

The Region and Taxation: School Finance, Cities, and the Hope for Regional Reform

MYRON ORFIELD†

INTRODUCTION

Americans today are governed by a panoply of local governments, especially those who live in metropolitan communities.¹ Political power is legally divided among tens of thousands of local governments,² from general purpose governments like cities and counties to special governments, like school districts and water districts. Each government is financed by a constantly changing mix of local, state, and federal funds, and each citizen subject to a shifting mix of taxes and user fees.³ Given this complexity, it is not surprising that almost no citizen is aware of all of these levels of government or of how their taxes finance these governments, much less how all these governments affect each other for good or ill.

This fragmented landscape is largely the result of the legal and cultural solicitude given cities, particularly in making land use decisions, and an ad hoc system of problem solving by the creation of new levels and forms of government. Although cities and townships derive their power from the state, such localities generally enjoy the legal right to make policy without considering the

† Associate Professor of Law and Director of the Institute on Race & Poverty, University of Minnesota Law School, Non-Resident Senior Fellow, the Brookings Institution.

1. The United States Census defines a “metropolitan area” as a single employment and housing market. DAVID Y. MILLER, *THE REGIONAL GOVERNING OF METROPOLITAN AMERICA* 51-53 (2002) (citing The Federal Office of Mgmt. & Budget, OMB Bull. 99-04).

2. *See infra* Part IA.

3. *See infra* Part IA.

repercussions on the region as a whole.⁴ Whether they realize it or not, city officials compete with each other, seeking tax wealth and social status in the form of businesses and high-income white individuals.⁵ While some economists and legal scholars view some parts of this competition as positive and productive,⁶ the balance of scholarly opinion sees the totality of it as increasingly problematic and detrimental to the region.⁷ The effects of competition harm all citizens of a region, city and suburban, rich and poor, racial minorities and white people.⁸ It affects the regional workforce, the strength of regional economies, and the quality of the environment in many of overlapping respects.⁹

In the last generations, a small group of scholars, the “new regionalists,” has focused on the dimensions and implications of city/suburban competition, particularly the problems it creates.¹⁰ New regionalists advocate measures to reduce growing inequality, discourage the detrimental fiscal competition between local governments within a metropolitan region, and remove fiscal barriers to cooperative land use planning. Given the pervasiveness of localism, however, most scholars and activists who believe in regional reform are pessimistic about the prospects for reform.

4. See *infra* Part IA.

5. See *infra* Part IA.

6. See, e.g., Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

7. See *infra* Part IA.

8. See *infra* Part I.

9. See NEAL R. PIERCE ET AL., *CITISTATES* (1993).

10. Among the best known works engaging with new regionalism are ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994); GERALD FRUG, *CITY MAKING* (1999); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) [hereinafter Briffault, *Our Localism: Part I*]; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) [hereinafter Briffault, *Our Localism: Part II*]; Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Richard Thompson Ford, *The Boundaries of Race: Political Geographies in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); Laurie Reynolds, *Intergovernmental Cooperation: Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93 (2003).

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This Article argues that there has been a steady, largely positive equalization in the funding of a major player in local government, the school district. After briefly discussing the problem of competition and the claims of new regionalists,¹¹ this Article will track the development of school finance reform, including the recent success of plaintiffs in asserting claims seeking adequacy in education, rather than simply equity in funding.¹² It will show that school districts' traditional reliance on local property taxes has been effectively lessened by state equalization.¹³ This Article will examine two states where significant changes in school equity occurred in the 1990s: Kentucky and Michigan. Both, moving from approximately twenty to eighty [check on this] percent state funding, saw dramatic drops in their reliance on local taxes and a rise in fiscal equalization, but in very different ways. In Kentucky, litigation and public education brought about change in what was arguably one of the worst school systems in the United States.¹⁴ In Michigan, discontent over high taxes caused the state legislature to first sever property taxes from its predominant role in funding schools, and then later give Michigan voters a choice of how to fund them.¹⁵ The Article will note lessons regionalists can learn from each case and from school finance reform largely. It will note that the most sweeping equitable result occurred in Kentucky where there was powerful, well planned litigation, significant investment in public education, and a coherent majority-based legislative strategy. However, while making school financing more equitable, particularly in the eyes of the particular plaintiffs who brought the case, this reform often did not have sufficient remedial effect on the inter-city competition for high income homeowners and businesses to break the dynamic of growing spatial and fiscal inequality. This Article will conclude by noting that some form of litigation strategy together with public education and organizing could advance the possibility of regional reform in other areas, such as municipal finance,

11. *See infra* Parts I, II.

12. *See infra* Part IV.A.

13. *See infra* Part IV.A.3.

14. *See infra* Part IV.B.

15. *See infra* Part IV.C.

regional land use and/or governance issues. Finally, the Article will argue that the collaboration necessary to build a school and municipal equity coalition can also be used to build a coalition on land use planning and regional governance.

I. THE PROBLEM OF REGIONAL FRAGMENTATION

A. *Horizontal Fragmentation*

State and local government are huge operations, rivaling and sometimes surpassing the federal government in total size and spending. In 2002, the federal government had nearly 2.7 million civilian employees, state governments had over 5 million and local government had over 13 million.¹⁶ While the federal budget in 2003 spent \$2.13 trillion,¹⁷ the combined expenditure of state and local government was \$2.16 trillion and local government over \$1 trillion.¹⁸ Although each governmental unit generates much of its own revenue, state and local governments depend on other governmental sources for significant streams of revenue, state governments from federal transfers and local governments from state transfers.¹⁹

Many urban and suburban problems arise from competition between local entities in gaining access to these sources of revenue. Local government in the United States comes in several forms, most prominently cities, special districts (including school districts), counties, and metropolitan planning organizations. All are creatures of the state, generally alterable at will by the state, but *all* are dependent on state revenue collected from outside their borders for operation. About one fifth of city, one third of

16. U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS GC02(3)-2, COMPENDIUM OF PUBLIC EMPLOYMENT: 2002 NATIONAL SUMMARY 1 tbl.1 (2002).

17. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2003, 395 tbl.S-1 (2002).

18. U.S. CENSUS BUREAU, SUMMARY OF STATE AND LOCAL FINANCES BY LEVEL OF GOVERNMENT: 2002-2003 (2005), *available at* <http://www.census.gov/govs/estimate/03s/00us.html>.

19. *Id.* (thirty percent of state general revenue comes from the federal government as aid while forty percent of local government revenue comes from state aid).

county, half of the public school system, and seven percent of special district budgets come from state aid.²⁰ Competing for state and federal aid, as well as local tax revenue and private investment are tens of thousands of local governments. In 2002, there were over 15,000 school districts, 35,000 other special districts, about 3,000 counties, and nearly 36,000 cities or towns in the United States.²¹ Although each type of local government seeks revenue from whatever sources it can obtain, the city lies at the heart of local competition.

The decisions of cities regarding land use and taxation are responsible for much of the inequity in regions in the United States today.²² Although city revenue is also drawn from sales and income taxes, the majority of local revenue is obtained from property taxes.²³ Cities seek to maximize their tax bases through fiscal zoning, land use decisions which encourage high revenue properties over low revenue properties. Within a state property tax system, for instance, office parks provide greater revenues and require fewer services than other forms of commercial or industrial property, which as a group provide more revenue and less services than most homes.²⁴ Similarly, expensive homes provide more revenue and require fewer services than modest homes or family rental housing.²⁵ These decisions have a profound effect on where individuals in a region can live and, correspondingly, their access to services and jobs.²⁶ Fiscal competition, interacting with persistent, illegal (but

20. U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS GC02(4)-4, FINANCES OF MUNICIPAL AND TOWNSHIP GOVERNMENTS: 2002 SUMMARY 1 tbl.1 (2005); U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS GC02(4)-3, FINANCES OF COUNTY GOVERNMENTS: 2002 SUMMARY 1 tbl.1 (2005); U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS GC02(4)-2, FINANCES OF SPECIAL DISTRICT GOVERNMENTS: 2002 SUMMARY 1 tbl.1 (2005); U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS GC02(4)-1, PUBLIC EDUCATION FINANCES: 2002 SUMMARY FINANCES 1 tbl.1 (2004).

21. U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS GC02(1)-1, GOVERNMENT ORGANIZATION 3 tbl.3 (2002).

22. See MYRON ORFIELD, AMERICAN METROPOLITICS 96 (2002). Counties also make land use decisions over unincorporated areas.

23. See *id.* at 88-89.

24. See *id.* at 90.

25. See *id.* at 88-90.

26. See *id.* at 91.

unredressed) housing discrimination on the basis of race and class, has had devastating consequences in terms of the safety, health, and opportunity structures of persons of color, particularly the poor.²⁷ Competition also creates a vicious cycle, whereby municipalities that have lost high revenue property must either increase tax rates or reduce services, either of which will reduce the locality's ability to compete in the future.²⁸

B. Vertical Competition

Each type of local government creates or minimizes the inequities of fiscal competition in different ways, largely based on the unique history and structure of each. Differing scopes of governance, levels of accountability, and relationships to other local jurisdictions, all factor into the effect a local government type has on equity.

1. *Cities*. Cities are the most fundamental local government actors in a region.²⁹ As discussed above, cities are the primary decision makers in terms of land use and hence the shaping of metropolitan society. The power of the cities to plan land use derives from the state through its delegation of the zoning power.³⁰ This power is limited by statutory and constitutional requirements that land use must promote health, safety, or the general welfare.³¹ This power has in practice given most cities basic sovereignty

27. See, e.g., PAUL A. JARGOWSKY, *POVERTY AND PLACE* (1997); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1993); DAVID RUSK, *CITIES WITHOUT SUBURBS* 27-31 (1994); Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747 (2005).

