Kansas, coupled the enhancement of state revenue with limits on local ability to tax and spend. *Id.* Two of the states, Louisiana and Rhode Island, did not. *Id.* While the gap between poor and wealthy districts decreased in Kansas and Oregon, it increased in Louisiana and remained the same in Rhode Island. *Id.*

65. In absolute per-pupil terms, the United States ranked first among G-7 countries, spending \$5434 per pupil, with other averages ranging from \$5297 (Sweden) to \$1463 (Korea). See U.S. DEPT. OF EDUC., NAT'L CENTER FOR EDUC. STATISTICS, ELEMENTARY AND SECONDARY EDUCATION: AN INTERNATIONAL PERSPECTIVE 27–28 (2000). In 1993–94, total expenditures in U.S. elementary and secondary schools were estimated at \$285 billion. See THREE STATES, *supra* note 11, at 3. At the same time, the U.S. school spending patterns displayed much less equality of distribution than existed in other countries. See *id.* at 41; see also Heise, *Equal Educational Opportunity*, *supra* note 39, at 419 n.37. According to one prominent commentator, per-student spending in U.S. schools has quintupled over each 50 year period since 1890. See ERIC A. HANUSHEK, MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS 27 (1994); see also McUsic, *The Law's Role*, *supra* note 39, at 110 (noting that the U.S. spends “more than virtually all other industrialized countries both as a total per pupil and as a percentage of government expenditures.”); Heise, *Hollow Victories*, *supra* note 26, at 566 (noting that the U.S. outspends almost all counterparts).

66. Though the performance of U.S. children in international assessments ranged from relatively good at the 4th grade level to below average at the 12th grade level, students in other countries routinely outperform their American counterparts. See U.S. DEPT. OF EDUC., NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 65, at 27–28; see also Michael Heise, *Choosing Equal Educational Opportunity: School Reform, Law, and Public Policy*, 68 U. CHI. L. REV. 1113, 1114–18 (2001) (summarizing data on the performance of U.S. students on international tests and government spending on education). The well-publicized decline in SAT scores is also used as evidence of declining student achievement in the face of rising student expenditures. See Heise, *Unintended Consequences*, *supra* note 39, at 642. Other research is more sanguine about American student achievement. See, e.g., Robinson, *supra* note 52, at 502–03 (summarizing one international literacy study that ranked American students highly). In fact, recent SAT scores show modest gains, leading some to express guarded optimism. See Diana Jean Schemo, *High School Seniors Get Highest SAT Math Scores in 35 Years*, N.Y. TIMES, Aug. 27, 2003, at B9.

67. A recent report by the Organisation for Economic Cooperation and Development and UNESCO Institute for Statistics compared international educational spending with international educational performance and found, once again, that although the United States spends more per student than any country except Norway and Luxembourg, its student achievement levels consistently lag behind. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT AND UNESCO INSTITUTE FOR STATISTICS, LITERACY SKILLS FOR THE WORLD OF TOMORROW—FURTHER RESULTS FROM PISA 2000 111–14 (2003); see also Matthew Ladner & Matthew J. Brouillette, *The Impact of Charter Schools and Public School Choice on Public School Districts in Wayne County, Michigan*, 45 HOW. L. REV. 395, 401 & n.17 (2002) (describing international studies that confirm that other countries “spend much less and get much better results.”); Lewis D. Solomon, *The Role of For-Profit Corporations in Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. TOL. L. REV. 883,

of one analyst of international educational achievement: “There are countries which don’t get the bang for the bucks, and the U.S. is one of them.”<sup>68</sup>

### *C. Limiting Luxury Spending in Public Schools*

The case for limiting spending by wealthy school districts does not depend on the resolution of the apparently interminable debate over whether, and if so how much, money is correlated with student achievement. On the one hand, if it is true that levels of funding are not correlated with student achievement, limiting spending at the top is smart, because it will either result in excess tax revenues that can be spent in other areas or in overall decreases in taxes with no decrease in student performance. Though the “money doesn’t matter” proponents typically use their statistical evidence to argue that it is foolish to “throw money” at low-performing and low-funded schools,<sup>69</sup> the argument seems to apply with equal force to counsel against overspending in those schools whose students are garnering the highest per-pupil funds in the state. If the generally-accepted claim that socioeconomic background is the most important predictor of student performance is in fact correct,<sup>70</sup> it may well be that high-spending, high-achieving districts are actually inefficient. That is, wealthy districts may be spending exorbitant amounts to produce the same outputs that would have resulted with far lower levels of spending.

On the other hand, if in fact it turns out to be the case that money does matter, limiting spending at the top in order to spread the wealth more broadly across the entire state would presumably produce more widely distributed gains in academic achievement. If expenditures really do influence educational achievement, withholding money from the lowest performing students, who come from the poorest and least advantaged families and neighborhoods, is indefensible public policy and runs counter to the exhortations with which school finance reform originated.

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885–91 (1993) (criticizing high spending levels that produce no academic gains, and describing the “weak academic achievement of U.S. school children” in comparison with school children worldwide).

68. See Editorial, *Money Can’t Buy the Best System*, BOSTON HERALD, Sept. 21, 2003, at A47 (quoting Barry McGaw, education director for the Organisation for Economic Cooperation and Development, which conducted an analysis of international spending on education; the study found that although the U.S. spent nearly 65% more than the average of the major industrialized nations, the performance of its 15-year-olds on math and reading tests fell in the middle).

69. See cases cited at *supra* note 55. In all of those cases, the defendants used Hanushek’s research to justify their failure to spend more money in the poorest districts.

70. See *supra* note 58.

Unchecked school district spending means that “the quality of a child’s education [is] a function of the wealth of his parents and neighbors.”<sup>71</sup> For those who still hold to the powerful simplicity of the Supreme Court’s description of education in *Brown v. Board of Education*, as “a right which must be made available to all on equal terms,”<sup>72</sup> this reality is unacceptable. Either way, then, reducing luxury spending on education would contribute to increased societal welfare.<sup>73</sup>

The next section evaluates a number of states that have in fact adopted school finance reforms that seek to reduce luxury spending. Though the laws differ in many ways, they all reflect a legislative determination to rein in spending by the wealthiest school districts, either through the imposition of tax limits or by redistributing excess revenues generated by application of a uniform tax levy. The literature and the case law suggest several important criticisms of the principles underlying this decision to check spending at the top. Thus, before analyzing the various state reforms that have taken that unusual move, it would be helpful to consider the range of the objections that have surfaced.

First, government action to limit luxury spending by public school districts might be challenged as inefficient, and as an unwarranted interference with personal freedom to spend as one chooses. According to the Tiebout model,<sup>74</sup> local governments, which include school districts,

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71. *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971). The court criticized the connection between wealth and educational quality in a system based on property tax revenues. *Id.* at 1263.

72. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

73. Current school spending patterns, where wealthy districts are engaged in a race to outspend each other, may respond to the same incentive of relative supremacy that Professor Frank describes for the individual consumer. See FRANK, *supra* note 20. Whatever the actual correlation between student achievement and school funding, his model provides a clear explanation of why wealthy school districts are unlikely to reduce their own luxury spending voluntarily. That is, the Luxury Fever model explains school districts’ urge to spend, not as a function of efficiency, choice, or enhanced student performance, but rather in terms of the importance of their relative position. In this view, the primary motivator for luxury spending is the wealthy districts’ resolve to remain at the top of the school district pyramid. Much like a country trapped in the nuclear arms race, or consumers seeking to impress their peers with fancy and expensive watches, no district is willing to take the risk of decreasing spending unilaterally. Without an overall limit at the top, any individual district that decreases spending would be at a perceived relative disadvantage vis-a-vis the other districts that continued to spend at luxury rates. If the spending power of all districts were capped, and if excess district spending were taxed, heavy spending at the top would flatten out, and individual district incentives would come more in line with overall societal incentives. The results of a recent GAO study are consistent with this suggestion. In its analysis of four state legislative equalization reforms, infusions of greater state funds into lower spending school districts was met with an increase in spending by wealthy districts, with the result that the gap between rich and poor was preserved or increased. Only in the two states that also imposed a cap on wealthy district spending did the state equalization dollars result in meaningful equalization. See STATE EFFORTS, *supra* note 9, at 30–44.

74. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For a brief summary of the doctrine and the critique it has generated, see Laurie Reynolds,

compete to provide a desired mix of services and to retain their constituents, whom Tiebout described as “consumer-voters.”<sup>75</sup> Competition between and among schools should produce greater efficiency and variety in the range and level of schools. Citizen-consumers will translate their preferences for, say, high spending schools, by moving to a jurisdiction that offers that level of service. It is just as likely, in theory at least, that some consumers will choose to live in a district that spends little on education.<sup>76</sup> Limits on school district spending would eliminate that competition and the efficiency benefits it produces.

Scholars have questioned the accuracy of the assumptions on which Tiebout’s theory is based<sup>77</sup> as well as the normative acceptability of the world the theory would produce.<sup>78</sup> In the context of school finance, though, the link between property wealth and school revenues makes the Tiebout theory particularly unacceptable. First, preference or choice is an inaccurate explanation of the reason so many children attend inadequate and underfunded schools. As Professor Frug has noted: “[P]eople who live

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*Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 103–06 (2003). In the legal literature, the preeminent critiques of the Tiebout theory are found in the work of Professors Richard Briffault and Gerald Frug. See generally Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990); Gerald E. Frug, *City Services*, 73 N.Y.U. L. Rev. 23 (1998).

75. See Tiebout, *supra* note 74, at 419.

76. That phenomenon is undoubtedly part of the balance struck by the many retired citizens who move to communities in the sun belt where numbers of school children, and thus school taxes, are low. To say, however, that these citizens are exercising their choice to live in districts that spend low sums on schools is misleading. Retirees are not searching for school districts where they can educate their own children at a low cost. Rather, they are looking for ways to contribute as little as possible to the education of others’ children. Thus, the phenomenon suggests that older citizens without children may choose to live where numbers of children are low, not that families with children choose low spending school districts because they prefer low spending schools. Low spending school districts are frequently correlated with low housing prices and with higher levels of community disorder. See generally WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001) (showing correlation with low-cost housing); Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 644–50 (2002) (book review) (showing correlation with community disorder). These facts cast further doubt on the Tiebout model’s accuracy when applied to schools and consumer-voter choice.

77. Professor William Fischel has noted that if Tiebout were correct in his claim that consumers choose their homes in accordance with the services they prefer to receive, we would expect the school districts with expensive good schools to be populated predominantly by families with children. Since that is not the case, Fischel suggests that the choice of a home in a high-spending school district is more of an investment decision than a consumption decision. See FISCHER, *supra* note 76, at 148–62. In her review of Professor Fischel’s book, Professor Lee Fennell criticized the normative underpinning of the Fischel model, as it results in economic segregation as well as the imposition of negative externalities, in the form of concentrated poverty in other less wealthy areas. See Fennell, *supra* note 76, at 642–45, 649–54; see also Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824 (2003).

78. For a summary of those arguments, see Reynolds, *supra* note 74, at 105–06.

in unsafe neighborhoods or send their children to inadequate schools don't do so because they have taste for them . . . . If they had a choice . . . , they would prefer better schools and less crime."<sup>79</sup> More fundamentally, perhaps, preference and choice seem inappropriate when used to describe the government's responsibility under state constitutional protections of public education. Constitutional guarantees, whatever their ultimate scope, surely must be more than mere restatements of market principles. Finally, if the benefit of a universally high quality education redounds to society as a whole, it is not immediately apparent that parents should have the "choice" to provide their children with an inadequate education.<sup>80</sup> In essence, the defense of luxury spending in school districts as an important element of individual choice and preference translates directly into the claim that citizens are entitled to "get what they pay for" in the receipt of a constitutionally guaranteed public service and, in turn, that it is acceptable to allocate public education dollars on the basis of wealth.<sup>81</sup>

Second, those who oppose limits on school district revenue raising point to pragmatic considerations: any proposal to cap spending, they argue, will produce fierce and insurmountable public opposition.<sup>82</sup> Though that is certainly the common wisdom, several facts cast doubt on the extent to which it is an overpowering force. As parents with school children become ever smaller percentages of the population,<sup>83</sup> and as aging

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79. See Frug, *supra* note 74, at 31.

80. Other commentators have described state discomfort with district power equalizer formulas that in essence leave the local districts with the decision whether to use state funds to reduce overall education spending and local tax levels, thus facilitating a shift from "low spending because of low wealth to low spending because of low tax politics." See Clune, *supra* note 28, at 728. For an analysis of the phenomenon in Michigan's school funding reform, see Michael F. Addonizio, Lyndon G. Furst & John Dayton, *Blowing Up the System: Some Fiscal and Legal Perspectives on Michigan's School Finance Reform*, 107 EDUC. L. REP. 15, 16–17 (1996); see also *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 579 (Tex. 2003) (noting that the legislature is "constitutionally bound" to "deprive[] school districts of any meaningful discretion to provide an inadequate education . . ."); *McGowan v. State*, 60 P.3d 67, 70 (Wash. 2002) (emphasizing that the state's obligation to fund education means that it cannot make educational quality dependent on the choice of the voters).

81. For a general critique of that model of local government, see Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373 (2004).

82. See Enrich, *supra* note 36, at 155–59; see also Augenblick, *supra* note 17, at 92, 98 (noting how wealthy districts in Kansas discussed secession from the state in response to threats to their spending levels); Robinson, *supra* note 52, at 515 (describing efforts to redistribute property tax from wealthy districts as "doomed to ultimate failure"). In the words of noted school funding commentators, "[l]ocal citizens, and especially parents, do not like to be told that they cannot raise and spend local revenues on their own schools." Ryan & Heise, *supra* note 48, at 2060. Another commentator describes spending caps as "the worst single problem besetting school finance litigation." Clune, *supra* note 28, at 739.

83. The average age in the United States is increasing, and the numbers of families with school-aged children is decreasing. Erin E. Buzuvis, Note, "A" for Effort: Evaluating Recent State Education

homeowners without children become less sympathetic to frequent calls for more money for schools,<sup>84</sup> the image of the politically all-powerful pro-school contingent may need updating.<sup>85</sup> Moreover, the number of districts that would be adversely affected by limits on spiraling increases is by definition very small. School finance reform in Vermont, for example, which capped luxury spending for the richest districts and resulted in greater state funding of education, produced lower property tax bills for 89% of Vermont's taxpayers.<sup>86</sup> In terms of sheer political strategy, then, capping school district spending may be less problematic than is commonly thought.<sup>87</sup>

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*Reform in Response to Judicial Demands for Equity and Adequacy*, 86 CORNELL L. REV. 644, 686 (2001). For instance, in the late 1970s in California, parents with children in school made up 42% of the electorate; by 1998, that figure had decreased to 21%. PETER SHRAG, *PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE* 125 (1998). One analysis of the 2000 Census data concluded that households with children constitute a declining percentage of overall U.S. population. In 2000, less than 25% of all households fell into the "married with children" category, compared with approximately 40% in 1970. Considering total households with children, whether the adults are married or not, the percentage rises to just under 33%. William H. Frey & Alan Berube, *City Families and Suburban Singles. An Emerging Household Story*, in *REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000*, at 257, 260–63 (Bruce Katz & Robert E. Lang eds., 2003); see also Robinson, *supra* note 52, at 508 n.85 (pointing to changing demographics as a key factor in decline of public support of education). These phenomena are likely to reduce local enthusiasm for luxury spending on public schools.

84. A GAO study noted increasing voter resistance to local school district referenda to raise school taxes. See *THREE STATES*, *supra* note 11, at 45, 53–54; see also *Seattle Sch. Dist. No. 1 of King County v. State*, 585 P.2d 71, 78, 101–02 (Wash. 1978) (describing repeated failed referendum attempts and noting that during the 1975–76 school year, 40% of the state's students lived in districts where bond levies had failed).

85. See *STATE EFFORTS*, *supra* note 11, at 14, 54–55 (reporting district difficulties in procuring passage of school bond referenda); Robinson, *supra* note 52, at 509 (noting decreasing popular support of property tax).