28. See ORFIELD, *supra* note 22, at 92.

29. "Cities," for purposes of this Article, include municipalities with land-use planning powers, such as villages, townships, boroughs, towns, and urban counties that control land use powers for unincorporated areas. Township governments may or may not be active in shaping land in an area which is otherwise incorporated or where the land use planning powers are undertaken by the counties.

30. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 3.5, at 47-48, § 5.3, at 157-59 (2003).

31. See *id.* § 3.6 at 48-49 (discussing widely adopted Standard State Zoning Enabling Act); see also *id.* § 10.12 at 442-43, § 10.12.D at 448-49 (discussing traditional and modern requirements of substantive due process).

over local land use decisions.³² While almost all cities have elected local governments (and if elected must be apportioned one person, one vote), there may be no constitutional right to an elected local government.³³

The early development of local government in the United States led largely to metropolitan municipal governments. The large cities of the country grew primarily during most of the nineteenth century by the annexation and consolidation of adjacent areas.³⁴ Annexation was attractive to people living near cities because cities provided infrastructure that they would not otherwise be able to afford, including sewer and water services and roads.³⁵ In most of the early years of annexation, however, the acquiescence of people living in areas to be annexed was not required—decisions regarding annexation were made at the state, rather than the local level.³⁶ The establishment of independent cities or towns was also discouraged by laws which treated municipal incorporation as a privilege to be granted by state government.³⁷

Demographic and legal change during the nineteenth century largely halted the trend toward metropolitan government. The arrival of poor Eastern European immigrants and African-American migrants in cities led many suburbanites to fight efforts at annexation.³⁸ State law soon shifted away from allowing forcible annexation toward requiring local referenda.³⁹ In addition, state legislatures made it easier to incorporate a new municipal unit on the edge of a great city. With such incorporation, the majority of local residents could effectively reject annexation.⁴⁰ Now groups of citizens at the edge of a great

32. See Briffault, *Our Localism: Part I*, *supra* note 10, at 39-41.

33. See 1 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 9.02 (2003).

34. See KENNETH T. JACKSON, CRABGRASS FRONTIER 138-43 (1985).

35. See *id.* at 146-47.

36. See *id.* at 147-48.

37. See JON C. TEAFORD, CITY AND SUBURB 6 (1979).

38. See JACKSON, *supra* note 34, at 150-51.

39. See *id.* at 152.

40. See *id.*

city can often simply decide they want to become a new municipality if the majority of residents agree.⁴¹

The difficulty of annexation and ease of incorporation reflect a legislative and judicial deference to local communities that runs throughout American law. Although traditionally cities have been viewed as creatures of the state, postwar courts allowed local communities to act with only the interests of their own residents in mind.⁴² This is reflected in the destructive fiscal zoning discussed in the previous section.

2. *School Districts.* School districts are the second most powerful actors at the local level. Although they were initially associated with cities and towns,⁴³ school districts evolved into entities separate from municipalities.⁴⁴ Inequalities in funding between school districts have long been a problem. Schools were initially funded through a variety of sources, including rate bills (a tax on parents for tuition), local taxes, and licensing and lotteries.⁴⁵ Although most states had begun to directly support schools by the mid-nineteenth century,⁴⁶ until well into the twentieth century, public education was mainly financed by local taxes.⁴⁷ A scholar of school finance noted in 1906 the inequality produced by reliance on the local tax base:

While the towns or counties having the lowest rate of taxation would have no difficulty in maintaining good schools taught by good teachers for nine in ten months of the year . . . the towns or counties having the highest rate of taxation could maintain, with

41. See Briffault, *Our Localism: Part I*, *supra* note 10 at 74-75.

42. See *id.* at 39-40.

43. LAWRENCE A. CREMIN, *AMERICAN EDUCATION* 153 (1980) (noting the primary role of towns in establishing early schools, with districts assuming a "surrogate" role).

44. See NEWTON EDWARDS, *THE COURTS AND THE PUBLIC SCHOOLS* 93-94 (3d ed. 1971).

45. FLETCHER HARPER SWIFT, *A HISTORY OF PUBLIC PERMANENT COMMON SCHOOL FUNDS IN THE UNITED STATES, 1795-1905* at 23-38 (1911); see also JOHN E. COONS ET AL., *PRIVATE WEALTH AND PUBLIC EDUCATION* 47-48 (1970).

46. See LAWRENCE A. CREMIN, *THE AMERICAN COMMON SCHOOL* 126 (1951).

47. See PERCY E. BURRUP ET AL., *FINANCING EDUCATION IN A CLIMATE OF CHANGE* 79 (6th ed. 1996).

difficulty, only poor schools, taught by cheap teachers, for the legal minimum term⁴⁸

Throughout the twentieth century, the share of school financing supplied by local taxes has steadily, if slowly, decreased.⁴⁹ The result, however, was not equal spending per student across districts. Following the Second World War there was a rapid growth in state finance that allowed many suburban districts composed largely of homes as their tax base, to finance and build separate suburban school districts that would never have been otherwise able to exist and support themselves as separate entities. The Kerner report, issued following the riots of the later 1960s and just before the first wave of school finance litigation, noted that state contributions have not had an equalizing effect on city schools.⁵⁰

Political fragmentation further harmed, and continues to harm, the ability of school districts to offer equal opportunities. Cities in the suburbs frequently zone subdivisions that make sense in terms of their fiscal needs, but they often do not understand or even care about the implications of their decisions on school districts. For instance, a municipality might see starter homes as a rapid revenue source, while school districts do not have sufficient local tax support to educate the children from those homes.⁵¹

Unlike other special districts discussed below, if school districts are elected and taxed, they must be apportioned one person, one vote.⁵²

48. ELLWOOD P. CUBBERLEY, *SCHOOL FUNDS AND THEIR APPORTIONMENT* 54 (AMS Press, Inc. 1972) (1906).

49. NAT'L CTR. FOR EDUC. STATISTICS, *DIGEST OF EDUCATION STATISTICS TABLES AND FIGURES, 2003* at 191 tbl.156, available at <http://nces.ed.gov/programs/digest/d03/tables/dt156.asp>.

50. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

51. This happens often in bedroom-developing suburbs, where lack of commercial tax base undermines all services, including schools. See ORFIELD, *supra* note 22, at 2-3.

52. See MARTINEZ, *supra* note 33, § 2.17.

3. *Other Special Districts.* Special districts, which have power over only a specific area of governance, are the most common form of local government and the fastest growing.⁵³ Special districts span the spectrum of areas of governance. Mid-nineteenth century districts served cities and their suburbs in areas including law enforcement, sanitation, and parks.⁵⁴ Another wave of districts was formed to circumvent state-imposed limits on debt and taxation; because special districts were separate units of local government, they were formally not subject to these state municipality limits.⁵⁵ By the middle of the twentieth century, special governments had authority over housing and an array of other areas: "law enforcement, health, planning, air quality control, resource conservation, economic development, airports, transit, and sewers."⁵⁶ Special districts are funded primarily through property taxes, service charges, and fees.⁵⁷

4. *Counties.* While cities were often the earliest form of local government in the northern United States, counties were the primary unit of local government in the early south.⁵⁸ The power of counties has been limited by region and by whether the county was urban or rural. Traditionally, especially in rural areas, counties maintained records, administered courts, and built roads.⁵⁹ Early counties had control over land use and continue to hold this power today in areas where they have not been superseded

53. See KATHRYN A. FOSTER, *THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT* 2 (1997). *But see* U.S. CENSUS BUREAU, *GOVERNMENT ORGANIZATION*, *supra* note 21, at 4-6 (showing, between 1952 and 2002, no measurable change in the number of county governments, less than six percent growth in subcounty (city and town) general government, nearly eighty percent fewer in school districts, and special districts nearly tripling).

54. See FOSTER, *supra* note 53, at 15-16.

55. See *id.* at 17; see also TEAFORD, *supra* note 37, at 6.

56. FOSTER, *supra* note 53, at 18-20.

57. See *id.* at 14.

58. See HERBERT SYDNEY DUNCOMBE, *MODERN COUNTY GOVERNMENT* 21-22 (1977); Lawrence L. Martin, *American County Government: A Historical Perspective*, in *COUNTY GOVERNMENTS IN AN ERA OF CHANGE* 1, 3-4 (David R. Berman ed., 1993).

59. MARTINEZ, *supra* note 33, § 1.5; DUNCOMBE, *supra* note 58, at 22.

by cities.⁶⁰ Counties now provide a greater variety of services, including hospitals, libraries, and parks, as well as administering social welfare programs.⁶¹ Regional differences still characterize the variety of services provided, with counties in New England providing fewer services than in other areas of the country.⁶² Counties are still very powerful in the South.⁶³

Because counties often span many municipalities and communities of differing incomes, taxing and spending by counties can both promote and inhibit equity.⁶⁴

Sometimes the assumption of social services by a county, particularly if it has a larger per capita tax base than a city in its borders, can redistribute wealth from affluent suburbs to less affluent cities.⁶⁵ This is true where wealthy suburbs exist in the same jurisdiction as the city. Often, however, a county tax rate applies to all residents equally, while services are primarily provided to people living in unincorporated, usually suburban, areas.⁶⁶ In addition, some county functions, like road building, by their nature distribute city tax dollars outward.⁶⁷

5. *Metropolitan Planning Organizations.* Metropolitan planning organizations (MPOs) are required by the federal government to allocate highway money within a region.⁶⁸ Their members are most frequently appointed from among other local government officials, by a state by state set of formulae.⁶⁹ While MPOs are vested with the power to

60. See JUERGENSMEYER & ROBERTS, *supra* note 30, § 3.5.

61. See DAVID K. HAMILTON, *GOVERNING METROPOLITAN AREAS* 262-66, 270 (1999).

62. *Id.* at 256.

63. See generally MARTINEZ, *supra* note 33, § 2.13

64. See HAMILTON, *supra* note 61, at 267.

65. See *id.* at 267-68 (discussing Brett W. Hawkins & Rebecca M. Hendrick, *Do County Governments Reinforce City-Suburban Inequalities?*, 75 *Soc. Sci. Q.* 755 (1994)).

66. See HAMILTON, *supra* note 61, at 267.

67. See *id.*

68. See 23 U.S.C. § 134(b)(1) (2000) (requiring creation of MPO for urban areas that exceed 50,000 individuals).

69. Martin Wachs & Jennifer Dill, *Regionalism in Transportation and Air*

formulate regional plans, state departments of transportation have, in practice if not law, the final authority as to which projects will go forward.⁷⁰ The discretion given states arguably cuts against regionalist ideals.⁷¹ Although a previous statute ensured that MPOs consider land use in their decisions, a recent amendment removed that language.⁷² Nonetheless, MPOs are the most promising form of local government for thinking about inter-regional problems.

II. NEW REGIONALISM: GOALS AND (FEW) HOPES

The problems of fragmentation and competition indicate the need for a regional solution. Growing groups of academics, politicians, and other thinkers are contributing to a body of scholarship analyzing the problems of metropolitan areas today and proposing solutions. Although there is considerable debate within this loose movement, these new regionalists share some consensus about what needs to be done to counteract competition and end inequity. They also share a common pessimism about the possibility for reform.

A. *The New Regionalist Consensus on Metropolitan Reform*

For over a century, the field of local government law has focused mainly on construing city and suburban questions in terms of municipal legal doctrines formulated in the nineteenth century. In the last generation, however, a small group of scholars, “the new regionalists” have focused on the dimensions and implications of city/suburban competition and the problems caused

Quality: History, Interpretation, and Insights for Regional Governance, in GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AMERICA 296, 303 (Alan Altshuler et al. eds., 1999) (noting that local legislators comprise the membership of most, but not all, MPO boards).

70. Benjamin K. Olson, Comment, *The Transportation Equity Act for the 21st Century: The Failure of Metropolitan Planning Organizations to Reform Federal Transportation Policy in Metropolitan Areas*, 28 *TRANSP. L.J.* 147, 159-60 (2000).

71. See *id.* at 169-72.

72. See *id.* at 171. Compare 23 U.S.C. § 134(f) (1998) with 23 U.S.C. § 134(f) (2005).

thereby.⁷³ Within this scholarship is a growing consensus calling for doctrinal reform in three broad areas of the city/suburban relationship. The first area is local government finance, with the goal being to reduce inequality, discourage the detrimental fiscal competition between local governments within a metropolitan region, and remove fiscal barriers to cooperative land use planning. Implied in this is a need to create funds to redevelop older communities in the region. The second area is land use planning with the goal being to maximize limited infrastructure resources, reduce discriminatory barriers to affordable housing, and protect open spaces and the environment through more cooperative land use planning. The third area is regional governance structure, with the goal being to coordinate the needs of regional communities through structural reform.

While members of this “New Regionalist” school agree on the existing problems within regional areas, there has been a sharp debate about the structure of solutions. One school of thought, led by Richard Briffault at Columbia Law School, was framed by two massive and influential articles written by Briffault in 1990. Briffault generally called for increasing the pressure on state government to redistribute equity and create state wide and regional land use planning frameworks. This would level the playing field in terms of taxation, and reduce the powers of local governments to exclude outsiders through land use planning.⁷⁴ Briffault also called for creating stronger regional governments in

73. See generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003); David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999); Briffault, *Our Localism: Part I*, *supra* note 10, at 1; Briffault, *Our Localism: Part II*, *supra* note 10; Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996) [hereinafter Briffault, *Boundary Problem*]; Sheryll D. Cashin, *Civil Rights in the New Decade: The Geography of Opportunity*, 31 CUMB. L. REV. 467 (2001); Cashin, *supra* note 10; Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002); Gerald E. Frug, *supra* note 10; Gerald E. Frug, *The City as Legal Concept*, 93 HARV. L. REV. 1057 (1980); Ford, *supra* note 10; Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173 (1995-96); Reynolds, *supra* note 10.

74. Followers of the school of thought led by Richard Briffault include Cheryl Cashin and Laurie Reynolds.

metropolitan America. Adherents of this reform vision could be called the state power/regional government group.

Another school of thought has been led by Gerald Frug at Harvard Law School. As outlined in his important book *City Making*, the synthesis of a generation of his legal scholarship, Frug believes that the regional problems noted above can be solved by empowering cities with greater inherent authority so that they can truly compete in the marketplace;⁷⁵ by creating more permeable municipal boundaries, by creating rights of regional citizenship, and by exploring new notions of cross border rights and responsibilities in what he calls a regional legislature. Frug also explores the ideas of representation and democracy.⁷⁶

B. *The Pessimism of the New Regionalists*

While there has been coherence among new regionalist scholars about objectives, there has been a certain hopelessness in the law and other fields about making political/legislative progress on regional disparities.⁷⁷ The schools realize that the legal and cultural foregrounding of local self-interest,⁷⁸ a tendency to cooperate only on narrow

75. Followers of the school of thought led by Gerald Frug include David Barron and Richard Ford.

76. See Myron Orfield, *Comment on Scott A. Bollens's "In Through the Back Door: Social Equity and Regional Governance,"* 13 HOUS. POLY DEBATE 659 (2002).

77. See DOWNS, *supra* note 10, at 195 ("odds are against" coalition forming to adopt equitable metropolitan growth strategies); Scott A. Bollens, *In Through the Back Door: Social Equity and Regional Governance*, 13 HOUS. POLY DEBATE 659 (2002) (most equity policies nowadays "likely insufficient" in absence of comprehensive, locally determined agenda); Briffault, *Boundary Problem*, *supra* note 73, at 1171 ("There is little reason to be optimistic about the prospects for metropolitan governance."); Harold Wolman et al., *Cities and State Legislatures: Changing Coalitions and the Metropolitan Agenda* 35 (Geo. Wash. Inst. Of Pub. Pol'y, Working Paper No. 3, 2003), available at <http://www.gwu.edu/~gwipp/papers/wp003> (though transportation is a good area for city-suburban cooperation, "[m]ore redistributive policies . . . face much greater difficulties in attracting supporters"); cf. Cashin, *supra* note 10, at 2048 (noting "only mild[] optimis[m]" of author regarding the possibility of an equitable regionalism).

78. Donald F. Norris, *Prospects for Regional Governance Under the New Regionalism: Economic Imperatives Versus Political Impediments*, 23 J. URBAN AFF. 557, 562-63 (2001); see also Reynolds, *supra* note 10, at 131.

and technical areas,⁷⁹ and powerful suburban interests,⁸⁰ are formidable barriers to change. Many new regionalist scholars would agree with Donald Norris's assessment of the possibilities for real equitable change:

My conclusion is decidedly pessimistic. Because of the formidable political factors that hinder its development, the probability of achieving regional governance anywhere in the US in the foreseeable future is very low. At least it is low in the absence of a sustained crisis or crises which would require local governments in a region to cede some of their local autonomy and cooperate in meaningful ways or which would require senior levels of government to step in and force some form of regional governance. Clearly, however, history is not very sanguine that such will occur.⁸¹

This pessimism is somewhat justified, as regional inequity is largely rooted in long-established competition between cities. Cities are at once both the most powerful local actors and the most visible ones. In this approach, however, the new regionalism has ignored two very broad initiatives that concern the second fundamental level of the metropolis—school desegregation and fiscal equalization.

Courts have crossed and blurred the boundaries of local government in two very important respects through school desegregation and fiscal equalization. School desegregation efforts represent the nation's only meaningful attempt to break down the walls of racial segregation. Driven by federal courts and Congress, this effort made a huge difference in terms of integration and opening up life opportunity for a huge number of children of color in this country. Sadly, progress peaked in the mid-1970s when the *Milliken* case shielded suburban districts from integration and schools have begun to re-segregate since courts allowed dismantlement of long-settled desegregation plans in the mid-1990s.⁸² The remedies which remain, such as hundreds

79. Scott A. Bollens, *Concentrated Poverty and Metropolitan Equity Strategies*, 8 STAN. L. & POL'Y REV. 11, 13 (1997); Briffault, *Our Localism: Part II*, *supra* note 10, at 376; Reynolds, *supra* note 10, at 137, 144-45.

80. Norris, *supra* note 78, at 564-65.

81. *Id.* at 569.

82. *Milliken v. Bradley*, 418 U.S. 7171 (1974); *see also Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237 (1991).

of millions of dollars of state funds to poor segregated schools such as Detroit, Kansas City, and other districts that could not be integrated with their suburbs (*Milliken II* funds), have been much less effective in helping promote opportunity and neighborhood stability than desegregative programs like busing.⁸³

The other major area of activity, the subject of this Article, relates to school fiscal equity. Driven by state courts and the formation of legislative coalitions in nearly every state of the union, equity in school funding continues to expand in the nation today.