86. See Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & EDUC. 167, 182 (2002).

87. It would be a mistake, however, to underestimate the disproportionate power of wealthy school districts and communities. In an analysis of regional demographics and politics in major metropolitan areas, Myron Orfield has found a remarkably similar distribution of population and wealth: 20–40% live in central cities; 25–30% in older declining suburbs; 10–15% in low tax base suburbs; and the remainder, the favored quarter, in high tax base, wealthy suburbs. Myron Orfield, *Conflict or Consensus? Forty Years of Minnesota Metropolitan Politics*, 16 BROOKINGS REV. 31, 34 (1998). Orfield urged the formation of seemingly natural political alliances between central city and older suburbs, many of which face similar problems with aging infrastructure, high social service needs, increasing poverty and declining tax base. MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* (rev. ed. 1997). In practice, however, notwithstanding their shared problems, alliances between central cities and older suburbs have proved difficult to create and sustain, which may be due, in part at least, to the disproportionate power of the wealthy local governments in a region. See Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1987 (2000) (noting how the favored quarter has been able to "capture the largest share of the region's public infrastructure investments and job growth").

Third, some fear that limiting luxury spending by school districts will produce a mass exodus of children to private schools.<sup>88</sup> Because of the generally accepted claim that the peer group is of substantial importance in predicting educational achievement,<sup>89</sup> loss of large numbers of more affluent children would have a negative impact on public school quality and on the educational achievement of those left behind.<sup>90</sup> The novelist John Irving is perhaps the most famous “bail out parent” in this controversy. Soon after Vermont restructured its school finance system to limit the upward spiral of heavy spending at the top, Irving denounced the reforms as “Marxist,” removed his child from the local public schools, and established a private school himself.<sup>91</sup> Whether the threat of flight to private schools is a real concern, of course, depends on how many families will assume the financial burden of private school tuition while continuing to pay their local school taxes. One study suggests that the likelihood of massive defection is extremely small. It documents how the much feared flight to private schools in California simply did not materialize in the wake of Proposition XII, the radical property tax revolt of the 1970s.<sup>92</sup> Even though California school spending plummeted from one of the top spending states to thirty-fifth over the course of a few short years,<sup>93</sup> private school enrollment rose only slightly.<sup>94</sup>

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88. See, e.g., Joondeph, *supra* note 49, at 819, n.235; Schomberg, *supra* note 11, at 168.

89. In spite of the strident disagreement surrounding funding and its impact on student achievement, one of the Coleman Report’s findings has enjoyed widespread support: “[T]he social composition of the student body is more highly related to achievement, independently of the student’s own social background, than is any school factor . . . .” COLEMAN, *supra* note 57, at 325. In a recent article, Professor Michael Heise described the “remarkable consensus [that] has formed on the point that the socioeconomic status of one’s peers matters a great deal.” See Heise, *By the Numbers*, *supra* note 57, at 1327.

90. Professor Clayton Gillette, who generally supports the application of market principles to the provision of government services, has recognized that exercise of individual choice to defect from public schools could have serious negative societal impacts. See Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185, 1213–14 (1996).

91. See Rebell & Metzler, *supra* note 86, at 183; Robinson, *supra* note 52, at 516 n.112.

92. See CAL. CONST. art. XIII A.

93. See James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 465 (1999). One author places California even lower, stating that it fell from one of the top ten to forty-first in 1995–96. See SCHRAG, *supra* note 83, at 66, 67. For another unflattering assessment of California school spending and achievement, see McUsic, *The Law’s Rule*, *supra* note 39, at 112 (noting that California school funding dropped to forty-sixth in terms of percentage of income spent on education, and that student reading proficiency performance fell to forty-ninth, with only Mississippi beneath it).

94. Between 1973 and 1993, private school enrollment increased 1% in California, while it increased 2% on a national level. Liz Kramer, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC. 1, 49 (2002). Although bailout from public to private schools may not be a real threat, the bailout phenomenon has been at work in American society, but in a different context—post World War II suburbanization, which emptied most major

A fourth objection to capping luxury spending raises the “dumbing down” concern—that reducing spending at the top will only serve to reduce the quality of schools at the top, with no corresponding gain at other levels across the state.<sup>95</sup> Merely lowering spending on one group of children, the argument goes, does nothing by itself to enhance the educational opportunities available to disadvantaged children.<sup>96</sup> Of course, if Hanushek is right about the connection between school finance and student achievement, decreasing spending in the wealthiest districts, whose children are typically from affluent families, is not likely to translate into a real decline in achievement. If he is not, and if money spent is in fact an important predictor of academic success, the “dumbing down” argument can be criticized as resting squarely on an unstated claim of entitlement to an uneven playing field. Though many concerned, well-meaning parents and citizens are unlikely to think of their devotion to public school spending in these terms, opposition to spending limits may simply seek to preserve the ability of wealthy school districts to provide an educational experience well beyond what is available in less affluent and poor districts. With that enhanced experience, presumably, comes enhanced achievement. One commentator described this possible motive by noting that parents in wealthy districts “don’t want their children to have to compete on even terms, although they are generally too savvy to

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cities of their middle classes. See generally KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985). As mainly white, affluent families left cities in droves for the suburbs, large urban school districts lost virtually all of their middle and upper middle class students. The homogeneous schools wealthy suburbanites now fund with their property taxes have been untouched by the decline and lack of achievement that characterize urban school districts. Had city parents not been able to translate their suburban property wealth into captured tax revenues for their own highly funded schools, it is not unreasonable to speculate that some of the urban flight might not have happened.

95. For example, in *Edgewood IV*, the court noted its opposition to absolute equality of school spending: “The effect of this ‘equity at all levels’ theory of efficiency is to ‘level-down’ the quality of our public school system, a consequence which is universally regarded as undesirable from an educational perspective.” 917 S.W.2d at 730. It may be true that equalization sometimes produces total overall decreases in school spending. For example, when California equalized school funding across the state, its total education spending dropped dramatically. State per-pupil expenditures, which had ranked fifth in the nation in 1964–65, fell to forty-second in 1992–93. See Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 *YALE L. & POL’Y REV.* 99, 157 n.229 (1996). The extent to which court-mandated school finance reforms produced the drop in overall education spending, because of the way in which it limited local school districts’ ability to generate money for local schools, is hotly debated. Dartmouth University economist William Fischel contends that the relationship is one of causation, while a recent article disputes that claim. Compare Fischel, *supra* note 76, with Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?*, 50 *UCLA L. REV.* 801 (2003). Another study found a negative correlation between judicial equalization orders and the overall rate of school funding increases. See Joondeph, *supra* note 49, at 810–17.

96. See Clune, *supra* note 28, at 739.

say so.”<sup>97</sup> Martha Minow made the same point somewhat more gently, when she noted the inherent tension in school funding debates “between two competing ethics: the ethic of neutrality that is supposed to guide governmental action, and the ethic of preferring your own that is permitted to guide family behavior.”<sup>98</sup> In either version, the phenomenon is the same—the goal of the unchecked spending at the top is to achieve performance that surpasses that of those whose schools do not have similar resources.

Finally, proponents of uncapped school tax and spending powers contend that schools at the top exert pressure on legislatures to raise the bottom—the rising tide theory as applied to schools, so to speak.<sup>99</sup> Removing the ability to raise funds at the top, the argument goes, reduces the extent to which the top schools will continue to pull up the bottom. In reality, though, the typical school finance scheme produces exactly the opposite incentive. So long as the schools at the top are able to generate high levels of locally-raised and locally-spent tax revenues for their schools, their fate is disconnected from the fate of the state’s poorest school districts. If the wealthy districts are content with their own largely self-funded luxury schools, they are less likely to impose much pressure on their state legislature to improve the condition of poor districts in the state.<sup>100</sup> The rising tide argument, in fact, appears to be more applicable in exactly those circumstances in which the top has been capped. If the only way spending on schools can rise is if it rises for everyone, the incentive is for the top districts to agitate for higher school spending for all schools.<sup>101</sup>

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97. Enrich, *supra* note 36, at 158. The author also observed:

[E]qualization of educational opportunity threatens the wealthy districts’ ability to give their children an advantage in the competition for post-school opportunities . . . . To parents who prize their own economic and social success and who care passionately about their children’s futures, preserving their schools’ superiority, and not merely their excellence, is of vital importance.

*See id.*

98. Minow, *supra* note 62, at 397. The Supreme Court has identified the same inherent tension: “The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children.” *Rodriguez*, 411 U.S. at 49 (quoting J. Coleman, *Foreward* to G. STRAYER & R. HAIG, *THE FINANCING OF EDUCATION IN THE STATE OF NEW YORK* (1923)).

99. *See* Clune, *supra* note 28, at 739.

100. *See, e.g.*, NATIONAL RESEARCH COUNCIL, *MAKING MONEY MATTER: FINANCING AMERICA’S SCHOOLS* 256 (Helen F. Ladd & Janet S. Hansen eds., 1999); Schomberg, *supra* note 11, 162–63 (noting that limits on wealthy districts would “bring education to the forefront of the political dialogue.”).

101. Professor James Ryan made the same point when he observed that the adequacy movement, by disconnecting the fate of wealthy districts from that of their poorer counterparts in less affluent

More fundamentally, however, the long-standing and firmly entrenched gap between rich and poor districts suggests that the rising tide is simply not a real phenomenon. The gaps between wealthy and poor, to the perhaps disappointing extent they have been reduced, have been reduced by litigation<sup>102</sup> or by greater tax efforts at the bottom,<sup>103</sup> not by pressure from the wealthy districts to raise revenues for poor school districts.

### III. STATE EFFORTS TO LIMIT SCHOOL SPENDING

For the most part, the problem of school district luxury spending appears to have escaped the attention of state legislatures. Scattered across the country, though, and embedded in at times hopelessly complex and convoluted funding schemes, are a few examples of state legislative limits on the taxing and spending options of wealthy districts. In some instances, the cap on spending at the top is implemented as part of a fundamental shift from local to state funding of education.<sup>104</sup> In others, the state has attempted to disconnect property wealth and school dollars without altering the basic local property tax scheme.<sup>105</sup> Each of the states described in this section, using either a cap, a recapture plan, or a combination of the two, is unique in its details and responsive to its own historical particularities. Yet by taking steps to cap spending at the top, the state statutes described here have all distinguished themselves from the overwhelming majority of school finance laws, where school districts can generate as much money for local schools as the taxpayers will authorize.

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parts of the state, removes a powerful incentive for school improvement for all children. In his words, “the best way to ensure fair treatment of a minority group is to align that group with the majority in such a way that the majority cannot help or hurt itself without doing the same to the minority group.” See Ryan, *Race and Money*, *supra* note 34, at 271.

In contrast, one commentator has argued that when local revenue is redistributed from wealthy to poor districts, those wealthy districts lose their incentive to support public education. In that view, when the “connection between the burden of taxation and the benefit of better local schools is more attenuated . . . [a]ffluent communities will . . . be less responsive to the needs of public education . . . .” Joondeph, *supra* note 49, at 815. To the extent that citizens view public education as a private good, one that provides a primary benefit to one’s own children, this argument may be persuasive. According to a recent survey, however, most Americans now believe that strengthening public education is the country’s top priority, and that support extends to the belief that all children should go to schools with high standards and highly qualified teachers. See Wendy D. Puriefoy, *Education: America’s No. 1 Priority*, in STATE LEGISLATURES, Sept. 2003, at 18.

102. See Evans, Murray & Schwab, *supra* note 54, at 10 (spending increased more and gaps were reduced more in those states whose funding statutes had been declared unconstitutional).

103. A recent GAO study concludes that “the larger tax effort of poor districts compared with that of wealthy districts contributed more to reducing funding gaps than did state equalization efforts in school year 1991–92.” STATE EFFORTS, *supra* note 9, at 5.

104. See the discussion of Washington’s statute, *infra* text accompanying notes 128–45.

105. See the discussion of Colorado’s statute, *infra* text accompanying notes 109–27.

Whatever the difficulties encountered by those states that have attempted to curb the spending of wealthy school districts, their decision to impose a cap reflects at least some commitment to the belief that the value of real property located within a school district's boundaries should not determine the quality of the education of that district's children. Moreover, their decisions to impose a limit on school districts' taxing and spending powers implicitly assumes, though again to varying degrees, that increases in spending by the wealthiest districts are destructive of the overall welfare of the state school system.<sup>106</sup> This Article excises that one

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106. In his analysis of the private consumer market, Professor Frank described the phenomenon as "smart for one, dumb for all." FRANK, *supra* note 20, at 146–58. This is shorthand for Frank's argument that in many consumption decisions, individual incentives directly conflict with societal incentives. Choices that would maximize overall welfare if undertaken by all of society are actually not in the consumer's best interest at the level of individual choice. For example, a consumer's decision to buy a sport utility vehicle is bad for society overall, because its larger size and greater power will increase the chances that others will die in a traffic accident, and because it will also raise the amount of total air pollution. A decision to forego the SUV, however, is bad for the individual: it will in fact make it more likely that the consumer, driving a smaller car, will be the victim of another's SUV purchase. Moreover, in terms of reducing pollution, the environmental impact of one less SUV on the road is meaningless. If everyone stopped buying SUVs, the relative safety advantage of having one would dissipate and the contribution to cleaner air would be significant. Of course, an individual can control only her own decisions and not those of others. *See id.* at 9. The well known tragedy of the commons comes from the same "smart for one, dumb for all" phenomenon. As described by Garrett Hardin, overharvesting is a rational response to dwindling resources. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243–48 (1968). In the absence of effective policing of individual behavior, no one user of natural resources (such as lumber, fish, pasture lands, etc.) has an incentive to reduce consumption, even though continued overuse will inevitably deplete the resource. FRANK, *supra* note 20, at 157, 237.

Several of Frank's other examples of the "smart for one, dumb for all" phenomenon touch on education. Many families with children, for instance, will spend as much as possible to buy a home in a good school district. As the bidding war increases housing prices, everyone ends up spending more for housing and "students end up at the same schools they would have attended if all families had spent less." *Id.* at 159. No one family can refuse to participate in the competition, but overall societal welfare is decreased when families save less and spend more on housing. Similarly, consider the many test preparation courses routinely offered to high school students at a cost of several thousand dollars each. Again, no single family will dare to be the one to forego the test prep, because it may reduce a child's chances of admission to an elite university. Yet if no one took the course, the number of students educated at those universities would remain constant. *See id.* at 155. Frank describes this phenomenon as the "ineluctable mathematical logic of musical chairs," which assures that the absolute number of children in the top ten percent, or the number of homes in the most expensive neighborhoods, will remain constant. *Id.* at 270. Only the price that people are willing to pay for those spots is subject to competitive bidding. *Id.* These and other examples led Frank to suggest a simple solution as the most efficient way to close the gap between individual and societal incentives.

Rejecting governmental regulation and/or prohibition of luxury spending as inevitably destined to fail, Frank proposed a consumption tax that would be sufficiently progressive to establish meaningful restraints on the rate of luxury consumption. FRANK, *supra* note 20, at 199–201. A simple one line amendment to the tax laws would categorize all income as either saved (and not taxed) or spent (and taxed at a steeply graduated rate). *Id.* at 211–19. Frank argues that among the many positive societal changes this tax would produce, the most fundamental would be the incentive it would create for individuals to forego increased monetary income and to pursue alternative forms of spending. *Id.* at

feature from school district funding formulas and concentrates exclusively on the cap or other spending limit. With that narrow focus, however, the analysis may inaccurately suggest that a state's school funding system can be intelligently deconstructed into its discrete components and then easily analyzed as a consistent whole. In fact, most school finance formulas are a hopelessly complex and sometimes seemingly irrational compilation of statutory provisions whose impact and import are not apparent to the naked eye, but rather require a longitudinal appreciation of the history of the state's legislative battles and its judicial orders.<sup>107</sup> The goal here, however, is not to provide a detailed economic and financial analysis of any of the schemes examined. It is, rather, to suggest some broad, generalizing insights about the impact of the taxing and spending powers of wealthy districts on school finance generally. The analysis will also provide a basis for suggesting whether school finance reform efforts are on the right track and if they are likely to produce the equalization many of them seek. Thus, it should provide guidance for any state that has either adopted or contemplated similar caps or recapture plans, suggesting which techniques are more likely to produce positive results and why some have failed in their attempts to limit luxury spending by wealthy school districts.

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277. Alternatives, in his view, would tend toward "less-conspicuous forms of consumption." *Id.* at 235. Such rewards consist of well-being that is not captured by the standard monetary calculation of income. Examples include working less to enjoy more leisure time or choosing to pursue a meaningful career whose income value may be lower than those that provide high market incentives. *Id.* at 235–39. In addition, Frank notes that the consumption tax revenues could be used to enhance overall societal welfare by providing well-paid public employment. FRANK, *supra* note 20, at 261–65. As a matter of economic policy, Frank argues that income inequality is negatively correlated with economic growth. Well-paid public employment would tend to reduce the current gap in income between rich and poor. *Id.* at 243–45. He also supports increased spending on public improvements that would enhance the quality of life for society as a whole. *Id.* at 53–54. Frank includes several examples: cleaner and safer water, air, and food; better infrastructure, including higher pay for teachers; and social programs such as drug treatment. *Id.* at 54–63.