III. THE DEVELOPMENT AND EFFECT OF MODERN SCHOOL FINANCE REFORM

A. *Federal Equal Protection and School Equity*

Federal equal protection challenges to state finance systems largely started and ended with *San Antonio Independent School District v. Rodriguez*,⁸⁴ a challenge to the Texas school finance system.⁸⁵ The case, brought on behalf of Mexican-American children from a school district of very low property tax wealth, claimed that the Texas funding system discriminated against the poor and those in poor districts. The Supreme Court acknowledged the finance system's disparities by contrasting the school spending between the plaintiff's school district, which overwhelmingly had students of color and low assessed property values, with another city district, which was predominantly white and had high assessed property values.⁸⁶ Given funding from all sources, the property-poor, minority district was able to spend \$356 per pupil, while

83. *See generally* Institute on Race & Poverty, *Minority Subordination, Stable Integration, and Economic Opportunity in Fifteen Metropolitan Regions* (March, 2006), http://64.233.167.104/search?q=cache:SERvGIE5WB0J:www.irpumn.org/uls/resources/projects/SummaryReport_030602.pdf+busing+neighborhood+stability+detroit&hl=en&ct=clnk&cd=2&gl=us.

84. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

85. *Id.* at 4-5.

86. *See id.* at 11-13.

the property-rich, white district spent \$594 per pupil.⁸⁷ The students from the poor school district claimed that the finance system violated the Fourteenth Amendment's Equal Protection Clause by unconstitutionally discriminating on the basis of wealth and by burdening the fundamental right to education.⁸⁸ The Supreme Court rejected both arguments.

The Court distinguished the plaintiff's case from previous wealth discrimination claims by stating that there was no evidence that the finance system discriminated against poor people, noting that poor people could live in property-rich districts.⁸⁹ The Court also noted that the finance system's disparities were only a relative deprivation, and that precedent had only recognized absolute deprivations.⁹⁰ As long as students received some education—and evidence showed they were receiving an “adequate” one—the Equal Protection Clause would not be violated.⁹¹

The Court also found, notwithstanding the strong suggestion in *Brown v. Board of Education*,⁹² that education is not a fundamental right. Although the Court recognized that education was linked to constitutionally-recognized rights to speech, it found no evidence that the finance system undermined these rights: “no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”⁹³

In rejecting the plaintiffs' claim, the Court acknowledged its decision was informed by federalist deference to states on education and revenue matters⁹⁴ and

87. *Id.* at 12-13.

88. *Id.* at 19-20, 29.

89. *Id.* at 22-23.

90. *Id.* at 23-24.

91. *Id.* at 24.

92. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

93. *Rodriguez*, 411 U.S. at 35-37.

94. *Id.* at 40-44.

concern that finding a constitutional violation could mean greater equity in funding other public services.⁹⁵

B. *State Litigation*

After *Rodriguez*, challenges to school finance inequity have taken place in the courts of four out of five states.⁹⁶ Plaintiff theories have centered on the equal protection and education clauses of state constitutions. Litigants challenging under the Equal Protection Clause argue that education is a fundamental right or wealth a suspect class, entitling financing schemes to greater scrutiny or that such laws are simply irrational.⁹⁷ Courts usually use different tests to determine whether a fundamental right is violated by a given educational system than the one used by the Supreme Court in *Rodriguez*,⁹⁸ but are more deferential in their suspect class analysis.⁹⁹ Low-wealth districts have also argued that school finance systems violate state constitutional requirements regarding state provision of public schools.¹⁰⁰ While early suits under both equal protection and education clauses sought to remedy funding inequality, most recent suits have focused on ensuring the

95. *Id.* at 54-55.

96. Perry A. Zirkel & Jacqueline A. Kearns-Barber, *A Tabular Overview of The School Finance Litigation*, 197 EDUC. L. REP. 21, 22 (2005) (“41 states have been the scene of pertinent published court decisions.”).

97. See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 107-08 (1995).

98. See William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1671-72 (1989).

99. See, e.g., *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1021 (Colo. 1982) (using Supreme Court precedent and state cases relying on Supreme Court precedent to find no suspect class); see also Jennifer L. Palmer, Comment, *Education Funding: Equality Versus Quality—Must New York’s Children Choose?*, 58 ALB. L. REV. 917, 926 (1995) (“[F]ew state courts have diverged from the Supreme Court’s holding that poverty does not constitute a suspect class.”). But see *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1976) (finding classifications by district wealth suspect); accord *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980).

100. See Thro, *supra* note 98, at 1661-70.

adequacy of students' educational experience, and used education clauses to do so.¹⁰¹

The results of lawsuits have been largely successful. Overall, twenty five states have declared their school systems unconstitutional while eighteen have upheld their systems in the face of legal challenge.¹⁰² Sometimes litigation strategies experienced several failures before ultimately succeeding. In Texas, for instance, a challenge to the school finance system which began in 1984 was only resolved over ten years later, after several trips to the state supreme court and several attempts by the legislature to meet state constitutional requirements.¹⁰³ The same legal theory can produce very different results in different states. In New Jersey an adequacy theory in *Abbott v. Burke*¹⁰⁴ profoundly redistributed money to the central city, after previous suits had failed to do so.¹⁰⁵ The racial composition of a district also has an effect on the likelihood of success—white districts have been considerably more successful than minority districts.¹⁰⁶

101. See William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 604 (1994). Although scholarly focus of late has been on education clause suits, plaintiffs still challenge on equal protection grounds. John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2382 n.177 (2004).

102. ACCESS, "Equity" and "Adequacy" School Funding Court Decisions, Mar. 10, 2005, http://www.schoolfunding.info/states/state_by_state.php3 (last visited Oct. 10, 2006) (citing Molly A. Hunter, Campaign for Fiscal Equity, Inc., State-By-State Status of School Finance Litigation (2005)).

103. See *Edgewood Indep. Sch. Dist. v. Meno*, 893 S.W.2d 450, 459-61 (Tex. 1995).

104. *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998).

105. Catherine Gewertz, *A Level Playing Field*, EDUC. WK., Jan. 6, 2005, at 42 (noting that post-*Abbott*, poor districts are spending "nearly what the richest districts spend").

106. See James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 455 (1999). Minority districts are able to reach or exceed state spending averages largely through funding from desegregation funds, funds which will dwindle as court desegregation orders are lifted. See *id.* at 436-37, 445-46.

C. Legislative Reform

Partially as a result of litigation, state legislatures have changed the way they finance school districts frequently in the past thirty years. As discussed above, scholars have long known of the inequity wrought by reliance on local taxes,¹⁰⁷ and state legislatures have attempted to tackle the problem sporadically throughout the twentieth century. Around the time challenges to finance systems began to be filed, states began a new wave of reform, in both those states being sued and those not (yet) sued.¹⁰⁸ Recent reform has increased the total spending on education and reduced the reliance on local taxes. Adjusting for inflation, spending per pupil increased from \$4,352 during the 1970-71 school year to \$8,742 during the 2000-01 year.¹⁰⁹

States have also changed their formulas for funding and the methods of obtaining revenue to fund schools. Although public education is still generally financed by a mix of federal, state, and local sources, the relative weight accorded to each source varies greatly from state to state, as well as the methods for allocating state aid.¹¹⁰ Most states establish and fund a minimum level of state aid for each student, provided a district taxes at a minimum rate.¹¹¹ This funding is often augmented by categorical aid, that is, aid based on district characteristics, including poverty, cost of living, and district size.¹¹² A few states give districts

107. *See supra* Part I.B.2.

108. William N. Evans et al., *Schoolhouses, Courthouses, and Statehouses After Serrano*, 16 J. POL'Y ANALYSIS & MGMT. 10, 11 tbl.1 (1997) (between 1971 and 1992, reform was court-mandated in sixteen states and not so mandated in twenty-one).

109. NAT'L CTR. FOR EDUC. STAT. *supra* note 49, at 204 tbl.166, <http://nces.ed.gov/programs/digest/d03/tables/dt166.asp> (last visited April 8, 2007).

110. For a good basic overview of funding methods, see Jeffrey Metzler, *Inequitable Equilibrium: School Finance in the United States*, 36 IND. L. REV. 561, 569-73 (2003).

111. *See generally* Yao Huang et al., *A Guide to State Court Decisions on Education Finance*, in *HELPING CHILDREN LEFT BEHIND: STATE AID AND THE PURSUIT OF EDUCATIONAL EQUITY* (John Yinger ed., 2004).

112. *See id.* at 344-45 app.B, tbl.B.5.

solely a per capita amount, regardless of need, wealth or income, while a handful of states finance their education solely by equalizing the fiscal capacity of districts.¹¹³ Equalization programs ensure that districts who tax at the same rate will receive the same revenue regardless of the resources within the district.¹¹⁴ A sizable number of states combine the foundation and equalization methods in tiered systems.¹¹⁵

113. *See id.* at 337 app.B, tbl.B.3. Flat grants are increasingly rare. *See* ALLAN R. ODDEN & LAWRENCE O. PICUS, *SCHOOL FINANCE: A POLICY PERSPECTIVE* 173 (1992).

114. *See generally* John Yinger, *State Aid and the Pursuit of Educational Equity: An Overview*, in *HELPING CHILDREN LEFT BEHIND*, *supra* note 111, at 3, 12-13 (describing aid formula for guaranteed Tax Base Aid).

115. *See* Huang, *supra* note 111, at 337 app.B, tbl.B.3

State	Foundation	Foundation Equalizing	Categorical Aid & Language			State Share		Year of the Data
			Poverty	Disability	1997	2000		
Alabama		X		X	73	69	2003	
Alaska		X	X	X	51	52	2003	
Arizona		X	X	X	51	51	2002 ^c	
Arkansas		X	X	X	68	91	2003	
California		X	X	X	67	66	2002 ^c	
Colorado		X	X	X	46	45	2003	
Connecticut		X	X		39	44	2002-2003	
Delaware		X		X	72	77	2003	
Florida		X	X	X	56	59	2003	
Georgia		X	X	X	59	56	2003	
Hawaii ^a			X	X	87	87	2003	
Idaho		X	X	X	64	68	2002 ^c	
Illinois		X	X	X	37	40	2003	
Indiana		X	X	X	59	56	2003	
Iowa		X	X	X	56	55	2002-2003	
Kansas		X	X	X	59	69	2003	
Kentucky		X	X	X	67	65	2003	
Louisiana		X	X	X	65	61	2003	
Maine		X	X	X	43	44	2003	
Maryland		X	X	X	37	38	2003	
Massachusetts		X	X		46	44	2003	
Michigan		X	X	X	69	67	2003	
Minnesota	X		X	X	57	64	2003	
Mississippi		X	X	X	66	62	2003	
Missouri		X	X		55	53	2003	
Montana		X		X	54	54	2003	
Nebraska		X	X	X	38	46	2003	
Nevada		X		X	64	64	2002 ^c	
New Hampshire	X			X	10	60	2000	
New Jersey		X	X	X	42	45	2002 ^c	
New Mexico		X	X	X	76	79	2003	
New York		X	X	X	48	48	2003	
North Carolina		X	X	X	68	71	2002-2003	
North Dakota		X		X	50	48	2003	
Ohio		X	X	X	47	49	2003	
Oklahoma		X	X	X	65	65	2002 ^c	
Oregon		X	X	X	53	60	2003	

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State	Foundation	Foundation Equalizing	Categorical Aid & Language			State Share		Year of the Data
			Poverty	e	Disability	1997	2000	
Pennsylvania		X	X	X	X	44	44	2003
Rhode Island ^b			X	X	X	47	43	2003
South Carolina		X			X	62	59	2002 ^c
South Dakota	X				X	44	42	2003
Tennessee		X			X	53	51	2003
Texas		X	X	X	X	49	48	2003
Utah		X	X	X	X	70	70	2003
Vermont		X	X	X	X	33	85	2003
Virginia		X	X	X	X	45	45	2003
Washington		X	X	X	X	76	72	2002 ^c
West Virginia		X		X	X	71	69	2003
Wisconsin		X	X	X	X	55	55	2001
Wyoming	X		X	X	X	52	59	2003
Total	5	44	31	38	48	55	56	

^a Hawaii has no aid system. It is 100% state supported.

^b Rhode Island discontinued its foundation program in 1999, and now provides state funding through a general aid program. The general aid dollar amount is based upon what districts received in the previous year, and adjustments are made based on legislative prerogative.

^c NCLS data

Different constituencies benefit from legislative choices in funding. When reform is in response to grassroots pressure, rather than litigation, the interests of each group becomes important for purposes of coalition building. Fiscal equalization helps rural areas, low property wealth suburban areas, and very poor central cities. Per capita payments help everyone, but do not achieve fairness for poor districts.¹¹⁶ Need-based systems tend to help very segregated cities and older rural areas with high poverty, but can also help less poor rural areas, places that have high capital costs, and places with older teachers. Categorical equity, it is much more likely to flow to urban and minority districts. Equalization is more likely to follow

116. See COONS ET AL., *supra* note 45, at 55-60.

the bedroom developing districts. Democrats like categorical formulas that give money to central cities, older suburbs, and bedroom suburbs and rural areas—the classic swing voters in the last election. Republicans wish to avoid equity sometimes. At other times, they support equalization which unites bedroom and rural areas and does not benefit cities. They also like per capita distribution that gives money to everyone.

Recent reform has successfully remedied much funding inequity. Between 1970-1971 and 2000-2001, the percentage of school revenue supplied by local sources decreased from 52.5% to 43.1%.¹¹⁷ Now funding from local sources and state sources is relatively equal.¹¹⁸ Case studies of individual states have reported that equity reforms increased spending in poorer districts and/or narrowed the gap between spending in rich and poor districts.¹¹⁹ Arguably, the effect of reform depends on the role of the courts. One study found that court-ordered reform was more successful than reform not undertaken by court order in both increasing the share of revenue taken by state aid and in targeting increases to poor districts.¹²⁰ In contrast, a paper studying reform in Michigan, which was not mandated by litigation, showed substantial equalization in expenditures among districts.¹²¹ The, still significant, reliance on local funds has a negative effect. Rising inequality in local tax revenues can offset much of the effects of finance reform.¹²²

The effect of school finance reform on student achievement is less certain but appears positive. Studies

117. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 49, at tbl.156, <http://nces.ed.gov/programs/digest/d03/tables/dt156.asp>.

118. See Yinger, *supra* note 114, at 10; COONS ET AL., *supra* note 45, at 66-68.

119. See Joydeep Roy, Impact of School Finance Reform on Resource Equalization and Academic Performance: Evidence from Michigan, 3 (2003) (reviewing studies of California, Kentucky, Massachusetts, and Vermont) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=630121.

120. Evans et al., *supra* note 108, at 28.

121. See Roy, *supra* note 119, at 9.

122. David Card & A. Abigail Payne, *School Finance Reform, the Distribution of School Spending, and the Distribution of Student Test Scores*, 83 J. PUB. ECON. 49, 67 (2002).

have found or suggested a modest increase in SAT scores following court-mandated reform,¹²³ an increase in test scores among high school seniors following both court-mandated and non-court mandated reform (though only the former was uniform),¹²⁴ modest increases in some, but not all standardized scores for students following one state's reform,¹²⁵ and lower drop-out rates after reform.¹²⁶

IV. CASE STUDY IN SCHOOL FINANCE REFORM: THE KENTUCKY EDUCATION REFORM ACT: WHAT WAS THE PERCENTAGE CHANGE?

In the past fifteen years, Kentucky has made significant progress in increasing school funding equity. Before reform, the state's education system was among the worst in the United States.¹²⁷ Kentucky ranked at the very bottom of states in per-pupil expenditures, adult literacy, adults with high school diplomas, and was near the bottom in student/teacher ratios and average teacher salary.¹²⁸ After 1979, school districts were funded by foundation and equalization plans which, when combined with tax and assessment policies, had little effect.¹²⁹ Before reform, the ninety-fifth percentile of districts raised \$3,262 while the fifth percentile only raised \$1,839.¹³⁰ Fulton County School District in western Kentucky could not afford to repair the leaky bathroom in its 1916 administration building, whereas Jefferson County School District was able to rely

123. *Id.* at 80.

124. See Thomas A. Downes & David N. Figlio, School Finance Reforms, Tax Limits, and Student Performance 30-31 (Dep't of Econ., Tufts Univ., Working Paper 98-05, 1998), available at <http://ase.tufts.edu/econ/papers/9805.pdf>.

125. See Roy, *supra* note 119, at 26.

126. See Caroline M. Hoxby, *All School Finance Equalizations Are Not Created Equal*, 116 Q.J. ECON. 1189, 1227-28 (2001).

127. See Molly A. Hunter, *All Eyes Forward: Public Engagement and Education Reform in Kentucky*, 28 J.L. & EDUC. 485, 486 (1999).

128. THE PARTNERSHIP FOR KENTUCKY SCHOOL REFORM, FROM DILEMMA TO OPPORTUNITY: A REPORT ON EDUCATION IN KENTUCKY 6 (1995).

129. See *Rose v. Council for Better Educ.*, 790 S.W. 2d 186, 196-97 (Ky. 1998).

130. Jacob E. Adams, Jr. & William E. White II, *The Equity Consequence of School Finance Reform in Kentucky*, 19 EDUC. EVALUATION & POLY ANALYSIS 165, 174 tbl.3 (1997).

on Louisville area businesses for millions each year and provided its schools with “the highest degree of computerization in the country.”¹³¹ When the legality of the finance system was finally challenged successfully, the court noted that these funding inequities clearly translated into educational inequities, as students in poorer school districts had lower test scores and higher student-teacher ratios than those in affluent districts and received “inadequate and inferior educational opportunities” in comparison.¹³²

Concerned Kentuckians had tried to improve the system for decades,¹³³ but the 1980s saw a fresh wave of activity regarding education reform. One of the most prominent pro-reform organizations was the Prichard Committee for Academic Excellence. Officially founded in 1983 and with roots running back several years earlier, the Committee is an organization of parents, prominent citizens, and community and business leaders who write, lobby, and educate the public on issues of education reform.¹³⁴ One of the Committee’s earliest successes was its organization of 145 town forums on education reform on one day in November of 1984, which about 20,000 people attended.¹³⁵ Separate from the Prichard Committee, sixty-six school districts organized the Council for Better Education in 1985, which was focused on promoting equity in Kentucky schools through litigation.¹³⁶

131. Cynthia Mitchell, *Kentucky Aims to Make Public Schools Equal Lawsuit Sparks Action to Help Poorer Districts*, ATLANTA J.-CONST., Aug. 27, 1989, at A16.

132. *Rose*, 790 S.W.2d at 197.

133. See Ronald G. Dove, Jr., *Acorns in a Mountain Pool: The Role of Litigation, Law and Lawyers in Kentucky Education Reform*, 17 J. EDUC. FIN. 83, 86-87 (1991).

134. See HARVARD FAMILY RESEARCH PROJECT, THE PRICHARD COMMITTEE FOR ACADEMIC EXCELLENCE: BUILDING CAPACITY FOR PUBLIC ENGAGEMENT IN EDUC. REFORM 5-6 (2000), http://www.gse.harvard.edu/~hfrp/content/projects/fine/resources/case_study/prichard_committee.pdf.

135. Crystal Harden, *Dusting off the Armor*, KY. POST, Nov. 11, 2003, available at <http://www.kypost.com/2003/11/15/prich111503.html>.