In essence, Frank concludes, the current trajectory, in which today's top of the line \$20,000 watch is inevitably destined to be tomorrow's mid-priced model, is simply indefensible as a matter of public policy. *Id.* at 276. Frank questions how we can defend the societal choice to leave luxury spending unchecked, while our infrastructure deteriorates, our environment becomes more contaminated, and our poorest children remain uneducated? See FRANK, *supra* note 20, at 276–77. The decision to rein in Luxury Fever with a steep consumption tax, he claims, would produce important societal improvements: it would lower the absolute level of luxury spending; it would provide meaningful choices for the individual citizen about spending and consumption that are unavailable when Luxury Fever remains untaxed; and it would also produce government revenues that could be spent in ways that would truly enhance our quality of life. For this Article's proposal to create a similar luxury tax for wealthy school district spending, see *infra* discussion at text accompanying notes 308–17.

107. See, e.g., Jeffrey Metzler, *Inequitable Equilibrium: School Finance in the United States*, 36 IND. L. REV. 561, 583–84, 591 (2003). The Texas Supreme Court made a similar observation about the Texas legislature's responses to its judicial orders. See *infra* note 158.

### A. Revenue Caps

In *Lujan v. Colorado State Board of Education*,<sup>108</sup> the Colorado Supreme Court upheld the constitutionality of the state's property tax-based school finance system, rejecting equality challenges along the lines described in Section II.<sup>109</sup> Notwithstanding the absence of a judicial mandate, the Colorado legislature's adoption of the Public School Finance Act of 1994<sup>110</sup> implemented fundamental changes in school funding formulas and declared that "a thorough and uniform system requires that all school districts operate under the same finance formula."<sup>111</sup> The statute's legislative declarations also emphasized that "equity considerations dictate that all districts be subject to the expenditure and maximum levy provisions [of the statute]."<sup>112</sup> Both statements express legislative adherence to the equality norm and appear to reject unrestricted local spending. In fact, the resulting statutory scheme does impose some limits on spending at the top. At the same time, though, the law leaves in place substantial wealth-based inequality in the generation of tax revenues and allows districts to tax themselves to generate additional revenues. In spite of the caps, then, district property wealth remains extremely relevant to Colorado school finance.

Colorado's school funding scheme establishes a formula for calculating the revenues to which each district is entitled, called the district's Total Program, which "represents the financial base of support for public education in that district."<sup>113</sup> The amount of each district's Total Program is dependent upon the number and level of students in the district, with adjustments made for cost of living differentials, personnel cost factors, numbers of at-risk students, and the size of the district.<sup>114</sup> The calculation is done without reference to the local district's property tax wealth and depends solely on the needs of the district as determined by statutorily mandated computations of total district need.<sup>115</sup>

Funding the Total Program depends on local and state taxation, however, and it is at this point that the property wealth of the district becomes significant. First, each school district is required to levy a

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108. 649 P.2d 1005 (Colo. 1982).

109. See *supra* discussion at text accompanying notes 26–54.

110. COLO. REV. STAT. § 22-54-101 *et seq.* (1998).

111. § 22-54-102.

112. *Id.*

113. § 22-54-104(1).

114. § 22-54-104(2)-(4).

115. § 22-54-104(3).

property tax, which must be the smallest of the following three measures: (1) the rate levied in the prior year; (2) the rate necessary to fund the district's Total Program;<sup>116</sup> or (3) the maximum rate allowed by the state constitutional tax caps, referred to as TABOR.<sup>117</sup> The amount generated by the applicable property tax levy is referred to as the district's local share.<sup>118</sup> If the local levy is not sufficient to generate the revenue determined to be required for the district's Total Program, the state will make up the difference.<sup>119</sup> Because the state does not impose an equalized tax rate on all school districts, though, districts with higher levels of property value will be able to fund their Total Program at a lower rate than poorer districts. Thus, although the calculation of per-pupil funding may be freed from the strictures of a district's property wealth, the actual levy reinstates the importance of the property wealth that the establishment of the Total Program apparently intended to eliminate. Since state law dictates only the maximum amount of local property tax revenue, but leaves it up to local property tax wealth to generate the revenues, substantial inequalities in tax rates across the state are inevitable.

Three important aspects of Colorado law also work against the equalizing thrust of the Total Program. First, voters of a district may approve an override property tax to generate an amount equaling up to 20% of its Total Program.<sup>120</sup> Second, because the Total Program only provides minimal funding for capital construction,<sup>121</sup> and because voters may authorize the issuance of bonds for capital expenditures that are payable out of property tax revenues,<sup>122</sup> higher property wealth provides a

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116. § 22-54-104(2)(a)(I).

117. The Taxpayers Bill of Rights, codified in Article X, Section 20, of the Colorado Constitution was adopted by initiative in the 1992 general election. It requires voter approval of "any new tax, tax rate increase . . . or extension of an expiring tax . . ." COLO. CONST. art. X, § 20(4). It is important to distinguish general property tax caps, such as TABOR and California's well-known Proposition XIII, CAL. CONST. art. 13A, from this Article's focus on state school finance statutes that independently impose limits on spending and revenue raising by wealthy school districts. Although tax caps such as TABOR and Proposition XIII have profound implications on school finance, they are beyond the scope of this discussion. *See* PAUL M. GOLDFINGER, REVENUES AND LIMITS: A GUIDE TO SCHOOL FINANCE IN CALIFORNIA 4-11 (2000).

118. *See* COLO. REV. STAT. § 22-54-106(2)(a) (1998).

119. § 22-54-106(4)(b). It is not clear that the state has always lived up to its funding obligations. *See, e.g., Denver Assoc. of Ed. Office Pers. v. Sch. Dist. No. 1*, 972 P.2d 1047, 1049 (Colo. Ct. App. 2000).

120. COLO. REV. STAT. § 22-54-108 (1998).

121. Districts must budget an amount for capital-related expenditures. § 22-45-103(c). Although some state funds are available, *see, e.g., § 22-54-117* (grants available for capital construction), school districts may issue bonds for school construction upon voter approval. § 22-42-102.

122. § 22-42-102.

second major advantage.<sup>123</sup> Finally, the state's hold-harmless provisions institutionalize pre-existing inequalities by allowing local levy overrides to generate the funds necessary to produce the pre-caps local levy.<sup>124</sup> Over the years, of course, districts with lower levies will gradually rise to the level of the districts with pre-caps high levies whose tax rates have remained unchanged. Nevertheless, hold-harmless provisions soften the blow of equalization for wealthy districts and may, in fact, stem the political uproar until the next economic crisis or successful lawsuit. Taken together, these options mean that communities with high levels of property wealth and/or growth have several options available for raising additional school funds that are realistically not available to poorer districts, whose needs for operations and construction funds may be just as pressing.

The Colorado Department of Education's explanation of school tax levies stresses the total local retention of property tax revenues: "[N]o district's property tax revenues are transferred to any other districts; instead, moneys raised remain in the district which imposes the tax."<sup>125</sup> Although the local capture of locally generated property taxes may make the levy limits more politically palatable, it has a regressive effect on the state's school funding. That is, though all districts' Total Programs are computed without reference to the districts' wealth, the generation of the local share will be substantially less painful for districts with high amounts of property wealth. Similarly, the feasibility of additional "override revenues" and of local approval of additional property tax levies to pay for school construction is greater in districts with higher assessed valuation, not only because the districts have greater wealth but also because their Total Program is likely to have been generated by a lower property tax rate than the one applied by poorer districts to generate the same amount. Thus, as the property value in the district goes up, more revenue can be generated at lower rates.

Although Colorado has been described as "among the very few states that place limits on how much revenue school districts can choose to raise

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123. For communities with rapid growth rates, school construction has been a particular problem. Although the Colorado Supreme Court has invalidated the use of school impact fees levied on developers to finance the cost of new school building, at least one community has negotiated with developers for voluntary contributions for school construction. *See* Bd. of County Comm'rs of Douglas County v. Bainbridge, Inc., 929 P.2d 691 (Colo. 1997); *see also* William P. Ankele, Jr., *Funding Schools Through Public-Private Partnerships*, 30 COLO. LAW. 75 (2001).

124. *See* COLO. REV. STAT. § 22-54-108 (1998); *see also* COLO. DEP'T OF EDUC., UNDERSTANDING COLORADO SCHOOL FINANCE AND CATEGORICAL PROGRAM FUNDING 7 (2003) [hereinafter UNDERSTANDING COLORADO SCHOOL FINANCE] (describing how a "hold-harmless" district may obtain override revenues).

125. *Id.* at 6.

on their own,”<sup>126</sup> the equalizing effect of its caps is severely undercut by the various wealth-based exceptions described above. In essence, the Colorado system potentially leaves substantial amounts of untapped wealth; for a property-wealthy district, the levy needed to generate the state-capped amount will be lower than the rate a property-poor district must levy. This inequality in tax rates potentially exacerbates the anti-equalizing impact of the local option overrides. That is, wealthy districts whose Total Program is funded at a lower property tax levy than districts with less wealth are more likely to be able to resort to that untapped property wealth to fund local budget overrides and local authorization of capital bonds. All in all, the caps leave substantial unequalized property wealth, produce lower levy rates for property rich districts, and authorize districts to generate fairly substantial amounts of extra funding if voters approve additional property tax levies.<sup>127</sup>

Although the Colorado legislature’s statutory declarations appear to embrace the goal of eliminating the inequality that comes from disparities in local property wealth, its actual implementation of the goal falls well short of the mark. In reality, because the caps are imposed on the state’s pre-existing wealth disparity among districts, they preserve much of the inequality they set out to eliminate. Moreover, the exceptions to the caps push to increase the gap with no offsetting redistribution from wealthy to poor. All in all, Colorado’s system of caps is unlikely to produce a financing scheme consistent with the legislature’s stated goals of school district financial equality.

### *B. Levy Caps*

In contrast to Colorado’s caps, which impose revenue limits without interfering with the local tax rate used to generate the funds, Washington’s funding statute imposes both revenue limits and a mandatory property tax levy. This means that whereas in Colorado, high property value translates into lower property tax rates, in Washington, all school districts are

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126. See John Augenblick, *The Role of State Legislatures in School Finance Reform: Looking Backward and Looking Ahead*, in STRATEGIES FOR SCHOOL EQUITY 89, 93 (Marilyn Gittel ed., 1998).

127. As of 2003, school districts’ per pupil expenditures ranged between \$5,511 to \$12,622, with a statewide average of \$5,930. See UNDERSTANDING COLORADO SCHOOL FINANCE, *supra* note 124, at 4. Given the way in which the Colorado statute adjusts per-pupil expenditures to reflect factors such as the district’s at-risk population, and its cost of living, that range could reflect one of two scenarios: continued disparities between rich and poor districts; or equalized spending that has been adjusted to reflect different needs among districts and their students. The caps’ anti-equalizing forces described in the text may make it extremely unlikely that the gap reflects a redistribution based on student and district need.

required to tax at a uniform rate. Moreover, and again in distinction to Colorado, Washington districts whose levy generates funds in excess of the amount to which they are entitled under the state funding formula are required to turn those revenues over to the state for redistribution to poorer districts.<sup>128</sup>

In a 1978 opinion, *Seattle School District v. State* (commonly referred to as the *Doran* opinion after the trial judge who wrote the first order),<sup>129</sup> Washington's highest court found that the state's school funding scheme violated its constitution's education clause. Pursuant to statutory overhaul, the state assumed responsibility for approximately 75% of school district general fund revenue.<sup>130</sup> State revenues are generated from a variety of taxes, but a statewide property tax levy is one of the sources.<sup>131</sup> That levy constitutes approximately 13% of the total state contribution; the remainder is made up by sales tax (which constitutes more than half of the total amount spent by the state on education) and other revenues.<sup>132</sup>

As in Colorado, Washington school districts may appeal to the voter for an override; with a 60% majority requirement, voters may approve raises in the so-called "levy lids" in an aggregate amount that does not exceed 24% of the previous year's total state and federal funding.<sup>133</sup> Since the local levies are based on local property wealth, wide variation in community tax bases guarantees that levies will produce vastly differing amounts.<sup>134</sup> The state of Washington does provide some incentive for poorer districts to pass local levies. This funding is labeled "local effort

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128. The California legislature implemented a cap system similar to Washington's in response to its supreme court's invalidation of the state funding scheme in *Serrano v. Priest*, 487 P.2d 1214 (Cal. 1971), but the voters' adoption of a constitutional property tax cap preempted that legislative reform. See Hanif S. P. Hirji, Note, *Inequalities in California's Public School System: The Undermining of and the Need for a Minimum Standards System of Education*, 32 LOY. L.A. L. REV. 583, 599-600 (1999). For a detailed description of California's extraordinarily complicated school funding scheme, see GOLDFINGER, *supra* note 117.

129. 585 P.2d 71 (Wash. 1978).

130. OFFICE OF THE SUPERINTENDENT OF PUB. INSTRUCTION, WASHINGTON SCHOOL FINANCE PRIMER 3 (1999) [hereinafter WASHINGTON SCHOOL FINANCE].

131. The maximum state property tax rate is set by statute at \$3.60 per \$1000 of equalized assessed value. See WASH. REV. CODE § 84.52.065 (2004).

132. See WASHINGTON SCHOOL FINANCE, *supra* note 130, at 2-3. As a total percentage of school revenues, the state property tax produces approximately 10% (that is, 13% of 75%).

133. The governor has urged an increase in the levy limit to 36%. See Linda Shaw & Jolayne Houtz, *Education in Budget Bind*, SEATTLE TIMES, Mar. 9, 2003, at A1.

134. One Washington district that includes a mill and other industrial uses generates \$5.5 million with a levy rate of 1.91 per \$1000 assessed valuation. Its less fortunate neighbor, which enjoys no similar industrial property within its borders, generates only \$3.5 million, and to do so must charge its residents almost 50% more. See *In Our View: Levy Lid Heavy*, THE COLUMBIAN, Mar. 15, 2003, at C6 [hereinafter *Levy Lid Heavy*].

assistance,”<sup>135</sup> and is intended to equalize the results of local levies. School districts qualify for this assistance if the amount they can raise with a 12% local levy is below the total that would be generated by a 12% levy in the average Washington school district.<sup>136</sup> The assistance does nothing for property-poor districts that are unable to convince 60% of their voters to pass a local levy, thus creating the double deprivation of receiving neither the local levy funds nor the state’s assistance funds. Moreover, it leaves all of the “above average” districts to enjoy the same pre-cap inequality that comes from wealth-based property tax levies. In addition, similar to the implementation of the caps in Colorado, Washington school districts with pre-reform local levies that exceeded those numbers were grandfathered in, thus protecting much of the pre-existing property-wealth-based inequality.<sup>137</sup>

By the mid 1990s, Washington had nearly halved the disparity between rich and poor districts.<sup>138</sup> But, as budget woes have recently intensified, and pressure for state funds has increased, the local levies have inevitably taken some of the funding pressure off the state.<sup>139</sup> The predictable result of widespread reliance on local option levies, of course, is that funding disparities in Washington are returning to their pre-1978 inequality.<sup>140</sup> Shortly after the landmark *Doran* opinion, local levies accounted for a mere 8% of district budgets.<sup>141</sup> By 2001, that figure had nearly doubled.<sup>142</sup> For some districts, local levies now constitute 30% of their operating budget, which does not compare favorably to the pre-*Doran* average of 24%.<sup>143</sup>

In essence, Washington caps, with their exemptions and exceptions, display much of the same inadequacy as the Colorado system described previously. Unlike Colorado, though, Washington’s adoption of a statewide property tax means that wealthy district spending is in fact superimposed on a system that has already undergone some statewide capture of revenues generated by the statewide property tax. In

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135. See WASH. REV. CODE § 28A.500.010 (2004).

136. See LEAGUE OF EDUC. VOTERS, REALITIES OF EDUCATION FUNDING IN WASHINGTON STATE 2002, at 19 (2002), at [http://www.levfoundation.org/funding\\_report/realities\\_report.htm](http://www.levfoundation.org/funding_report/realities_report.htm) (last visited Jan. 3, 2005).

137. See LEAGUE OF EDUC. VOTERS, LEVY LID Q & A, at 1 (2002), at <http://www.levfoundation.org/Levy%20Lid.pdf> (last visited Jan. 3, 2005).

138. See Joondeph, *supra* note 49, at 809.

139. *Levy Lid Heavy*, *supra* note 134.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

comparison to Colorado's caps, then, the Washington system produces more redistribution of property-wealth-based revenues and a greater limitation on wealthy district spending. Since a relatively small percentage of school funds in Washington come from this source,<sup>144</sup> however, the redistributive sting of the statewide levy is not substantial. Just like their Colorado analogues, the caps have done little to reduce the gap between wealthy and poor districts. In fact, the irony of the Washington cap system is that, in terms of the gap between rich and poor districts, "[w]e are almost back to where we started."<sup>145</sup>

### C. *The Robin Hood Systems*

Notwithstanding the redistribution of local property tax revenues produced by some of the statutes discussed in this section,<sup>146</sup> taxpayers and commentators appear to have reserved the "Robin Hood" epithet for Texas's school funding formula and Vermont's original Act 60.<sup>147</sup> Both systems explicitly seize property tax revenues and redistribute them (or force the local school district itself to distribute them) to districts with less property wealth. Because in both statutory schemes the poorer districts' enhanced state aid comes directly from the wealthy districts, with no substantial additional state aid,<sup>148</sup> the cost of raising the bottom is borne almost exclusively by the districts at the top. Nevertheless, both systems reflect legislative commitments to reduce the link between school district funding and local property wealth and to equalize school spending; their differences offer interesting perspectives on the hurdles facing states that wish to cap luxury spending by wealthy school districts.

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144. Only 10% of education funds are derived from the statewide property tax levy. *See supra* notes 131–32 and accompanying text.

145. *See* LEAGUE OF EDUC. VOTERS, A BRIEF HISTORY OF SCHOOL FINANCE IN WASHINGTON, at [http://www.educationvoters.org/school.funding/how\\_did\\_washington\\_get\\_to\\_where\\_.htm](http://www.educationvoters.org/school.funding/how_did_washington_get_to_where_.htm) (last visited Jan. 3, 2005). The phenomenon is described in a recent article as a predictable push back towards an "inequitable equilibrium." *See* Metzler, *supra* note 107, at 564. The author explains: "[W]hile a court decision declaring the education finance system unconstitutional may force the legislature to make immediate changes in the system, subsequent amendments and formula modifications are likely to shift the allocation of resources back to the balance that existed before the court decision." *Id.* at 584.

146. *See* the discussion of the statutory reforms of Washington, text accompanying *supra* notes 131–36; Kansas, text accompanying *infra* notes 220–24; and Wyoming, text accompanying *infra* notes 235–51.

147. The Act recently underwent substantial legislative modifications; both the original and the amended Vermont funding cap systems will be discussed in this section. *See infra* discussion at text accompanying notes 182–201.

148. This is no longer true in Vermont; recent amendments to Act 60 have come with a commitment of a substantial infusion of state funds. *See infra* note 258.

In Texas, the much maligned Senate Bill 7 was the legislature's third attempt to implement its supreme court's holding in *Edgewood I*,<sup>149</sup> which had invalidated Texas's property-tax-based school finance system. Concluding that although the state constitution does not require absolute equalization of per capita funding, the court in *Edgewood I* stressed that "districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort."<sup>150</sup> The Texas legislature's first response, known as Senate Bill 1, eliminated much of the interdistrict inequality by raising new taxes,<sup>151</sup> but the Texas Supreme Court declared the act unconstitutional in *Edgewood II*.<sup>152</sup> The court noted that while the law did establish a guaranteed amount of revenue per student, it improperly failed to address the underlying causes of the funding disparity, that is, the variation in property wealth among districts.<sup>153</sup> Soon after, Senate Bill 351 completely revamped the school district governance structure, creating 188 county education districts that would levy school taxes.<sup>154</sup> That law was invalidated by the court in *Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District (Edgewood III)*,<sup>155</sup> because it violated the state constitutional prohibition of statewide property taxes and because it impermissibly imposed a property tax without voter approval.<sup>156</sup> Finally, in *Edgewood Independent School District v. Meno (Edgewood IV)*,<sup>157</sup> the Texas Supreme Court upheld the legislature's third attempt, Senate Bill 7.<sup>158</sup> That law preserved much of Texas' pre-existing two-tiered school funding system, which focuses on equalizing revenues for districts that impose equal tax rates.<sup>159</sup>

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149. *Edgewood I*, 777 S.W.2d at 391.

150. *Id.*

151. S. 1, 74th Leg., R.S. (Tex. 1990).

152. *Edgewood II*, 804 S.W.2d at 491.

153. *Id.* at 496.

154. 1991 Tex Gen Laws 20 §§ 20.941–20.945, 20.947–20.948.

155. *Edgewood III*, 826 S.W.2d 489 (Tex. 1992).

156. *Id.* at 524. The Texas Constitution provides: "No State ad valorem property taxes shall be levied on any property within this State." TEX. CONST. art VIII, § 1-e.

157. *Edgewood IV*, 917 S.W.2d 717 (Tex. 1995).

158. Although the court upheld the statute as constitutional, it emphasized its disappointment with the legislative scheme: "For too long, the legislature's response to its constitutional duty to provide for an efficient system has been little more than crisis management. The rationality behind such a complex and unwieldy system [as Senate Bill 7] is not obvious. We conclude that the system becomes minimally acceptable only when viewed through the prism of history. Surely Texas can and must do better." *Id.* at 726.

159. Tier 1 guarantees a basic per student allotment from the state, so long as the district levies the required tax rate on all property. That rate is currently set at \$0.86 per \$100 of taxable property value. TEX. EDUC. CODE ANN. § 42.252 (Vernon 1996). If that rate does not generate the allotment, the state

Most controversial of Senate Bill 7's funding reforms is the recapture or Robin Hood provision. Under Texas law, each school district is subject to a \$305,000 per student maximum taxable property value cap, which is referred to as the district's "equalized wealth level."<sup>160</sup> Any district whose property wealth exceeds this amount falls into the recapture range and must choose one or more of the following statutory options: (1) to consolidate with another district; (2) to detach property from its district; (3) to contribute money to the state that corresponds to the amount of excess funding generated by the property; (4) to pay for the education of non-resident students; or (5) to consolidate its tax base with another district.<sup>161</sup> In practice, districts have chosen either option 3 or option 4, or a combination of the two.<sup>162</sup>

Since *Edgewood IV*, the funding levels across the state have been equalized for 90% of Texas students.<sup>163</sup> Not all school districts, however, are happy with the Texas school funding reforms. In 2000, almost \$1 billion (out of a total \$29 billion state school budget) was redistributed from wealthy to poorer districts.<sup>164</sup> As the Robin Hood funds rise, the percentage of total school funding derived from property tax revenues rises as well; since *Edgewood IV*, the figure has been slowly increasing.<sup>165</sup> Currently, 56% of all school revenues come from the local property tax.<sup>166</sup> At the same time, the differential in revenues between wealthy and poor districts shows the same upward creep—the current funding gap between

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will make up the difference. Tier 2 operates to equalize revenues for districts that choose to tax beyond the minimum rate. § 42.302. Thus, the state system in essence guarantees that equal tax rates will generate equal revenues across the state. The Texas Supreme Court's analysis of SB 7 provides a helpful narrative explanation of its main provisions. See *Edgewood IV*, 917 S.W.2d at 727–28.

160. TEX. EDUC. CODE ANN. § 41.002 (Vernon Supp. 2004).

161. TEX. EDUC. CODE ANN. § 41.003 (Vernon 1996).

162. See J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 684 (1999).

163. See Todd Smith, *My Education on Education*, FORT WORTH STAR-TELEGRAM, July 10, 1999, at 15. Some assessments of the Texas school finance reform are quite positive. See Eleanor Dougherty, *Getting Beyond Policy: School Reform in Practice*, 6 VA. J. SOC. POL'Y & L. 127 (1998); Joseph F. Johnson, *The Influence of a State Accountability System on Student Achievement in Texas*, 6 VA. J. SOC. POL'Y & L. 155 (1998). For a detailed account of the *Edgewood* litigation, see Farr & Trachtenberg, *supra* note 162.

164. See *West Orange-Cove*, 107 S.W.3d at 570; Alberta Phillips, *Reforming School Finance in Texas Benefits a Privileged Few*, AUSTIN AM. STATESMAN, Mar. 19, 2004, at A15. That money comes directly from wealthy districts, which in their totality teach 12% of all school children in Texas. Janet Elliott, *Perry, Legislators to Seek School Finance Solutions*, THE HOUSTON CHRON., Mar. 23, 2004, at A13.

165. *West Orange-Cove*, 107 S.W.3d at 572–73.

166. Phillips, *supra* note 164, at A15.

wealthy districts and a poor district such as El Paso surpasses \$1,000 per year per pupil.<sup>167</sup>

The inadequate funding of poor schools, when combined with the opposition of wealthy districts to the redistribution they feel singled out to bear, makes for never-ending legislative disputes. Every year, legislators battle over the Robin Hood provisions, with frequent statutory proposals to end the redistribution.<sup>168</sup> The problem, of course, is how to fund the \$1 billion shortfall. To date, the funding system implemented by Senate Bill 7 remains intact. Its future, however, is uncertain.<sup>169</sup>

In fairness to the Texas legislature, the volatility of the current funding scheme is due in no small part to three conflicting forces of Texas legal doctrine that the legislature must navigate. First and foremost is the state constitutional prohibition of a statewide property tax.<sup>170</sup> Second, of course, is the Texas Supreme Court's insistence that property wealth not dictate the revenues available to school districts.<sup>171</sup> Third is the court's somewhat contradictory insistence that there not be too much "leveling down" of the highest districts. The court has criticized what it terms the "equity at all levels" approach, noting that its effect is to "level-down" the quality of

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167. See Gary Scharrer, *Cash for Schools is a Bleak Spot*, EL PASO TIMES, Mar. 20, 2004, at 1B. Plaintiffs in the *West Orange-Cove* litigation point to similar disparities involving the Edgewood school district, which receives about \$1500 less per student than the top 5% of students living in the wealthiest school districts. That translates into \$1,000,000 difference annually for a school of 600 students. See Brief for Edgewood Intervenors at 13, *West Orange-Cove*, 107 S.W.3d 558 (Tex. 2003).

168. See Clay Robison, *Bill Guaranteeing More Aid for Schools Draws Concern*, HOUSTON CHRON., Feb. 9, 2005, at B3 (noting that "Gov. Rick Perry and Republican legislative leaders have been vowing for three years to repeal Robin Hood.").

169. Shortly after the Texas Supreme Court issued its opinion in *Edgewood IV*, four wealthy school districts filed suit to invalidate the property tax recapture system. By capping the rates at which districts can tax, and by redistributing locally raised property tax revenues, the plaintiffs allege, the state has violated the constitutional prohibition of state level property taxes. *West Orange-Cove*, 107 S.W.3d at 562. In 2003, the Texas Supreme Court reversed the lower courts' dismissal of the lawsuit and remanded the case for trial. The key issue in the case will be whether school districts retain "meaningful discretion" over their property tax levy or whether "increasing costs of education and evolving circumstances" have forced them to tax at maximum rates. *Id.* At least one justice has concluded that the recapture provisions are "both inequitable and unconstitutional." *Id.* at 587 (Smith, J., dissenting).

170. The Texas Constitution states: "No State ad valorem taxes shall be levied upon any property within this State." TEX. CONST. art. VIII, § 1-e. Oklahoma, Nebraska, and Florida have similar limitations. See FLA. CONST. art. VIII, § 1A; NEB. CONST. art. VIII, § 1A; OKLA. CONST. art. X, § 9(a). For discussion of their scope, see *West Orange-Cove*, 107 S.W.3d at 601-03 (Smith, J., dissenting).

171. Consider, for instance, the court's statement in *Edgewood I* that the Texas Constitution "does not allow concentrations of resources in property-rich school districts that are taxing low when property-poor districts that are taxing high cannot generate sufficient revenues to meet even minimum standards . . . . Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds." *Edgewood I*, 777 S.W.2d at 397.

our public school system, a consequence which is universally regarded as undesirable from an educational perspective.”<sup>172</sup> It is not immediately apparent that any legislative scheme, at least in the absence of a massive infusion of state funds,<sup>173</sup> could simultaneously achieve substantial redistribution of revenues, preservation of the local property tax system, disconnection of property wealth from school funding, and preservation of wealthy district spending.

Notwithstanding the significant redistribution of wealth caused by the Robin Hood redistribution, the Texas caps do display some of the same anti-equalizing tendencies prevalent in other state cap systems. Their hold-harmless provisions<sup>174</sup> preserved, temporarily at least, the privileged status of the wealthy districts.<sup>175</sup> In addition, equalization mandates do not apply to facilities funding; each district’s ability to levy a property tax of no more than \$.50 to pay for debt translates into huge differences in revenue.<sup>176</sup> For instance, a property-poor district like Edgewood must set a debt service levy of about \$.08 to fund a \$5 million bond; a wealthy district nearby would generate \$75 million from the same tax effort.<sup>177</sup> To compensate for the wealth disparity, the state provides only limited access to equalizing facilities funds to property-poor districts.<sup>178</sup> One of the court’s *Edgewood* opinions warned of the problems caused by facilities funding schemes: “The challenge to the school finance law based on inadequate provision for facilities fails only because of an evidentiary void. Our judgment in this case should not be interpreted as a signal that the school finance crisis in Texas has ended.”<sup>179</sup> Overall, however, the anti-equalizing forces of the Texas school funding statute pale in comparison to the redistributive effect of the Robin Hood recapture system; thus, it is not surprising that the source of most Texan opposition has been from wealthy donor districts and not from poorer recipient districts that object to the relatively small wealth-preserving provisions.

Much like Texas’ Senate Bill 7, Vermont’s original Act 60 was also the product of a judicial order. In 1997, the Vermont Supreme Court’s opinion

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172. *West Orange-Cove*, 107 S.W.3d at 571.

173. In Texas, for instance, the Attorney General calculated that it would require an amount equal to four times the total state budget to bring all districts up to the top. See *Edgewood II*, 804 S.W.2d at 495–96.

174. TEX. EDUC. CODE ANN. § 41.002(e) (Vernon 1996).

175. See Kramer, *supra* note 35, at 41.

176. TEX. EDUC. CODE ANN. § 45.0031(a) (Vernon Supp. 2004).

177. See Brief for Edgewood Intervenors, *supra* note 167, at 14.

178. TEX. EDUC. CODE ANN. § 42.301 (Vernon 1996).

179. *Edgewood IV*, 917 S.W.2d at 725.

in *Brigham v. State*<sup>180</sup> invalidated the state's district power equalizing formula on equal protection grounds, and ordered the legislature to "make educational opportunity available on substantially equal terms."<sup>181</sup> In stark contrast to the Texas legislature's repeated efforts to meet the directives of the *Edgewood* opinion, the Vermont legislature's swift response,<sup>182</sup> adopted within months of *Brigham*, had an immediate and profound redistributive effect. First, the law adopted a statewide property tax of \$1.10 per \$100 of homestead property value.<sup>183</sup> Using those revenues, the state distributed a per-pupil allocation to each district.<sup>184</sup> Any district that chose to levy a higher property tax rate to raise funds above that amount was required to turn over a percentage of the revenues generated to the state's education fund.<sup>185</sup> The higher the district's average property value, the greater the percentage of revenue that was earmarked for the state,<sup>186</sup> after a phase-in period, the wealthy districts would ultimately pay approximately 70% of their excess levy to the state fund.<sup>187</sup> This so-called "sharing pool,"<sup>188</sup> also referred to as the "shark pool,"<sup>189</sup> produced vehement opposition from the wealthy districts. An example from one of Vermont's ski resorts (known as the "gold towns") illustrates the impact of the new Act—for the town of Winhall to continue spending at pre-Act 60 levels would have required a quadrupling of its tax rate.<sup>190</sup> The immediate sting, however, was softened by the transitional phasing in of the plan as well as by the wealthy's districts' ability to circumvent the sharing pool through the establishment of educational foundations funded through private donations.<sup>191</sup>

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180. 692 A.2d 384 (Vt. 1997).

181. *Id.* at 398.

182. For a detailed account of the legislative response, an analysis of the political process that led to passage of Act 60, and an interpretation of the public's response, see Rebell & Metzler, *supra* note 86, at 179–86.

183. VT. STAT. ANN. tit. 32, § 5402(a) (Supp. 2003).

184. VT. STAT. ANN. tit. 16, § 4011(b) (2004).

185. VT. STAT. ANN. tit. 16, § 4027 (Supp. 2003).

186. *Id.*

187. See *Stowe Citizens for Responsible Gov't v. State*, 730 A.2d 573, 575 (Vt. 1999).

188. For descriptions of how the sharing pool worked, see Buzuvis, *supra* note 83, 677–78; Rebell & Metzler, *supra* note 86, at 181.