136. Hunter, *supra* note 127, at 492.

A. Rose v. Council for Better Education

Hoping to force education reform, a group of plaintiffs, headed by the Council for Better Education, filed a complaint in 1985 challenging the state's education system as violating the state constitution's education clause.¹³⁷ Section 183 of the Kentucky constitution states that the General Assembly, comprised of the state's Senate and House of Representatives, "shall, by appropriate legislation, provide for an efficient system of common schools throughout the State."¹³⁸ The trial court declared Kentucky's system unconstitutional and appointed a select committee to gather evidence and provide guidance as to what a constitutionally adequate system of schools would entail.¹³⁹ The President Pro Tem of the Senate and the Speaker of the House, both named defendants, appealed to the Kentucky Supreme Court, which decided the matter in a 1989 opinion titled *Rose v. Council for Better Education*.¹⁴⁰

In *Council for Better Education*, the state supreme court ruled that the General Assembly had not met its constitutional responsibility and invalidated the state's school system.¹⁴¹ The court's evidentiary review found a "tidal wave" of evidence that showed that Kentucky's public schools were under funded and inadequate, particularly for students in property-poor districts.¹⁴² The court also reviewed the history of Section 183 and found that the section created a fundamental right to education.¹⁴³ In reaching its conclusion, the opinion emphasized several

137. *Rose*, 790 S.W.2d at 190; see also Dove, *supra* note 133, at 93. The plaintiffs also alleged violations of the federal constitution, and the trial court found a violation of the Fourteenth Amendment. *Rose*, 790 S.W.2d at 190, 194. Given its finding of a state constitutional violation, the Kentucky Supreme Court found it "unnecessary" to review these federal constitutional claims. *Id.* at 215.

138. 2004 Ky. Rev. Stat. Adv. Legis. Serv. 628 (LexisNexis).

139. See *Rose*, 790 S.W.2d at 192-93.

140. *Id.* at 191.

141. *Id.* at 215.

142. *Id.* at 197.

143. *Id.* at 206.

themes: (1) reform is solely the legislature's duty;¹⁴⁴ (2) reform must be directed at the "whole gamut" of Kentucky's school system;¹⁴⁵ and (3) reform must promote equality among schools and districts.¹⁴⁶ The court, however, refused to order a specific course of reform, a choice with which one concurring justice disagreed.¹⁴⁷ It did, however, set out minimum steps for compliance and established a set of curricular goals, which included academic, artistic, civic, and vocational proficiency.¹⁴⁸

B. *The Kentucky Education Reform Act (KERA) of 1990*

The *Council for Better Education* court withheld the finality of its decision to give the General Assembly time to create a new system of common schools in Kentucky.¹⁴⁹ Within the year, the Assembly passed the Kentucky Education Reform Act (KERA) of 1990.¹⁵⁰ KERA changed large swaths of state education law, focusing on curriculum, school governance, and school finance.¹⁵¹ The non-finance reforms included standardization of curricula, textbooks, and teacher certification, as well as reorganization of the state's department of education.¹⁵² As part of the financial reform, KERA created the Support Education Excellence in Kentucky (SEEK) formula.¹⁵³ SEEK establishes a base

144. *See id.* at 205, 211-12, 216.

145. *See id.* at 215; *see also id.* at 205, 208. This requirement was particularly striking, as no previous case had declared an entire system unconstitutional on an adequacy theory. C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J.L. REFORM 599, 608, 608 n.71 (1995).

146. *See Rose*, 790 S.W.2d at 207, 211-12.

147. *Id.* at 215 ("We decline to issue any injunctions, restraining orders, writs of prohibition or writs of mandamus."); *see also id.* at 216-18 (Gant, J., concurring).

148. *See id.* at 212.

149. *Id.* at 216.

150. 1990 Ky. Acts 1208.

151. Trimble & Forsaith, *supra* note 145, at 610.

152. Jacob E. Adams, Jr., *School Finance Reform and Systemic School Change: Reconstituting Kentucky's Public Schools*, 18 J. EDUC. FIN. 318, 328-29 (1993).

153. KY. REV. STAT. ANN. §§ 157.310-.440 (LexisNexis 2001 & Supp. 2005).

payment-per-student, with districts receiving more aid for transportation costs and for students from low-income families and students with special needs.¹⁵⁴ In 2004-05, the basic payment was \$3,222.¹⁵⁵ Each district is required to tax at a given minimum rate, with the state paying the difference between the local revenue and the adjusted base payment.¹⁵⁶ Districts also have two optional funding choices, both of which allow the district to raise additional funds, and one of which equalizes funds for districts below a certain level of assessed property.¹⁵⁷

KERA both increased the total education expenditures and brought poorer districts closer to the levels of the wealthier districts. Adjusted for inflation, expenditures on primary and secondary education in Kentucky increased from \$2.1 billion in 1989-1990 to \$4 billion in 2000-2001.¹⁵⁸ The increase was also equitable. In the program's first eight years, revenue in property-poor districts rose significantly, while revenue in more affluent districts rose more modestly.¹⁵⁹ A recent study employed multiple tests of inequity and concluded that the SEEK formula has achieved "a substantial degree of fiscal equity."¹⁶⁰ Where there was previously a large gap between affluent and poor districts, after KERA, "the link between property wealth and revenue per pupil is essentially gone."¹⁶¹

154. KY. REV. STAT. ANN. § 157.360(2) (LexisNexis 2001 & Supp. 2005).

155. CINDY HEINE, PRICHARD COMM. FOR ACAD. EXCELLENCE, KENTUCKY SCHOOL UPDATES: A PARENT/CITIZEN GUIDE FOR 2004-2006 at 2 (2004), http://www.prichardcommittee.org/pubs/04_KSU/School_Finance.rtf.

156. KY. REV. STAT. ANN. § 160.740(a); see also Lawrence O. Picus et al., *Assessing the Equity of Kentucky's SEEK Formula: A 10-Year Analysis*, 29 J. EDUC. FIN. 315, 317 (2004).

157. KY. REV. STAT. ANN. § 157.440(1)(a), (2)(a) (LexisNexis 2001 & Supp. 2005).

158. NAT'L CTR. FOR EDUC. STAT., DIG. OF EDUC. STAT. TABLES & FIGURES (2003), *supra* note 49, at tbl. 161, <http://nces.ed.gov/programs/digest/d03/tables/dt161.asp>.

159. Ann E. Flanagan & Sheila E. Murray, *A Decade of Reform: The Impact of School Reform in Kentucky*, in HELPING CHILDREN LEFT BEHIND, *supra* note 11, at 195, 204-05.

160. Picus et al., *supra* note 156, at 334-35.

161. *Id.* at 334-35.

Nonetheless, further progress is needed. Although Kentucky is far ahead of most states in terms of equitable funding, to provide an adequate education for each child would likely require a higher basic payment.¹⁶² In fact, the Council for Better Education recently filed a new lawsuit alleging that the General Assembly has failed to adequately fund education, noting that the percentage of money spent on education has declined between 1994 and 2003.¹⁶³

V. LESSONS FROM KERA AND COUNCIL FOR BETTER EDUCATION

Central to the success of education reform in Kentucky was broad popular support. Hard work, wise strategies, and good luck united a significant portion of the population behind education reform and kept them supportive. Given the importance of KERA, there has been significant work done interviewing key players in litigation and reform, analyzing strategies, timing, and messages.¹⁶⁴ The details of how litigation led to real legislative reform and more equity in Kentucky yield some lessons for future school finance reformers, and perhaps those seeking to remedy inequity in other policy areas.

A. *Broad public support for reform*

Those who sought to reform the education system in Kentucky benefited from tremendous public awareness of Kentucky's educational inadequacy and widespread support for reform. Those who sought reform actively cultivated this; for example, the lead counsel for the plaintiffs understood the importance of strength in numbers and only took the case after a substantial percentage of districts

162. *See id.*

163. Nancy C. Rodriguez, *School District Out of Funding Suit*, COURIER-J. (Louisville, Ky.), Dec. 28, 2003, at 1B.

164. *See generally* Bert T. Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 HARV. J. ON LEGIS. 367 (1991); Dove, *supra* note 133; Hunter, *supra* note 127; Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons From School Finance Litigation in Kentucky, 1984-1995*, 26 L. & SOC. INQUIRY 631 (2001).

agreed to join in the effort.¹⁶⁵ Many other factors contributed to this widespread public understanding.

1. *Clear Problem.* Reformers in Kentucky “benefited” from the fact that its schools were truly awful. It may have been possible to argue the nuances of what the Kentucky Constitution demanded, but it wasn’t feasible to hide the fact the Kentucky public schools were very bad.

2. *Efforts to Educate the Public.* The Prichard Committee did a great deal to raise the profile of the issue of school quality and funding. In addition to organizing the town forums in 1984, the Committee issued numerous reports and helped increase media attention to the failed Kentucky school system. Committee Director Robert Sexton visited civic clubs around the state to educate citizens about educational problems and the need for reform in light of Kentucky’s changing economy. Moreover, whereas the poor district plaintiffs were part of the school system, members of the Committee were not school or government officials, the Committee was funded through private contributions, and therefore, the Committee was respected as an independent source.¹⁶⁶

3. *Newspaper Coverage Favorable to Reform.* The Lexington Herald Leader, the Kentucky Post, and the Louisville Courier-Journal all ran dramatic features on the dire condition of the state’s system of public education.

4. *High Profile Leadership.* Education reform was advocated by a number of prominent Kentuckians, not least of whom was the lead attorney for the Council for Better Education, Bert Combs, a former governor and judge in both the federal and state court systems. Influential citizens were also members of the Prichard Committee. The stature of these reform proponents helped bring publicity and credibility to the cause.

5. *Committed Support from the Business Community.* Reformers also enjoyed strong and consistent support from Kentucky’s business community, which saw education as a

165. See Dove, *supra* note 133, at 90-91 (citing Interview with Bert T. Combs, Lexington, Ky. (Nov. 8, 1990)); Paris, *supra* note 164, at 648-49.

way to fill and maintain positions and attract new business.¹⁶⁷ For example, Ashland Oil ran ads in support of education reform.

6. *The Grassroots Group*. In the late 1980s, virtually all of Kentucky's education advocacy groups—teachers associations, PTA groups, administrators associations, the Catholic Conference, the Chamber of Commerce, etc.—came together to form a coalition originally called the Grassroots Group, now known as the Education Association. The group met quietly for about two years and completed a report giving reform recommendations prior to the supreme court ruling. The fact that these disparate groups came to consensus on reform proposals and were able to meet the legislature as a united front had a huge influence on the ultimate substantive outcome of KERA, affecting legislative, if not popular, opinion.

B. *Strategies that Facilitated Broad Support Were Selected*

A reform strategy should take into account the roles of both the general public and all political actors.

1. *The Anti-Robin Hood Approach*. Reform should not be perceived as redistributing funding from the wealthy districts to the poor districts. The “anti-Robin Hood” approach used by the Kentucky litigants served several aims. First, it recognized the general lack of funds in Kentucky's schools, even in more affluent districts. Second, and strategically the most important, it allowed the lawsuit to go forward without much opposition from wealthy districts.¹⁶⁸ Although property-poor districts were the mainstays of the CBE, reformers approached every district in the state, and in doing so, managed to win overt and informal support from some affluent districts and generally minimize opposition.¹⁶⁹ Although the sweeping nature of the supreme court's decision went far beyond “leveling up” or “leveling down,”¹⁷⁰ the anti-Robin Hood approach helped

166. See Hunter, *supra* note 127, at 489-90.

167. See *id.* at 490-91.

168. See Dove, *supra* note 133, at 115.

169. See Paris, *supra* note 164, at 649.

170. *Id.* at 649 n.23.

2007]

123

make the litigation palatable to all districts, and thus successful.

2. *Wise Litigation Strategy: Litigation was Framed as a Last Resort.* The Kentucky plaintiffs also waited until legislative reform had failed before pursuing court action. The state had a long history of school finance reform, with little success. The *Council for Better Education* plaintiffs waited until after a 1985 special session on education had come up short before filing its suit.¹⁷¹ Because counsel Combs waited to file the suit until after the legislature failed to enact and fund the reforms, he was able to address the media and critics without appearing to be litigation-hungry. He was thus able to tell the press in early 1986 that he and the superintendents “were reluctant to file the case, but thought they had a duty to do so.”¹⁷²

3. *Litigation Was Targeted to Avoid Separation of Powers Issues as Much as Possible.* The lawsuit asserted that the defendants, members of the executive and legislative branches, had failed in their constitutional duty. Given the inevitable separation-of-powers struggle that would arise if the court ordered the legislature to reform the system, the plaintiffs aimed for a declaratory judgment of unconstitutionality.¹⁷³ They hoped that a court decision would generate and mobilize grassroots support, which would, in turn, force the General Assembly to act.¹⁷⁴

4. *The Lawsuit Provided Cover for Politicians.* The victory in *Council for Better Education* did not necessarily guarantee Kentucky an adequate education system. Many expected that the General Assembly would either not respond at all or would make rhetorical, rather than substantive, change.¹⁷⁵ Past legislative efforts at school

171. See Paris, *supra* note 164, at 649.

172. Combs Calls School Finance Suit the Best Way to Settle Issue, COURIER-J. (Louisville, Ky.), Jan. 19, 1986, at B8 (cited in Paris, *supra* note 164, at 650).

173. See Combs, *supra* note 164, at 372. Such intergovernmental fighting had already occurred by the time *Council for Better Education* was decided. When the complaint in the case was filed, the state senate passed a bill making it illegal to sue the state with money from school funds. See Dove, *supra* note 133, at 94-95. As the Council had used funds from each of the plaintiff districts, this would have quickly ended the lawsuit. *Id.* at 92, 94-95. Fortunately for the reformers, the bill died in committee in the House. *Id.* at 95.

174. See Combs, *supra* note 164, at 372.

175. See *id.* at 375.

reform had been thwarted by the reluctance to raise taxes. The governor at the time, Wallace G. Wilkinson, had been elected on a no-new-taxes platform and legislators were loath to propose taxation without the governor's agreement.¹⁷⁶ The supreme court decision, and the accompanying media coverage, made education the top public priority and provided "cover" for both the governor and the General Assembly to raise the taxes necessary to fund reform.¹⁷⁷

5. *Good Legislative Strategy.* The legislature, by funding the education reforms in the same bill that provided for the reforms, denied an easy way out for legislators opposed to the reforms. Legislators couldn't vote for reform and then underfund it later, so reform opponents were forced to go on the record as actually opposing the reforms.

6. *Political Tradeoffs Were Used to Garner Votes in the Legislature.* Leadership in the legislature effectively leveraged rewards for reform proponents and retribution against reform opponents. "Pet projects" were awarded and taken away in efforts to garner support for KERA.

C. *Strong Legislative Coalitions are Not Required for Reform*

Although KERA suggests that strong support from citizens and business interests are necessary for reform, the history of its enactment makes clear that legislative coalitions are less important. Despite the divide between poor and rich school districts, there did not seem to be any strong coalitions with the General Assembly either for or against KERA. The substantive work was done by committee, with occasional input from the Council for Better Education.¹⁷⁸ Rather than coalition building based on similarities in school districts or tax capacity, legislative leaders promised spending in districts that would vote yes

176. See Paris, *supra* note 164, at 655-56.

177. See *id.* at 665-66 & n.44 (citing numerous polls illustrating how strongly the public favored education reform).

178. See Dove, *supra* note 133, at 105-08.

on the education reform package and cut funding in districts where representatives looked to be voting against the package.¹⁷⁹ Northern Kentucky lost both a library and an arena because only two of its eight house members were planning to vote in favor of the reform plan.¹⁸⁰ By the time the bill arrived in the Senate, senators representing Northern Kentucky voted for the education bill and attempted to persuade the Senate leaders to push their projects back into the budget.¹⁸¹

Though deal making predominated rather than political coalitions, voting did to some extent follow class and regional lines. Kentucky's counties generally fall into three geographic categories: (1) metropolitan counties; (2) rural counties adjacent to metropolitan areas; and (3) rural counties in outlying areas of the state.¹⁸² The metropolitan areas have seen the largest increase in tax bases while outlying rural counties have much smaller tax bases and have seen much smaller increases.¹⁸³ Predictably, almost half of the forty-two "Nay" votes in the House came from wealthier metropolitan areas.¹⁸⁴ With higher property values, the state's three metropolitan areas (Lexington, Louisville, and Northern Kentucky-Cincinnati) were and are able to more easily contribute to their local school districts than are areas that have limited fiscal capacity. Despite the gain in funding that they would receive under KERA, fifteen house members from Appalachian counties voted against KERA.¹⁸⁵

179. Bill Bishop, *Making Deals for Better Schools—But at What Cost?*, LEXINGTON HERALD-LEADER, Mar. 25, 1990, at F1.

180. *Id.*

181. *Id.*

182. Myron Orfield, *Kentucky's Rural/Metropolitan Fiscal Divide: A Statewide Agenda for Sustainable Communities* (Report to The Mountain Ass'n for Cmty. Econ. Dev. and The S. Rural Dev. Initiative) (May, 2000) (on file with author).

183. *Id.* at 10.

184. In the Northern Kentucky-Cincinnati Metropolitan area, only two of eight representatives voted for KERA. Kentucky Legislative Research Commission. In Fayette County, three representatives voted Yea and two voted Nay. *Id.* Jefferson County includes Louisville and has nineteen representatives, eleven of which voted against KERA. *Id.*

185. *Id.*

VI. CASE STUDY: MICHIGAN'S PROPOSAL A

School equity was achieved in Michigan without a successful lawsuit. In fact, earlier legal challenges to the school finance system had failed.¹⁸⁶ After the dismissal of the reform plaintiffs in *Milliken v. Green*,¹⁸⁷ Michigan responded to growing disparities by adopting a guaranteed tax base formula.¹⁸⁸ The state funding formula guaranteed that each local district would receive a given yield for each student and for each mill taxed.¹⁸⁹ The state also provided categorical aid for certain types of students and programs, as well as including aid to districts with high taxes for other services.¹⁹⁰ Unfortunately, over time the failure to adjust the guaranteed base and weak or nonexistent recapture provisions largely negated any equalizing effect.¹⁹¹ By 1994, 38% of districts received less than \$4,500 per pupil, while only 5.5% received more than \$7,000 per pupil.¹⁹²

Perhaps more important for the purposes of reform was the burden that the state's finance system had on taxpayers.¹⁹³ Tax incentives and the guaranteed tax base

186. See *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973); *Durant v. State Bd. of Educ.* 381 N.W.2d 662 (Mich. 1985); *East Jackson Pub. Sch. v. State*, 348 N.W.2d 303 (Mich. Ct. App. 1984).

187. 212 N.W.2d at 711.

188. MICHAEL F. ADDONIZIO ET AL., NAT'L CTR. FOR EDUC. STATISTICS, PUBLIC SCHOOL FINANCE PROGRAMS OF THE UNITED STATES AND CANADA, MICHIGAN 1 (1998-99), available at <http://www.nces.ed.gov/edfin/pdf/StFinance/Michigan.pdf>.