189. See Rebell & Metzler, *supra* note 86, at 167.

190. See *id.* at 182.

191. For the first several years after Act 60's adoption, the Freeman Foundation matched donations to local school foundations. See Sarah Schweitzer, *School Funding Gap Grips Vermont*, BOSTON GLOBE, Feb. 23, 2003, at B1. One commentary describes the fairly heavy-handed fund raising efforts undertaken by districts seeking to retain their pre-Act 60 levels of funds. One city went so far as to publish the names of those who did not contribute. Some districts took more drastic measures—the Vermont Attorney General was forced to file suit to compel payment from three districts. See Rebell &

In the years following its adoption, Act 60 remained controversial. Although 89% of state residents paid lower property taxes under Act 60 than they had in previous wealth-based funding systems,<sup>192</sup> and although early reports suggested that equalization was correlated with some reduction of the gap in student achievement,<sup>193</sup> the law was the target of continual legislative proposals for amendment. Finally, in 2003, as the real impact was about to be felt in wealthy districts,<sup>194</sup> the Vermont legislature substantially amended Act 60. The amendments' passage was heralded with triumphant declarations such as the Governor's: "It ends the divisiveness of Act 60 by doing away with the sharing pool."<sup>195</sup>

On closer inspection, while it is indeed true that the actual mechanism of the sharing pool has been largely, but not completely, eliminated, the amount of redistribution of local property taxes for wealthy Vermont school districts remains very high. As amended, Act 60 retains the statewide property tax, which in and of itself produces substantial redistribution of locally generated revenues. Those property tax revenues are pooled at the state level and allocated on the basis of a district's enrollment and not its property wealth. Moreover, the newly created "split grand list"<sup>196</sup> divides all property into two categories: homestead property<sup>197</sup> is subjected to a tax rate of \$1.10, while all nonresidential property (including vacation homes and other non-primary residences)<sup>198</sup> is assessed at \$1.59.<sup>199</sup> That levy provides every school district with the state base amount of \$6,800 per pupil, irrespective of the revenues it actually generates in any particular district.<sup>200</sup> The equalized \$6,800 base amount is supplemented by categorical grants for specialized needs, such as special education and transportation costs.<sup>201</sup>

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Metzler, *supra* note 86, at 183.

192. See Rebell & Metzler, *supra* note 86, at 182.

193. See Downes, *supra* note 61, at 22; Rebell & Metzler, *supra* note 86, at 185.

194. Rebell & Metzler, *supra* note 86, at 186.

195. Candace Page, *Funding Reform Gets Step Closer*, BURLINGTON FREE PRESS, May 29, 2003, at 1B.

196. *Id.* According to Vermont's governor, that innovation "was one of the most important features of the bill." *Id.*

197. See VT. STAT. ANN. tit. 32, § 5401(7) (Supp. 2003).

198. See tit. 32, § 5401(10).

199. The tax rates for both homestead and nonresidential property are established in VT. STAT. ANN. tit. 32, § 5402 (Supp. 2003). An additional progressive feature of the Vermont school property tax is its income sensitivity; though the formula is complicated, property tax burdens are lowered for those with incomes under \$75,000. tit. 32, §§ 6061, 6066.

200. See tit. 16, § 4011(b).

201. Categorical grants are used to fund special education, transportation, small schools, aid for state-placed students, technical education, and essential early education. See VERMONT DEP'T. OF EDUC., OVERVIEW OF VERMONT'S EDUCATION FUNDING SYSTEM UNDER ACT 68, at 1 (2003)

Under the amended Vermont system, school districts that wish to tax themselves at a higher rate than the state-imposed levy of \$1.10 may do so. The voters, however, may only impose higher levies on homestead property; all non-residential and non-homestead property in the state remains taxed at a fixed \$1.59 rate. Moreover, the legislation treats all districts alike in their supplemental tax efforts. Pursuant to voter approval, a district may decide to generate, say, 10% more revenue than the guaranteed base, or \$680 in additional funds per pupil. To receive that amount, the voters must agree to increase their tax levy by 10%;<sup>202</sup> the actual amount generated by the levy is irrelevant. In essence, Vermont applies a district power equalizer approach to supplemental local levies.<sup>203</sup> The new law, however, goes one step further for districts that seek to preserve their luxury spending rates. Any district that chooses to spend more than the state-determined “excess spending” limit,<sup>204</sup> which in 2005 is any budget that exceeds 35% of the average state spending level from the previous year, is subject to an “additional tax rate.”<sup>205</sup> At high levels, then, the sharing pool has been preserved.

According to some reports, the new Act has proved to be much more popular than its Robin Hood predecessor. One source noted the increased ease with which school budgets are now being approved, in contrast to the Act 60 years when many were rejected outright.<sup>206</sup> The source of the alleged newfound popularity, however, is not readily apparent. The amended Act 60 continues the substantial redistribution of what, in the pre-*Brigham* years, were local revenues, generated by local wealth and preserved for local school districts. One part of the answer may be the addition of substantial statewide funding, which lessens the direct connection between local property wealth and school funding. With the adoption of the amended Act 60 came the state legislature’s pledge of approximately \$73,000,000 in increased state funding for education, generated from an increase in the state sales tax, several other taxes, and a

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[hereinafter VERMONT’S EDUCATION FUNDING SYSTEM]. Thus, the “equality” that Vermont seeks is not a rigid adherence to equal amounts of money on a per capita basis, but rather a system that adjusts funding in accordance with the special needs of each district’s children. *See supra* discussion at text accompanying notes 180–91.

202. VT. STAT. ANN. tit. 32, § 5402 (Supp. 2004).

203. *See supra* discussion and sources cited at notes 198–201.

204. *See* tit. 32 § 5401(12)-(13).

205. *See id.* The Vermont Department of Education describes the formula in greater detail. *See* VERMONT’S EDUCATION FUNDING SYSTEM, *supra* note 201, at 4–5.

206. *See* Molly Walsh, *Burlington Commercial Taxes Expected to Spike*, BURLINGTON FREE PRESS, Mar. 13, 2004, at 1B.

new lottery.<sup>207</sup> Vermont's new system, however, continues to rely heavily on the property tax—the state's Department of Education estimates that almost 65% of total education revenues in 2005 will be derived from the property tax.<sup>208</sup>

Another possible explanation for the greater popular acceptance of the amended Act 60 is more subtle, having to do with the way in which the amendments may have produced a shift in the taxpayers' mentality. The loss of the highly touted "ownership"<sup>209</sup> or control of local property revenues appears to have been accepted by a firm majority of Vermonters.<sup>210</sup> Of course, for the extremely wealthy Vermont school districts, the opposition remains virulent. And in fact, the sting felt by those districts continues unabated; in Killington, for instance, the town's property will generate a \$9.7 million increase in property taxes, while the town's schools will receive only slightly more than \$2 million.<sup>211</sup>

Like the cap states discussed in this section, both Texas and Vermont have taken important steps to break the link between property wealth and school funding, and to limit spending by wealthy districts. In both states, notwithstanding the familiar problems of hold-harmless provisions and exemptions for capital facilities, the legislative scheme creates a meaningful cap on the revenues that can be generated by local property wealth. At the same time, both states redistribute substantial amounts of wealth from rich to poor districts. In some ways, then, they are similar to the caps discussed in earlier sections. Their uniqueness, however, stems

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207. Specifically, the new revenue sources include a 1% increase in the sales tax, a 1% increase in the tax on telecommunications service, a .50% increase in the transfer tax on nonresidential property, and a new Powerball lottery estimated to bring in a bit more than \$3 million per year. See Vermont Sch. Bds. Ass'n, *Legislative Update* (2003), available at <http://www.vtvsba.org/legis/final2003.html> (last visited Jan. 3, 2005).

208. VERMONT'S EDUCATION FUNDING SYSTEM, *supra* note 201, at 2.

209. See *supra* discussion at text accompanying notes 180–91. In *Homevoter Hypothesis*, the author extols the ownership model and contends that severing property taxation from local control will prove disastrous to local government coffers. FISCHER, *supra* note 76; see *infra* text accompanying notes 270–76.

210. See Molly Walsh, *Tax Reform Helps School Budgets Pass*, BURLINGTON FREE PRESS, Mar. 3, 2004, at 1A. Moreover, opposition to the original Act 60 may have been overstated. As one commentary has pointed out, the Republican candidate for governor in 1998 made Act 60 a central campaign issue, promising to repeal it if elected. Incumbent Governor Howard Dean, however, was reelected with a 56% vote. Anecdotal stories about failed school budgets do not comport with the study's finding that only 10 out of 300 school budget measures were defeated in the year after Act 60 was adopted. In years previous, an average of 27 budgets were defeated. See Rebell & Metzler, *supra* note 86, at 184–85.

211. See Diane Allen, *Tax Frustration, Fantasy Reflected in Secession Vote*, BOSTON GLOBE, Mar. 7, 2004, at B1. As the title of the article suggests, the application of the state's new school funding law led to a Killington town vote to secede from Vermont and join New Hampshire. The 25 miles between Killington and the New Hampshire border apparently did not dissuade the voters. *Id.*

from the ways in which they have implemented the caps. In Texas, it has been accomplished by forcing the wealthy districts themselves to transfer revenues generated locally. Vermont's original Act 60 accomplished the cap in much the same way, with the term "sharing pool" used to refer to the direct recapture and redistribution of local property tax revenues. Vermont's amended Act 60, in contrast, achieves similar levels of redistribution without the hated sharing pool. Fundamental to its legislative reforms is its decision to change the level at which the property tax is imposed. This relatively straightforward and uncomplicated shift, one admittedly not available to Texas because of its constitutional prohibition on a state property tax,<sup>212</sup> may be the key reason why Vermont's amended Act 60 appears to have gained the political support needed to legitimize the reforms. In Section IV, this Article will return to a consideration of the ways in which a shift to state level property taxation may be an essential component of any state statutory plan to cap the spending of wealthy districts.<sup>213</sup> It will suggest that meaningful limits on local district spending will only be successful if the state can break the current stranglehold of ownership produced when local property wealth generates local property tax revenues.

#### *D. Beyond Caps and Recapture*

The caps and recapture plans described in previous parts of this section do not, of course, invariably result in equalization of school funding. They should, however, accomplish the dual purposes of slowing the growth of the disparity between the wealthy and poor districts while simultaneously imposing meaningful limits on the wealthy districts' ability to tax themselves and spend at increasingly higher levels. As the earlier discussion of existing caps and recapture plans has shown, their failure to accomplish those goals lies in the crafting and implementation of the legislative system—be it through hold-harmless provisions, exemptions of capital expenditures, or generous local levy options—and not in the theory of caps itself.

For at least two states currently embroiled in litigation and sparring among the judiciary, the legislature, the state board of education, and the school districts, the judiciary has made clear that even rigorous implementation of spending caps would fall short of state constitutional guarantees. Recent judicial opinions issued by the courts of Kansas and

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212. See *supra* note 156.

213. See *infra* discussion at text accompanying notes 283–95.

Wyoming appear to conclude that nothing short of absolute equalization can survive constitutional challenge.<sup>214</sup> In many ways, the trajectory of school funding litigation in those states follows a familiar pattern—judicial invalidation of funding statutes, followed by legislative reform, which was in turn followed by the incremental creep back towards the unequal funding schemes that prompted the litigation in the first place, thus triggering a new round of litigation.<sup>215</sup> What is unusual about the most recent opinions of the Kansas and Wyoming courts, however, is how the demonstrated ineffectiveness of the legislative reforms has produced, not grudging judicial acceptance of an admittedly imperfect system, but rather a categorical rejection of the legislative efforts.<sup>216</sup> In the words of the Wyoming Supreme Court: “[A constitutional school funding scheme] must not create a level of spending which is a function of wealth other than the wealth of the state as a whole.”<sup>217</sup> This approach, of course, leaves little, if any, room for the wealthy districts to generate supplemental revenues for their own schools.

In a legal challenge to Kansas school funding laws filed in the early 1990s, a trial court invalidated the state’s property-based school finance statute. The court’s opinion in *Mock v. State* held that the state had a nondelegable duty to provide an equal educational opportunity to each child, regardless of the wealth of the child’s school district.<sup>218</sup> In addition, the court stressed that the state’s constitutional guarantee of an adequate education imposed substantive, qualitative standards as well as requirements for equitable financing.<sup>219</sup> In response to the court’s opinion, the legislature enacted the School District Finance and Quality

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214. See *infra* notes 214–54 and accompanying text.

215. A recent article describes this phenomenon as the inevitable push towards an “inequitable equilibrium.” See Metzler, *supra* note 107. The author documents the widespread frequency with which legislative reforms to school funding formulas are undone, as new legislation incrementally restores the invalidated inequality.

216. Compare the Texas Supreme Court’s reluctant decision to uphold its state’s third attempt to meet the requirements of the court’s earlier opinions: “For too long, the Legislature’s response to its constitutional duty to provide for an efficient system has been little more than crisis management. The rationality behind such a complex and unwieldy system is not obvious. We conclude that the system becomes minimally acceptable only when viewed through the prism of history. Surely Texas can and must do better.” *Edgewood IV*, 917 S.W.2d at 726.

217. *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 336 (Wyo. 1980).

218. *Mock v. State*, Case No. 91-CV-1009 (Shawnee County Dist. Court, Oct. 14, 1991) (extensively described and quoted in the district’s court recent decision in *Montoy v. State*, No. 99-C-1738, 2003 WL 22902963 (Kan. Dist. Ct. Dec. 2, 2003)).

219. The court stated: “In addition to *equality of educational opportunity*, there is another constitutional requirement and that relates to the duty of the legislature to furnish enough total dollars so that the educational opportunities afforded every child are also suitable.” *Montoy*, 2003 WL 22902963, at \*11.

Performance Act,<sup>220</sup> which establishes an equal base allotment distributed on a per-pupil basis as well as additional funding for students with special needs.<sup>221</sup> The law requires each school district to levy a property tax at a state specified rate,<sup>222</sup> if the district's property wealth generates more than the state-determined amount, those revenues are "recaptured" and go to the state for redistribution to poorer districts.<sup>223</sup> Additional local option levies were authorized, but limited to an amount equal to no more than 25% of the total budget and "power equalized" for all districts below the 75th percentile in terms of property value.<sup>224</sup>

Because of the ways in which the new law redistributed money that had previously been controlled by the wealthy school districts, a number of wealthy districts filed suit to challenge the recapture provisions as an uncompensated taking of property. The Kansas Supreme Court upheld the state's new law in *Unified School District No. 229 v. State*,<sup>225</sup> concluding that the scheme rationally provided suitable financing to Kansas school children. It rejected the challengers' "dumbing down" arguments that the new system impermissibly "cut[s] off the mountain tops to fill in the valleys,"<sup>226</sup> and stressed that the state as a whole is affected by the quality of the education received by each and every Kansas student.<sup>227</sup>

Less than a decade after the *Unified School District* opinion, another challenge to the funding statute was filed,<sup>228</sup> this time by poor school districts alleging that, notwithstanding the Act's caps and limits on optional local levies, Kansas school finance laws no longer complied with the landmark opinion's insistence that "[t]he education of each similarly situated student is to be equally funded regardless of where he or she resides."<sup>229</sup> The trial court's opinion in that ongoing litigation<sup>230</sup> agreed

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220. KAN. STAT. ANN. § 72-6405 *et seq.* (1992); *see Montoy*, 2003 WL 22902963, at \*26.

221. *See Montoy*, 2003 WL 22902963, at \*\*26-27.

222. KAN. STAT. ANN. § 72-6431 (Supp. 2004).

223. § 72-6431(d).

224. Under this scheme, all districts whose total assessed property value placed them in the lowest 75% of school districts would receive supplemental state funding to guarantee that the local option budget generated a certain amount of funding irrespective of the wealth of the district. For the top 25% of districts, of course, the amount of revenue generated could be substantially greater, and depended exclusively on the amount of property wealth within the district. KAN. STAT. ANN. § 72-6435 (1992); *Montoy*, 2003 WL 22902963, at \*27.

225. *Unified Sch. Dist.*, 885 P.2d 1170.

226. *Id.* at 1184.

227. *Id.* at 1195.

228. *Montoy*, 2003 WL 22902963.

229. *Unified Sch. Dist.*, 885 P.2d at 1195.

230. *Montoy v. State*, No. 99-C-1738, 2004 WL 1094555 (Kan. Dist. Ct. May 11, 2004); *Montoy*, 2003 WL 22902963, at \*50. As this Article was in press, the Kansas Supreme Court partially reversed the district court. *See Montoy v. State*, 102 P.3d 1160 (Kan. 2005).

with the plaintiffs, noting how the disparity between wealthy and poor districts has climbed back to its pre-*Mock* levels, reaching a 300% disparity between the top and the bottom.<sup>231</sup> The sources of the increasing inequality are multiple—local levies of up to 25% of total budgets; absence of state funds for capital expenditures; no cap on local spending for capital expenditures; extra funds for districts with declining enrollments; and hold-harmless provisions that have preserved the funding advantages of wealthy districts.<sup>232</sup> In response to this evidence of financial inequality, the trial court has taken a categorical stance, insisting that the state constitution requires complete severance of the wealth of a school district and the quality of its educational opportunity: “[D]ifferences in per pupil spending, to pass constitutional muster, must be premised on actual differences in *costs incurred* to provide an essentially equal educational opportunity for all Kansas children.”<sup>233</sup>

The Kansas experience displays a familiar circular progression from judicial equalization order to legislative reform to “back to where we started.”<sup>234</sup> That the Kansas legislature’s response was destined to produce wealth-based disparities between districts was certainly apparent when the Kansas Supreme Court upheld the state’s school funding scheme in its 1994 opinion in *Unified School District*. What the court must not have anticipated was that the caps and recapture would be structured in such a way as to bring the disparity back to its previous magnitude. Thus, the trial court’s current unequivocal rejection of the connection between property wealth and school funding and its blanket prohibition of any formula that allocates money on the basis of district property wealth may be based more on its impatience with the legislature than on an ideological opposition to a modest amount of luxury spending by wealthy districts. In

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231. *Montoy*, 2003 WL 22902963 at \*37.

232. *Id.* at \*\*33–37.

233. *Id.* at \*21. The following year, the trial court issued another order in the case, noting that state legislative reforms over that year period were still inadequate. *Montoy*, 2004 WL 1094555. The court enjoined all further operation of the unconstitutional scheme and ordered the State to “terminate all spending functions under the unconstitutional funding provisions, effectively putting our school system on ‘pause’ until the unconstitutional funding defects are remedied by the legislative and executive branches of our government.” *Id.* at \*11. Seeking to be “crystal clear,” the court noted that: “If school funding is not based on actual costs incurred by our schools in providing a suitable education for our children, no one, not this Court, not the Supreme Court, not the schools, not the public, and not even the Legislature itself will ever be able to objectively determine whether that funding meets the dual requirements of our Constitution, those being 1) adequacy and 2) equity.” *Id.* at \*14.

234. See *supra* text accompanying notes 138–45. The sequence is consistent with Jeffrey Metzler’s theory of inequitable equilibrium that pervades school finance reform. Metzler, *supra* note 107.

any event, if *Montoy* is ultimately affirmed by the state's higher courts, Kansas will have become one of the few states to have gone beyond caps to require not only a limit on spending by wealthy districts, but also a total severance of the link between district property wealth and school revenues.

In many ways, the Wyoming school funding controversy parallels the Kansas experience described above. In judicial opinions going back to 1971, the Wyoming Supreme Court has expressed its dissatisfaction with property-based school funding schemes and the inevitable inequality they produce,<sup>235</sup> typically because of the uneven distribution of mineral wealth across the state. In its 1980 opinion in *Washakie County School District No. One v. Herschler*,<sup>236</sup> the court squarely invalidated the Wyoming school funding formula, holding that the law's reliance on local property wealth rendered the entire scheme unconstitutional under both the constitution's education clause and its equal protection clause.<sup>237</sup> Its lengthy opinion repeatedly stressed that a child's access to education cannot be a function of the district's wealth,<sup>238</sup> and that the state legislature had the constitutional obligation to reform state law to produce both equality of financing and equality of quality.<sup>239</sup> Though the court noted that its view of equality did not require mathematical precision in per-pupil revenues, it stressed that the funding formula could be adjusted for "special needs educational cost differentials" but not for "district wealth."<sup>240</sup>

For whatever reason, the Wyoming legislature appears not to have taken the court at its word. Though it created some equalization of funding by recapturing funds from districts whose tax levy generated more than a fixed amount,<sup>241</sup> it left many wealth-based formulas in place. Once again, the Wyoming Supreme Court came down hard on the legislative response, declaring it unconstitutional in *Big Horn County School District No. One v. Campbell County School District (Campbell I)*.<sup>242</sup> Chief among the

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235. See *Johnson v. Schrader*, 507 P.2d 814 (Wyo. 1973); *Sweetwater County Planning Comm. for the Org. of Sch. Dists. v. Hinkle*, 491 P.2d 1234 (Wyo. 1971).

236. *Washakie*, 606 P.2d at 310.

237. *Id.* at 336.

238. *Id.* at 332, 336–37.

239. *Id.* at 334–35.

240. *Id.* at 336.

241. For a full description of Wyoming's post-*Washakie* funding reforms, see *Campbell I*, 907 P.2d at 1248–50; see also William E. Sparkman, John Dayton & Fred Hartmeister, *Financing Wyoming's Public Schools: The Wyoming Legislature Gets to Try Again*, 31 LAND & WATER L. REV. 469, 476–78 (1996).

242. *Campbell I*, 907 P.2d at 1238.

funding mechanisms targeted by the court for invalidation were: a provision allowing local districts to retain 109% of the funds generated locally that exceeded the state average;<sup>243</sup> statutory allowance of an optional local levy;<sup>244</sup> and capital construction financing provisions that relied on local bond issues.<sup>245</sup> All of these provisions, the court concluded, were “tarred with the same brush of disparate tax resources.”<sup>246</sup> As if to underscore its irritation with the legislature’s refusal to comply with its earlier directives, the court noted the increasing magnitude of school funding inequality.<sup>247</sup> While the *Washakie* funding disparity between rich and poor districts—found to be unconstitutional in 1980—was \$2,360, approximately 10 years later, that difference had grown to \$13,016.<sup>248</sup>

In two opinions issued since *Campbell I*, the Wyoming Supreme Court has continued to hold the legislature’s feet to the fire, and the complexion of its supervision of the Wyoming legislative process has changed. In *State v. Campbell County School District (Campbell II)*,<sup>249</sup> and *State v. Campbell County School District (Campbell III)*,<sup>250</sup> the court engaged in painstaking, detailed review of numerous specific funding allocation provisions, holding each to the constitutional standard that the only permissible deviations in funding equality were those based on cost. The intensive review prompted the dissent of one justice, who complained that the court had crossed the line of justiciability and had usurped the function of the political process.<sup>251</sup>

In sum, Kansas and Wyoming stand out for the vehemence with which their courts have rejected the types of funding reforms that are frequently upheld by other state courts. In both of these states, the legislatures’ failure to remove the wealth-based disparities in spite of clear judicial mandates produced not grudging acceptance of a highly convoluted and complex funding scheme but rather categorical invalidation of the inadequate legislative response and an unequivocal imposition of the equality norm. With their apparent willingness to require absolute equalization and a total ban on luxury spending, Kansas and Wyoming have become the school finance equivalent of the prohibitive sumptuary laws described by

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243. *Id.* at 1267–69.

244. *Id.* at 1269–74.

245. *Id.* at 1274–75.

246. *Id.* at 1275 (quoting *Washakie*, 606 P.2d at 337).

247. *Campbell I*, 907 P.2d at 1279.

248. *Id.* at 1251 n.13 (citing *Washakie*, 606 P.2d at 338–39).

249. *Campbell II*, 19 P.3d 518 (Wyo. 2001).

250. *Campbell III*, 32 P.3d 325 (Wyo. 2001).

251. *Id.* at 338 (Voigt, J., dissenting).

Professor Frank in *Luxury Fever*.<sup>252</sup> In his discussion of private consumption patterns, Frank argued that government attempts to prohibit luxury spending are destined to failure and will inevitably result in evasive or avoidance behavior.<sup>253</sup> Whether the positions taken by the Kansas and Wyoming courts are sustainable over the long haul, of course, remains to be seen. Nevertheless, the battle that lies ahead for those states is no longer to determine allowable spending levels but rather the equally divisive task of translating equality into dollars and cents.<sup>254</sup>

### E. Summary

All of the statutes described in this section impose some limit on the spending of wealthy school districts. Typically, however, the programs fail to produce the spending limits on which the schemes were premised. As the earlier discussions have shown, in the case of most spending caps, this is because the caps are often not really caps at all. Rather, in many cases, they allow supplemental local spending that may exceed the cap by a significant percentage. In other cases, the caps' exemptions and exceptions are so profoundly gap-enhancing in their effects that the pre-existing levels of school district wealth disparities can, and do, quickly resurface. All in all, adherence to the ideal of caps without clear legislative commitment to prohibit the anti-equalizing forces that have made their way into most state caps schemes does little to deal with luxury spending by wealthy school districts. At the other end of the spectrum, the caps insisted on by the Kansas and Wyoming courts are categorical and absolutely equalizing. They remove all school district discretion to "overspend" and insist that all revenue differential among districts be based exclusively on differing costs

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252. See FRANK, *supra* note 20, at 199–201. In an admittedly cursory review, Frank describes the failed efforts of numerous government attempts to prohibit luxury spending, beginning with the Roman Empire and continuing up through the 19th century. He concludes that collective action to curb spending by the wealthiest segments of society is more legitimate and more effective if it takes the form of taxation rather than prohibition. This conclusion leads him to the proposal of a Luxury Fever tax. See *supra* discussion at note 20.

253. See FRANK, *supra* note 20, at 199. That observation led Frank to propose this a steeply progressive luxury tax would be more effective than governmental regulation or prohibition of luxury spending. See *id.* at 207–13. For my proposal to adopt a similar luxury tax limit on school spending, see *infra* text accompanying notes 308–17.

254. For instance, in Kansas, large urban school districts have challenged the legislative weighting factor that gives small, declining rural districts an extra allocation, see *Montoy*, 2003 WL 22902963 at \*27, while in Wyoming the dispute is over whether the presence of large mines within a town imposes social costs that must be reflected with an additional educational payment. See *Campbell I*, 907 P.2d at 1268–69. The courts of both states have insisted that equalization does not mean simply a per-capita equality; rather, the formula must be sensitive to individual student needs. *Id.* at 1269; *Montoy*, 2003 WL 22902963 at \*30.

and student needs. Though the equalization they require may impose a more absolute limit on luxury spending than the system of any other state, it is not clear whether their absolute and prohibitory nature will render them unsustainable over the long term.

In terms of their redistributive effect, the caps and recapture plans of Texas and Vermont are no more extreme than some of those found in the other caps states. Yet their galvanizing effect on wealthy districts makes them politically unstable, the object of continual vilification by the districts that feel unfairly singled out to bear the burden of bringing up the bottom. As the next section will suggest,<sup>255</sup> it may be that luxury spending cannot realistically be capped unless the state is able to end the stranglehold exerted by the sense of local ownership of property taxes that pervades most states' tax structures. If that is in fact the case, the problem of capping luxury school spending may lie not so much in the determination to equalize school revenues as in the application of the equalization norm to a system where the proprietary control of tax revenues has become an apparently permanent part of the landscape.

#### IV. BREAKING THE STRANGLEHOLD OF OWNERSHIP

##### A. *The "Get What You Pay For" Model*

Commentators have noticed the increasingly proprietary sense that pervades taxpayers' attitudes about "their" local property tax revenues.<sup>256</sup> As the consumer model of government becomes more entrenched in the mentality of local residents, the payment of taxes is equated with market transactions, in which intelligent consumers weigh individual costs and benefits before making a purchase. Transferred to the world of local government, this means that the taxpayer assesses the legitimacy of taxes much as she would evaluate the potential purchase of a television set, asking whether the money she pays provides her with a sufficient municipal service bang for her tax buck. With the efficiency-driven market approach comes a heightened sense of ownership of the revenues: if I am purchasing services much like I purchase a television set, it is not unreasonable for me to expect that the money that I "spend" on taxes will redound to my individual benefit. With that mindset, an anti-redistributive

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255. See *infra* text accompanying notes 256–307.

256. See, e.g., Fennell, *supra* note 76, at 625; Frug, *supra* note 74, at 29–31; Reynolds, *supra* note 81, at 430–41; Schragger, *supra* note 77, at 1827–29.

attitude is a natural corollary. After all, since I don't pay for your television set, why should I pay for your schools?

In most states, the ownership of property tax revenues for local schools goes unquestioned. Coupled with that absolute ownership is the similarly unrestrained local discretion to set the tax rate and to determine the amount of local funds to be generated by that rate for local schools. Those states that have dared to interfere with the wealthy districts' ownership of local revenues, whether by capping district spending or by requiring a reallocation of the revenues, have been met with strong political opposition. Though caps and other limits on spending by wealthy districts are universally unpopular, it is the states that have superimposed a requirement of wealth redistribution on a firmly entrenched and locally "owned" tax system that have encountered the most virulent reaction.

The funding reforms instituted in Texas<sup>257</sup> and Vermont<sup>258</sup> provide the clearest examples of state efforts to redistribute wealth from rich to poor without interfering with the essential local ownership of property taxes. In both cases, state laws require school districts to generate revenues with the local property tax and to then distribute some of those funds to poorer districts. That is, both state systems acknowledge the districts' ownership of the revenues, and then order them to give those revenues up. In Texas, the school districts' ownership is implicit in the statutory scheme, which gives wealthy districts choices about how to redistribute their excess revenues themselves.<sup>259</sup> In Vermont's original Act 60, though the ownership issue was more subtle because the revenues were taken and redistributed by the state, the very use of the term "sharing pool" inevitably reinforced the districts' claim of ownership of the redistributed revenues. After all, sharing is an action that can only be taken by an owner. With the ownership of the revenues reinforced by the schemes themselves, it is not surprising that they produced relentless opposition.

In a recent book review, Professor Richard Schragger described the proprietary model of local taxation and came away quite troubled by the

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257. See *supra* text accompanying notes 147–179.

258. See *supra* text accompanying notes 180–211. This discussion in this section refers to Vermont's original Act 60. The legislature's amendments have fundamentally altered the Vermont scheme, by adopting a split grand list for purposes of a statewide property tax and removing non-homestead property from local control for local luxury spending.

259. As noted earlier, Texas's Constitution prohibits the adoption of a statewide property tax. See *supra* note 156. Thus, the legislature must choose between the preservation of local ownership of property taxes and the use of statewide taxes other than the property tax to fund education. Given the experience of many states, which have seen school funding decrease when non-property taxes at the statewide level have been adopted to fund education, it is not surprising that the legislature has sought to preserve the use of local property taxes for education. See *infra* text accompanying notes 104–255.

assumptions on which it is based.<sup>260</sup> Fundamentally, the proprietary model relies on what Schragger calls a “naturalized view of local boundaries,”<sup>261</sup> ignoring the “distributional choice”<sup>262</sup> implicit in all local government systems, which require state authorization and delegation of authority. Without state permission, wealthy municipalities would not be able to use their zoning powers to exclude the poor and to insulate themselves from the costs created by the presence of poorer citizens and their reduced ability to generate taxes for local services. Because the poor must live somewhere, of course, the ability of wealthy jurisdictions to exclude them necessarily depends on a “parasitic relationship”<sup>263</sup> with communities that have no choice but to house those with few resources and potentially high service needs.

As he reflected on the sense of ownership that is firmly cemented in the minds of suburban voters, Schragger noted how it produces an often virulent resistance to the redistribution of local tax revenues to other less fortunate jurisdictions.<sup>264</sup> In contrast, those same citizens are unlikely to expend similar amounts of vitriol to oppose the substantial redistribution frequently produced by payment of their much higher state and federal income taxes. New Jersey residents, he noted, pay \$2,342 more per capita in federal taxes than they receive in federal spending,<sup>265</sup> yet the Robin Hood rally cry rarely surfaces in anti-tax efforts at those levels of government.

Schragger’s New Jersey example, when contrasted with the opposition of wealthy taxpayers to the Texas and Vermont school funding schemes, suggests that it is not solely the redistribution of tax revenues that provokes the ire of taxpayers, but, in addition, the disconnect between the level of government at which the taxes are levied and the level of government at which the revenues are spent.<sup>266</sup> When the property tax is

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260. Schragger, *supra* note 77.

261. *Id.* at 1848.

262. *Id.* at 1850.

263. *Id.* at 1850.

264. *Id.* at 1847.

265. *Id.* at 1847 n.74.

266. Charles R. Weaver Metropolitan Revenue Distribution Act, MINN. STAT. ANN. § 473F (2000). The Act is a striking exception to the generalization that redistribution is typically accomplished by the government that has levied the redistributive tax. The Act requires municipal governments in the Minneapolis metropolitan area to share the increase in their tax revenues generated by new commercial and industrial development. See Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1764, 1821–22 (2002). The absence of other examples suggests the force of the generalization. In the case of the Minnesota legislation, it appears that the legislature was convinced that the sharing of revenues redounded to the enhanced welfare of each constituent government unit. Those arguments were made most forcefully by Myron Orfield, then a Minnesota legislator, who has

levied locally, taxpayers assert the ownership and control that comes with local taxation, and redistribution of the revenues produces cries of Robin Hood. In contrast, in those states where schools are funded increasingly from state sources, the ownership of school tax revenues appears to have lost much of its force.<sup>267</sup> It is almost as if a shift in the level of funding forces a shift in the debate, with Robin Hood cries disappearing when the taxing jurisdiction is also the spending jurisdiction.

Calls for state funding of local school systems are, of course, not new.<sup>268</sup> And in fact, most state finance reform is moving toward ever greater state shares of school funding.<sup>269</sup> At the same time, though, the vast majority of the states leave the local property tax in place as an important source of revenue. That is, though the state's share continues to grow, the local portion remains important and generally offsets the redistributive effect of the state funding. Defending the local property tax as an important manifestation of local control, state after state has refused to upset the apple cart of the local property tax. What the previous review of many of the caps states has shown, however, is that the reforms are often counterproductive. They preserve huge inequalities between districts and leave state funding efforts in a continual catch-up race, trying to supplement the revenues of poor districts while the wealthy continue to tax and spend at ever higher levels.

### *B. What About the Homevoter?*

In *Homevoter Hypothesis*,<sup>270</sup> Professor William Fischel makes much of the phenomenon of property tax ownership. In his view, it is a model to be encouraged, because it pushes towards the optimal distribution of government services.<sup>271</sup> Moreover, in the homevoter world, homeowners

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argued in favor of joint regional action to address the problems that plague inner cities and declining suburbs alike. See generally MYRON ORFIELD, *METROPOLITICS* (rev. ed. 1997). In the context of schools, the argument would be that school districts should be willing to pool their resources to promote the education of all children, because of the long-term societal interest in having an educated citizenry. Policy-making at the local level, however, appears inextricably tied to short-term, rather than long-term, interests. See Paul D. Gottlieb, *The Effects of Poverty on Metropolitan Area Economic Performance*, in *URBAN-SUBURBAN INTERDEPENDENCIES* 38 (Rosalind Greenstein & Wim Wiewel eds., 2000).

267. See *supra* text accompanying notes 209–10.

268. See, e.g., Kirk J. Stark, Note, *Rethinking Statewide Taxation of Nonresidential Property for Public Schools*, 102 *YALE L.J.* 805 (1992).

269. See *supra* note 7.

270. See Fischel, *supra* note 76.

271. The market model of local government finance was first articulated by Charles M. Tiebout. Tiebout, *supra* note 74, at 416. Tiebout emphasized the efficiency gains inherent in a system in which

protect their property values by supporting municipal services, and by paying for them with their taxes. In this view, municipal tax payments are an important means of preserving the homeowner's investment. Moreover, Fischel warns, if the link between property ownership and control of local tax revenues is broken, the homeowner will rebel. As an example, he points to California. When the California Supreme Court invalidated the property-tax-based school funding scheme, ruling that it impermissibly preserved entrenched inequality and unfairly burdened poor districts,<sup>272</sup> he argues, the California voter responded with Proposition XIII,<sup>273</sup> the most famous of all voter-initiated tax caps. In Fischel's analysis, the California property owner was unwilling to tolerate a system that deprived local communities of the substantial wealth generation power captured by the property tax system.<sup>274</sup>

Fischel's model is based on the experience of one highly unusual state,<sup>275</sup> and it is as much an ideological defense as a descriptive analytical tool. Not surprisingly, it has spawned analysis and commentary that dispute the empirical and normative strength of his claims.<sup>276</sup> For those who are troubled by the distributive implications of the homeowner model, particularly as applied to public education, alternatives to Fischel's theory all point in the same direction. If the homeowner is allowed to use the municipal tax base as a means of protecting her investment in her home, she will continue to do so. The inevitable result is a metropolitan landscape where some privileged communities are able to create enclaves of high property values and where owners tax themselves to pay for the services they and their similarly situated neighbors all want. At the same time, the less wealthy, often taxing themselves at higher rates than their

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local governments compete with each other to attract consumer-voters. The theory is based on the assumption that individuals can, and will, freely choose to live within the borders of a local government that provides the desired level of service. Tiebout's model has generated substantial debate; for a summary of the salient points, see Reynolds, *supra* note 74, at 101–08.

272. *Serrano*, 487 P.2d at 1263–66.

273. CAL. CONST. art. XIII.A.

274. See Fischel, *supra* note 76, at 98–127.

275. At the same time that property values were rising rapidly, California began to experience the influx of large numbers of Latino immigrants, whose education and income levels were generally lower than the average California voter. The decision to cap property taxes, therefore, could also be related to the unwillingness of wealthier Californians to fund education for the children of their new, poorer neighbors. Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1239 (2000). One statistical analysis of the voting patterns in California argues that Proposition XIII is best explained as based on “a populist, anti-government instinct, not a reaction to *Serrano*.” Stark & Zasloff, *supra* note 95, at 833.

276. See Stark & Zasloff, *supra* note 95; see also Fennell, *supra* note 76; Schragger, *supra* note 77.

privileged counterparts, continue to suffer the consequences of inadequate and underfunded schools. As long as state law recognizes and tolerates the mutually reinforcing relationship between property value and level of government services, school finance reform will not be able to correct the current maldistribution of revenues.

If Fischel's model is an accurate description of the redistributive malfunction that plagues our schools, then we must look to the model to identify the cause. If Fischel is correct that the strength of the connection between property ownership and municipal services is the lynchpin that holds the current suburban landscape together, then those who oppose the pattern of redistributive inequality it produces are led to the conclusion that the lynchpin is also the key to dismantling the system. Ultimately, of course, whether the homevoter world is a model to eliminate or emulate comes down to a basic political question about the role of government in the redistribution of resources. In the context of school funding, however, a growing number of state courts is leaving no doubt that the model is inadequate and inconsistent with fundamental principles of state constitutional law. When it comes to state guarantees of educational quality, the homevoter model rests on the preservation of the very inequality that has led to judicial invalidations of state school financing schemes.

### *C. State Funding and Local Options*

The data on school inequality,<sup>277</sup> the experiences of state funding reforms,<sup>278</sup> and strong normative arguments<sup>279</sup> combine to make a powerful case for limiting the taxing and spending options of wealthy school districts. As the experiences of Texas and Vermont suggest, however, legislative caps and recapture plans are not easily implemented as part of a local property tax system. The examples of Kansas, Wyoming, and Washington (as well as Vermont's recently amended Act 60), with their abolition of the local property tax for school funding, suggest that the solution may lie not in the adoption of funding reforms that preserve local

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277. See *supra* discussion at text accompanying notes 11, 64.

278. See *supra* note 57. The sources cited in this note make varying conclusions about the success of school funding reform, but most agree that the gap between wealthy and poor remains, and may even have widened, in states whose courts have issued equalization orders. Moreover, the fact that school funding litigation is pending or planned in forty-five states certainly suggests that existing school finance reforms have not solved the problems that led to the original lawsuits in the 1970s. See David Brunori, *Political, Legal Crises Plague School Finance*, 20 ST. TAX NOTES 339, 340 (2001).

279. See *supra* discussion at text accompanying notes 77–78.

ownership while forcing wealthy districts to redistribute what they invariably view as their own property, but rather in a more straightforward divestment of the local property tax itself. Once the revenues are no longer “owned” by the districts, the statewide debate over how best to spend limited school dollars appears to proceed to the pressing task of determining how to allocate funds in response to educational needs, rather than as a function of district property wealth.<sup>280</sup>

With its call for state funding of education, this Article makes no new proposals.<sup>281</sup> Where it may differ from the typical proposal for state funding, however, is in its suggestion of two important components that build on the experiences of the states described in Section III.<sup>282</sup> Fundamentally, those experiences suggest that so long as state law preserves the link between local property wealth and school revenues, state reforms will never eliminate the gross disparities in revenues and in educational quality that pervade most state school systems. Thus, this Article urges the adoption of a uniform statewide property tax, whose revenues will be allocated according to state distribution formulas rather than according to the wealth of the property within the state’s school districts, to replace the local property tax.<sup>283</sup> Second, starting from that equalized base, the Article recognizes the force of wealthy districts’ desire to spend lavishly on their own children. Drawing on important insights on the patterns of consumer spending,<sup>284</sup> it agrees that an absolute prohibition of luxury spending in school finance is similarly unlikely to succeed.

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280. In a recent article, Jeffrey Metzler has suggested that “adoption of a nominally more progressive school finance formula will not necessarily result in a more equitable allocation of education resources. To achieve this latter goal, courts and reformers must dig deeper, and they must focus on changing the political dynamics that perpetuate the inequitable equilibrium of school finance.” Metzler, *supra* note 107, at 564. Severance of the link between property district wealth and school revenues would certainly require a profound change in the political dynamics of the state. Without such a paradigm shift, according to Metzler, school funding reform will continue to drift back to the point of “inequitable equilibrium . . . [which] permits wealthy districts, even at lower tax rates, to spend more per student than poor districts.” *Id.*

281. *See, e.g.*, Augenblick, *supra* note 17; John C. Reitz, *Public School Financing in the United States: More on the Dark Side of Intermediate Structures*, 1993 BYU L. REV. 623, 624.

282. *See supra* notes 104–255 and accompanying text.

283. In his student note, Professor Kirk Stark argued for a partial statewide property tax. Stark proposed a division between residential and non-residential property, with all non-residential property tax revenues paid to the state and preservation of local property taxation for residential property. *See Stark, supra* note 268.

284. *See FRANK, supra* note 20. Professor Frank’s theory of luxury fever spending are described in *supra* notes 20 and 126. Because of the negative impact of luxury spending on overall societal welfare, *Id.* at 66–67, and because of the documented failures of government attempts to prohibit luxury spending, *Id.* at 199–201, Frank proposed a simple consumption tax that would be sufficiently progressive to establish meaningful restraints on the rate of luxury consumption. *Id.* at 211–19.

Thus, this Article suggests that wealthy districts be permitted to spend beyond the state equalized rate, but only at a steeply graduated tax rate.

The experiences of Texas and Vermont (under its original Act 60) illustrate the difficulties inherent in a system that both preserves local ownership of property tax wealth while requiring massive redistribution of locally generated revenues. It may be an impossible balance to preserve, particularly in tight economic times, because it relies on the forced generosity of taxpayers to hand over large amounts of locally generated revenues to districts whose revenue raising capabilities are much inferior. One Vermont politician has suggested that the real problem is that the Robin Hood schemes are just too “in your face” to be tolerated by the wealthy owners.<sup>285</sup> In contrast, when the state accomplishes the redistribution by altering the level at which the tax is generated, though the initial outcry may be just as strenuous, the level of political opposition appears to decrease over time.<sup>286</sup>

Although many might agree that the local property tax is an inappropriate funding source for today’s schools, the debate over its replacement shows little consensus. As a growing number of states reshape their school finance statutes by replacing the local property tax, they must find new or increased state tax revenues. Some states have increased their general sales tax or income tax,<sup>287</sup> while others have turned to a more narrow source of funds such as lottery revenues.<sup>288</sup> Perhaps because of the widespread public hatred of the property tax,<sup>289</sup> though, school funding reformers frequently promise to reduce or eliminate the property tax. When that happens, schools must compete at the state

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285. See Rebell & Metzler, *supra* note 86, at 187 n.131.

286. Consider, for instance, a Wyoming newspaper’s description of the impact of a recent natural gas boom on some Wyoming towns. Under Wyoming school funding laws, when the property tax revenue generated by local wealth exceeds a state-mandated amount, the excess is used by the state for its general education fund and redistribution to poorer districts. The state constitution, however, caps the state’s ability to redistribute local revenues; when they exceed a certain amount, the surplus must remain at the local level. The limit has rarely been met. In a newspaper article describing how the gas fields in the town of Pinedale were going to generate property tax revenues that would be immune from state recapture, the town’s fortunate situation was described as a “windfall.” See Rob Shaul, *Pinedale Schools Set to Receive \$8 Million Windfall*, THE PINEDALE ROUNDUP, Feb. 20, 2003, available at <http://meek.sublette.com/roundup/v97n21/v9721s2.htm> (last visited Jan. 3, 2005). Though certainly anecdotal, it suggests a shift in the popular perception of who owns what.

287. See Robinson, *supra* note 52, at 517.

288. *Id.* at 518.

289. A recent compilation of the results of more than 25 years of polling the American public on issues related to taxes suggests that the local property tax and the federal income tax consistently rank the two most hated taxes. See AM. ENTER. INST., AEI STUDIES IN PUBLIC OPINION, PUBLIC OPINION ON TAXES, Rule 18.2.1(g) 7–8 (2004), available at <http://www.aei.org/publication16838> (last visited Jan. 3, 2005).

legislative level for all of their dollars with the many other state agencies and constituencies that are lobbying for funding for other pressing public needs. At that point, the give and take of legislative budget deals inevitably falls on schools as well. In fact, overall school funding levels frequently drop when the state assumes greater responsibility for education.<sup>290</sup> Though undoubtedly disappointing to school advocates, the explanation seems straightforward: when a government service has to compete for its budget dollars with the demands of other agencies and departments, it receives less money than it would if its revenue stream were separated and guaranteed.<sup>291</sup>

A statewide property tax for schools makes sense for a number of reasons. First, its revenue producing potential is fairly predictable and stable over time.<sup>292</sup> Moreover, it provides legislators with a source of funding that can be pledged exclusively to schools, thus reducing the vulnerability of school revenues in statehouse budget battles.<sup>293</sup> In addition, though the property tax may be unpopular, state control can eliminate its most objectionable features. As a statewide tax, it would be levied at a uniform rate, thus eliminating the complaints of those (particularly non-homevoters, such as owners of commercial and industrial property) who see wide disparity in the tax burden imposed on property of identical value in different communities around the state.<sup>294</sup> Moreover, a

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290. For example, the shift to partial statewide funding, triggered in large part by the *Doran* decision, see *supra* note 129 and accompanying text, has not resulted in increased revenues for Washington's schools. In fact, when adjusted for inflation, the state actually gave schools \$115 less per student in 2002 than it did a decade earlier. See Linda Shaw & Jolayne Houtz, *Education in Budget Bind*, SEATTLE TIMES, Mar. 9, 2003, at A1. These numbers mean that Washington has slipped from its 1992 ranking at about the national average; in 2002, it was spending about \$400 per student below that average. *Id.* Professor Michael Heise, however, has described the claims about the impact of successful school funding litigation on the level of statewide spending on education as "murky and unsettled." Heise, *Hollow Victories*, *supra* note 26, at 590. He reviews numerous statistical studies that reach conflicting conclusions. *Id.* at 590–97.

291. The term "full line forcing" is used to describe this phenomenon. For a full explanation, see Kathryn A. Foster, *The Political Economy of Special-Purpose Government*, in AMERICAN GOVERNANCE AND PUBLIC POLICY 189–217 (Barry Rabe & John Tierny eds., 1997); see also Heise, *Hollow Victories*, *supra* note 26, at 590–91.

292. See BRIFFAULT & REYNOLDS, *supra* note 51, at 548–51; cf. Robinson, *supra* note 51, at 514.

293. For instance, even in the profoundly anti-tax state of California, taxpayers appear to agree that education funding should be segregated and protected. Proposition 98, a California law adopted by voter initiative, guarantees that a certain percentage of the state budget will be spent on elementary and secondary education. The actual amount is calculated by a formula that "depends on recent economic growth, enrollment changes, projections of state revenues and income per capita." Kramer, *supra* note 35, at 20.

294. The equality of tax rate for businesses was an important selling point in the passage of the amendments to Vermont's Act 60. See *New Education Funding Law Will Make a Big Difference*, THE HERALD, June 5, 2003, at 1; Nancy Remsen, *School Tax Law's Winners, Losers*, BURLINGTON FREE PRESS, June 1, 2003, at 1A (noting hotel owner's support of new law because it establishes the same

state property tax can be adjusted for owners whose property holdings far outstrip their income stream, particularly the elderly and some family farmers.<sup>295</sup>

For many who advocate funding schools with the local property tax, the asserted loss of local control is reason enough to reject a state property tax. Local control of schools has a long and venerable tradition, and the values of localism are recognized by courts<sup>296</sup> and commentators<sup>297</sup> alike. In fact, the local control argument has been important since the earliest school funding cases; the Supreme Court's unwillingness to invalidate local property tax funding of schools was based in no small part on its appreciation of the importance of local control to the quality of local schools.<sup>298</sup> Without closer inspection, however, the local control argument masks the essential inequality on which it is built. Local control is not the same thing for all school districts—for the wealthy it brings the ability to generate (and spend) high levels of revenue at much lower rates than districts with less property value within their borders. When the term “local control” is used to describe the ability to self-tax and spend, it becomes a cruel joke for districts where even a high tax rate will not

tax rate statewide).

295. Vermont's statewide property tax levy is adjusted for those whose income is below a certain point. See Remsen, *supra* note 294, at 1A (describing how school funding law now provides a tax credit for households with incomes less than \$75,000).

296. See BRIFFAULT & REYNOLDS, *supra* note 51, at 81–124.

297. In the legal literature, Professor Gerald Frug is the preeminent defender of localism as the level of government at which democratic ideals can most easily be realized. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980). For discussion and critique of Frug's localism, see Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1–3, 56 (1990); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 389–406 (1990); Reynolds, *supra* note 74, at 106–08.

298. The Supreme Court's refusal to upset Texas' local property tax system of school finance rested in no small part on its high opinion of local control:

The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means . . . the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to “serve as a laboratory; and try novel social and economic experiments.”

*Rodriguez*, 411 U.S. at 49–50 (internal citation omitted).

Note, though, that financial autonomy is but one of the important components of local control mentioned by the Court. All of the other aspects it described would not necessarily be affected by a shift in the level of funding of education from local to state.

generate adequate revenues to educate the district's children.<sup>299</sup> Unless local control is redefined to exclude the ability to rely on local revenues for local school funding, it will preserve the inequality inherent in the property tax system. Properly defined, local control is an important, perhaps essential, component of public education: in the context of schools, the virtues of localism translate into hands-on involvement by local citizens, investments of time and energy into the shape of local education, and deliberation over the proper use of tax dollars.<sup>300</sup> Disconnecting the funding source from the local district's boundaries merely democratizes local control by giving all districts the same important decision-making power over the education of their children.<sup>301</sup>

In an ideal world, all schools would be able to offer equal facilities and educational opportunities to their students. In our real world, however, the force of the economics of consumption suggests that some minimal tolerance of local options to over tax and spend is acceptable or perhaps even essential. Just as Professor Frank's proposal for a Luxury Fever tax<sup>302</sup> recognized the indisputable power of the drive to spend in our market economy, so too should state law tolerate the desires of wealthy districts to spend more on their children's education than what state tax revenues will buy. This power, however, must be carefully limited and narrowly defined to ensure that the Luxury Fever option remains a small exception to the

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299. See Dorothy A. Brown, *Deconstructing Local Control: Ohio's Contribution*, 25 CAP. U. L. REV. 1 (1996). Professor Brown quotes the concurring opinion of an Ohio Supreme Court justice, in which he described the local control argument as nothing more than a "cruel illusion." *Id.* at 26 (citing *DeRolph I*, 677 N.E.2d at 777 (Douglas, J., concurring)). The majority opinion in that case, which invalidated the Ohio school funding formulas, was equally unimpressed by the local control argument, referring to it as a "cliche." *DeRolph I*, 677 N.E.2d. at 746.

300. Professor Frank's Luxury Fever model similarly recognized the importance of non-monetary forms of spending, arguing that his luxury tax would provide incentives for consumers to forego increased monetary income and to pursue alternative forms of spending. FRANK, *supra* note 20, at 277. Alternatives, in his view, would tend toward "less-conspicuous forms of consumption," whose rewards consist of well being that is not captured by the standard monetary calculation of income. *Id.* at 235. Examples include working less to enjoy more leisure time or choosing to pursue a meaningful career whose income value may be lower than those that provide high market incentives. *Id.* at 235-39. Translated to the context of schools, Frank's insights suggest that taxing luxury spending by wealthy school districts would produce a similar incentive to pursue non-monetary forms of educational improvement.

301. In today's world, it would be a mistake to overstate the importance of any measure of "local control" to public education. Both state and federal laws create numerous regulatory burdens that school districts must shoulder but cannot control. See BRIFFAULT & REYNOLDS, *supra* note 51, at 423-24; Michael D. Blanchard, *The New Judicial Federalism: Difference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231, 280-82 (1998); Charles F. Faber, *Local Control of the Schools, Still a Viable Option?*, 14 HARV. J.L. & PUB. POL'Y 447, 450-58 (1991).

302. For a fuller explanation of Professor Frank's proposal for a Luxury Fever tax, and his explanation of the "smart for one, dumb for all" phenomenon that undergirds it, see *supra* note 108.

rule of equalized state funding. Only if the local option is superimposed on a statewide property tax, available to the wealthy districts only after the state has levied (and redistributed) the property tax, will the local option be prevented from turning the exception of Luxury Fever spending into the rule of wealthy district control of local revenues.<sup>303</sup>

In Professor Frank's *Luxury Fever* world of private consumption, consumers' luxury spending would be taxed at a high rate with the revenues redistributed by the government.<sup>304</sup> In the world of school funding, this Article proposes that state legislatures would have greater flexibility in determining how to limit the luxury spending of wealthy districts. A straightforward analogue to Frank's Luxury Fever tax is possible and uncomplicated, as the state would merely have to determine a rate of state taxation to apply to the generation of local property tax revenues.<sup>305</sup> Under that method, of every dollar of surplus revenues generated by the local district for its schools, the state would take a uniform percentage. A somewhat more sophisticated approach, one that incorporates the district power equalizer<sup>306</sup> method of generating revenues for excess local district spending, would further equalize the revenue raising potential of excess levies for all districts. That is, much as Vermont's amended Act 60 now provides,<sup>307</sup> the increase in school funds generated by a local levy would depend, not on the value of the property situated in the district, but rather on the percentage increase of the levy, with all districts guaranteed the same amount for an equal tax levy. Either way, whether through a straightforward luxury tax or with the added equalization inherent in a district power equalizer, the cap on wealthy district spending would both stem the increase of spending at the top and would produce more revenues for statewide redistribution.

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303. The example of Washington, shows how caps and state funding do not necessarily produce increased or more equalized funding. Though the state has a statewide property tax, it constitutes a small percentage of overall school funding sources. Moreover, Washington's caps are not really caps; they allow substantial local district override, where school districts are free to generate substantial local option budgets. It is not surprising, that the gap between rich and poor in Washington has returned to its pre-litigation magnitude. See *supra* notes 128–45 and accompanying text.

304. Frank proposed a simple one-line amendment to the tax laws, which would categorize all income as either saved (and not taxed) or spent (and taxed at a steeply graduated rate). FRANK, *supra* note 20, at 211–19.

305. Vermont's original Act 60 imposed this kind of tax, producing what was dubbed the "sharing pool," that is, revenues generated locally that were transferred to poorer school districts. See *supra* 180–213 and accompanying text.

306. See *supra* note 36.

307. See *supra* notes 202–03 and accompanying text (describing how Vermont authorizes luxury spending pursuant to a district power equalizer formula, thus adding a layer of progressivity to its admittedly regressive allowance of luxury spending).

The proposal to allow any luxury spending on schools is, of course, a concession to the anti-equalizing forces of property wealth and may be rejected by those who hold steadfastly to the equality norm in school finance. The local option levy, even if equalized in its results, is likely to be taken only by school districts with ample wealth. Its justification lies not in its doctrinal defensibility, but rather in its pragmatic concession to the power of wealth and local control.

## V. CONCLUSION: STRIVING FOR MEANINGFUL SCHOOL FINANCE REFORM

The failure of equalization orders to produce equality in schools and the inadequacy that continues to plague the school systems of many states whose courts have invalidated numerous funding schemes suggests that the current predominant trajectory does not bode well for meaningful school funding reform. The seemingly unending conundrum of school funding reform stems from two inescapable facts: (1) most of the country remains highly segregated on the basis of wealth,<sup>308</sup> and (2) state legislatures are unwilling or unable to spend on poor schools what the wealthy already spend on their own.<sup>309</sup> As school finance litigation shows no signs of abating; as some states are immersed in the second, third, or fourth iteration of cases that began more than 35 years ago; and as school

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308. If school districts were of relatively equal property value, the use of the local property tax would in fact redistribute revenue across the district. In today's highly segregated society, however, local borders segregate according to wealth. The Texas Supreme Court noted how changing demographics rendered the Texas property tax system unconstitutional for public schools:

If our state's population had grown at the same rate in each district and if the taxable wealth in each district had also grown at the same rate, efficiency could probably have been maintained within the structure of the present system. That did not happen. Wealth, in its many forms, has not appeared with geographic symmetry. The economic development of the state has not been uniform. Some cities have grown dramatically, while their sister communities have remained static or have shrunk. Formulas that once fit have been knocked askew. Although local conditions vary, the constitutionally imposed state responsibility for an efficient education system is the same for all citizens regardless of where they live.

*Edgewood I*, 777 S.W.2d at 396. A Kansas trial court has made a similar observation: "When the assets of the state consisted virtually entirely of unimproved prairie land, and when school districts had about equal amounts of that, the property tax likely resulted in reasonably equal educational opportunities for every child." *Montoy*, 2003 WL 22902963 at \*13. For a comprehensive documentation of the extent of racial and socioeconomic segregation in public education, see Ryan, *Schools, Race, and Money*, *supra* note 34, at 272–84. The website of Harvard's Civil Rights Project contains numerous statistics about the resegregation of America's schools, see, for example, GARY ORFIELD & JOHN T. YUN, CIVIL RIGHTS PROJECT, HARVARD UNIV., RESEGREGATION IN AMERICAN SCHOOLS (1999), available at [http://www.civilrightsproject.harvard.edu/research/deseg/Resegregation\\_American&uscore;Schools99.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Resegregation_American&uscore;Schools99.pdf) (last visited Jan. 3, 2005).

309. See STATE EFFORTS, *supra* note 9, at 5; Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 522 (1991).

funding reforms appear not to satisfy the taxpayers, the courts, or the consumers of public education, it may be time for reevaluation of the ways in which most state laws leave untouched the ability of wealthy districts to tax and spend to their hearts' content. This central feature of school funding produces a never-ending upward spiral of spending by wealthy districts that leaves state legislatures in a permanent scramble to patch together funds for the poorer districts for which the discretion to tax and spend is a meaningless catchall phrase.<sup>310</sup>

Moreover, unrestrained school district discretion to tax and spend unwisely incorporates the consumer model of local government into the states' constitutional obligations to provide quality education to all children. Short of an overwhelmingly massive infusion of state funds, severing the link between property wealth and school revenues is the only way to ensure that the current gaps will be eliminated. And, as the experience of the relatively rare caps and recapture states has revealed, even those mechanisms can be inadequate to the task. So long as caps are riddled with exceptions and amenable to local option overrides they will never impose a meaningful limit on the spending of wealthy districts. Finally, as the volatile political experiences of Texas and Vermont suggest, legislative commitment to limit wealthy district spending through the imposition of a recapture plan, superimposed on a system of locally generated and owned property tax revenues is problematic. While it may produce the desired leveling of spending statewide, it is likely to produce never-ending opposition by wealthy districts, whose taxpayers feel unfairly singled out to bear the burden of improving the quality of education available to other people's children. Only if the state is willing to change the level at which the tax is levied, by definitively ending the local ownership of property tax revenues, is meaningful reform likely to succeed. As the courts of Kansas and Wyoming appear poised to follow the bold equalizing lead of the Vermont courts and legislature, the prevalent laissez-faire attitude to wealthy school district spending may have lost some of its luster as an unquestioned feature of school finance. With the adoption of a uniform statewide property tax and use of Professor Frank's *Luxury Fever* insights to limit the taxing options of wealthy districts, school finance statutes would change the trajectory of current spending patterns and make meaningful strides towards reducing the disparity between wealthy and poor districts.

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310. See STATE EFFORTS, *supra* note 9, at 7 (noting how analysis of spending patterns in four states leads to conclusion that "without constraints on local tax efforts, increases in states' equalization efforts may prompt districts to adjust their tax effort in a way that undermines the equalization effort").

The call for a statewide property tax is likely to be met with intense opposition from the districts that stand to lose significant revenues as they lose control over the property wealth within their borders. This opposition, though limited to a small numbers of districts, will be powerful indeed;<sup>311</sup> thus some pragmatic accommodation is warranted. Absolute equalization is likely to produce avoidance behaviors, such as opting out of the public school system or establishing foundations that can provide additional revenue to wealthy districts, that will be detrimental to the overall quality of education statewide.<sup>312</sup> Thus, in a pragmatic vein of recognizing the power of wealth, states should allow the wealthy districts to continue to engage in some luxury spending, but that spending should be steeply taxed. This limited recognition of local option spending, though it may cater to the whims of the wealthy districts, is less likely to produce the same gaps that have resulted in the caps states described earlier. That is because, first, the local options proposed here would be superimposed, not on the entrenched inequality seen in the earlier review of school finance caps, but rather on the equalized base that comes from the statewide property tax. Second, and again in contrast to the caps adopted across the country, the proposed luxury tax on that local option spending would both slow the rate at which luxury spending increases and also produce revenues that can be used by the state on districts whose property value makes local option spending impossible.

Though limiting the spending of wealthy districts is a crucial element of meaningful school reform, it is not a magic bullet. Equally important is the concurrent long-term effort to broaden the stakeholders in public education. As the stereotypical model of the two-parent family with children, owning a single family home and enthusiastically supporting schools at great personal cost in tax payments becomes less the demographic norm, education needs a constituency that extends well beyond the group of people with children.<sup>313</sup> A move to statewide funding

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311. Even though 89% of Vermont taxpayers saw reduced property tax bills with the passage of Act 60, the political opposition was powerful and sustained. One legislator uses an insight from Macchiavelli to explain how a law that benefited so many people was nevertheless ultimately put on the political chopping block: "Major changes make the losers very angry, but elicit only lukewarm support from the beneficiaries because most people fundamentally don't trust change." Rebell & Metzler, *supra* note 86, at 184 (from a telephone interview with Paul Cillo, formerly Majority Leader of the Vermont House of Representatives).

312. Professor Clayton Gillette, who generally supports the application of market principles to the provision of government services, has recognized that exercise of individual choice to defect from public schools could have serious negative societal impacts. See Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185, 1213–14 (1996).

313. See Schomberg, *supra* note 11, at 178.

of education opens the door for a broader, statewide support for education from the business community and from the general citizenry, which may be more interested in raising the level of educational achievement generally than in preserving luxury school district spending for a small segment of the state. Evidence about how all of society will pay the cost of inadequate education, with increased state funds needed to combat higher levels of crime, unemployment, and welfare, can be highlighted more easily at the state level.<sup>314</sup> Moreover, with the property tax rate equalized across the state for all businesses, the level playing field eliminates the often-heard criticism that, because of variation in local property tax rates across the state, some businesses contribute far more than others to public education.

Of course, this Article's two-pronged proposal for a statewide property tax coupled with a steeply taxed local option to engage in luxury spending will not, by itself, solve the problems of public education. It does nothing to address, for instance, the corrosive and destructive effect of hyper-segregation that plagues most inner city and wealthy suburban schools.<sup>315</sup> Nor does it provide answers to the unresolved questions about the correlation between spending and educational quality.<sup>316</sup> What it does, however, is suggest a reform that would radically change school finance in most states and that would provoke a shift in the school finance debate. With the link between property wealth and school revenues definitively broken, educators, legislators, and taxpayers could move to the next difficult step in the process, turning their attention to the task of improving educational quality and making sure that all children's needs are accounted for in state funding formulas. So long as that link remains unbroken, the enormous gap between wealthy and poor districts will endure, and with it, the inevitable litigation filed to force states to live up to their constitutional obligation to create a system of school finance that guarantees that education is truly "available to all on equal terms."<sup>317</sup>

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314. Though local policy making has a long track record of responding only to short-term, and not long-term costs and benefits, the long term benefits of increased educational quality may find greater resonance at the statewide level. See Gottlieb, *supra* note 266.

315. The work of Professor James Ryan deals with the impact of funding reforms on racial and educational equality. See, e.g., Ryan, *Race and Money*, *supra* note 34, at 249; Ryan, *supra* note 93, at 432; Ryan & Heise, *supra* note 48, at 2043.

316. See *supra* note 31 and accompanying text.

317. *Brown*, 347 U.S. at 493.