189. See William S. Koski, Comment, *Equity in Public Education: School-Finance Reform in Michigan*, 26 U. MICH. J.L. REFORM 195, 231-32 (1992).

190. See *id.* at 232-33.

191. July Berry Cullen & Susanna Loeb, *School Finance Reform in Michigan: Evaluating Proposal A*, in HELPING CHILDREN LEFT BEHIND, *supra* note 111, at 215, 219-20; HANK PRINCE, HOUSE FISCAL AGENCY, PROPOSAL A AND PUPIL EQUITY (1996), http://www.house.mi.gov/hfa/prop_a.html (last visited April 8, 2007); see also C. Philip Kearney & Li-Ju Chen, *Measuring Equity in Michigan School Finance: A Further Look*, 14 J. EDUC. FIN. 319, 358-61 (1989) (revenue and expenditure equity among districts decreased on the whole from 1979-85, with a slight uptick in 1984-85).

192. OFFICE OF REVENUE & TAX ANALYSIS, MICH. DEPT OF TREASURY, PROPOSAL A: A RETROSPECTIVE 35, exh. 29 (2002), http://www.michigan.gov/documents/propa_3172_7.pdf [hereinafter PROPOSAL A: A RETROSPECTIVE].

193. See Cullen & Loeb, *supra* note 191, at 221 (noting that taxes, not school

formula that subsidized property-poor school districts encouraged voters to continue to approve higher local property tax rates for school funding. The increasing rates and heavy reliance on local taxes to fund schools led Michigan to the seventh-highest property tax burden in the United States in 1993.¹⁹⁴

The stage for reform was set by the rejection of a 1993 ballot, called Proposal A, which would have cut operating millage, raised the sales tax, provided more funds for poor school districts, and capped property assessments.¹⁹⁵ The defeat had been the eleventh failed property tax and school finance reform measure since the early 1970s.¹⁹⁶

A. P.A. 145: A Political Double Dare Wipes the Slate Clean

Following the 1993 defeat, the legislature once again began discussions on school finance. Although the Republican majority leadership was planning to propose a more modest property tax reduction plan, Debbie Stabenow, a Senate Democrat from Macomb (a low property tax base area), offered an amendment to the tax bill that eliminated the use of property taxes for school revenue altogether.¹⁹⁷ Stabenow stated for the record in the Journal of the Senate that the bill was designed to “guarantee that we have comprehensive school finance reform and that we eliminate the burden of property taxes as it relates to funding schools in this state.”¹⁹⁸

The *Wall Street Journal* characterized Senator Stabenow’s amendment, which became P.A. 145, as a “political double dare.”¹⁹⁹ Governor John Engler had vowed

inequality, were the driving force behind reform).

194. PROPOSAL A: A RETROSPECTIVE, *supra* note 192, at 4.

195. See Ted Roelofs, *Proposal A Expected to Draw Big Turnout*, GRAND RAPIDS PRESS, June 2, 1993, at A1.

196. See Michael F. Addonizio et al., *Michigan’s High Wire Act*, 20 J. EDUC. FIN. 235, 237-38 (1995).

197. See *id.* at 239.

198. JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN 1988 (July 20, 1993) [hereinafter SENATE JOURNAL].

199. Ron Suskind, *Michigan’s School-Aid Crisis Offers Crash Course in Convergence of Tax and Education Revolts*, WALL ST. J., Nov. 30, 1993, at A18.

in the 1990 election to slash property taxes,²⁰⁰ but was now faced with the option of approving a proposal to abolish the school tax entirely. The proposal faced opposition from both sides of the aisle in the House, whose members thought it irresponsible to remove all funding without providing replacement funding, and by school administrators, for similar reasons.²⁰¹ Senator Stabenow was put in the position to disagree with her longtime union allies and responded that, “we did not create a crisis; we created a deadline for solving the crisis.”²⁰² The bill passed both houses and was signed by the Governor within the span of a month.²⁰³

B. *Education and Education Finance Reform*

The immediate effect of the bill was to reduce revenue for schools by \$6.5 billion,²⁰⁴ and, consequently, a new school financing system was required. In the aftermath of P.A. 145, the issues of how schools would be funded and the source of that funding were bifurcated. In October of 1993, the governor announced his plan to reform education quality and financing,²⁰⁵ and on December 24, 1993, legislation on education and school financing reform was adopted.²⁰⁶

The bill that had the effect of equalizing school funding passed with broad bipartisan support, and the bill’s support and opposition were instead based on geography, with legislators from property-rich districts generally opposed to equalization and legislators from property-poor districts in favor. School funding equalization passed with strong support in large part because nearly two-thirds of school districts stood to gain from equalization. The Michigan school funding equalization was also made more palatable

200. Addonizio et al., *supra* note 196, at 237.

201. See Peter Luke, *Bipartisan Deal May End Property Taxes for Schools*, GRAND RAPIDS PRESS, July 21, 1993, at A1.

202. Michael deCourcy Hinds, *Drastic Start From Scratch On Financing for Schools*, N.Y. TIMES, July 28, 1993, at A15.

203. See Addonizio et al., *supra* note 196, at 239.

204. See *id.*

205. See *id.* at 243.

206. See PROPOSAL A: A RETROSPECTIVE, *supra* note 192, at 3.

by the fact that the legislature opted not to level-down funding and instead effectively raised funding in lower funded districts to bring them closer to richer districts.

C. Proposal A

In December of 1993, the Michigan legislature passed an education plan that put two funding options before the Michigan voters. If the voters approved a revamped Proposal A, then Michigan would fund public schools from a variety of sources, most prominently a two percent sales tax increase and a fifty-cent-per-pack increase in the cigarette tax.²⁰⁷ The income tax rate would decrease from 4.6% to 4.4%, while a per-parcel cap on assessment growth would be set and property taxes for school operations reduced in most districts.²⁰⁸ If the voters rejected Proposal A, then the "Statutory Plan" would increase the income tax from 4.6% to 6.0% and increase the single business tax rate from 2.35% to 2.75%.²⁰⁹ Under either proposal, the way school revenues were spent would be radically changed. Michigan would go from a guaranteed tax base system to a foundation system, with the state guaranteeing a minimum amount per pupil.²¹⁰ For two months before the ballot, Governor Engler campaigned for the passage of Proposal A, routinely highlighting the fact that Proposal A raised the sales tax while the backup plan raised the income tax.²¹¹ Senator Stabenow supported the statutory plan, along with teachers unions, and cigarette companies.²¹² On March 15,

207. SENATE FISCAL AGENCY & HOUSE FISCAL AGENCY, THE MICHIGAN SCHOOL AID ACT COMPILED AND APPENDICES app. A (1994), reprinted as *School Finance in Michigan Before and After the Implementation of Proposal A: A Comparison of FY 1993-94 and FY 1994-95 Approaches to K-12 School Funding in Michigan*, available at [http://senate.michigan.gov/sfa/Publications/JointRep/](http://senate.michigan.gov/sfa/Publications/JointRep/finpropa/95comp.html)

finpropa/95comp.html [hereinafter SENATE FISCAL AGENCY REPORT].

208. See *id.*; see also Addonizio et al., *supra* note 196, at 255.

209. SENATE FISCAL AGENCY REPORT, *supra* note 207.

210. See Addonizio et al., *supra* note 196, at 248.

211. Peter Luke, *Voters Give Sales-Tax Hike for Schools A-plus*, GRAND RAPIDS PRESS, Mar. 16, 1994, at A1.

212. See *id.*

1994, Proposal A passed by a 69% to 31% margin with a 40% voter turnout.²¹³

The effect of Proposal A was to drastically cut the contribution that local property taxes made to education. After its adoption, the state's share of education funding dramatically increased. State revenue for schools increased from 28% in 1993-94 to 66% in 1998-99, while local revenues dropped from 65% to 27%.²¹⁴ The reform had an immediate balancing effect. The restricted range of basic payments, which measures the difference between the highest and lowest non-outlying values, dropped 18.2% after reform.²¹⁵ Whereas the most affluent districts saw a growth of 6% throughout the 1990s, the poorest districts saw a growth of 46.9%.²¹⁶

VII. LESSONS FROM PROPOSAL A

As with the Kentucky case, Michigan's reform has occasioned critical notice.²¹⁷

A. *Taxpayer Revolt Can Help Forge Coalitions*

A strong majority (33-4) in the state senate carried P.A. 145, with representatives from all constituencies supporting it.²¹⁸ One reason for this strong showing was that tax-cutting reached across political and economic spectrums. In a previous work, Thomas Luce and I classified communities in Michigan, considering tax base, income, household growth and density, and poverty.²¹⁹ Politicians from a wide variety of communities, ones with varying abilities to raise revenue (capacity) and ones with high and low costs (free-

213. *Id.*

214. Addonizio et al., *supra* note 196.

215. Prince, *supra* note 191, tbl.5.

216. Cullen & Loeb, *supra* note 191, at 229.

217. See Cullen & Loeb, *supra* note 191; Paul N. Courant & Susanna Loeb, *Centralization of School Finance in Michigan*, 16 J. POL'Y ANALYSIS & MGMT. 114 (1997); Addonizio et al., *supra* note 196;

218. SENATE JOURNAL, *supra* note 198, at 1983.

219. MYRON ORFIELD & THOMAS LUCE, AMERIGIS & METRO. AREA RESEARCH CORP., MICHIGAN METROPATTERNS 4-5, 7 (2003).

lunch-eligible-students or significant enrollment changes) supported P.A. 145. Democratic Senator Miller, from Detroit area Macomb County, which has both Moderate Capacity-Low Cost and Moderate Capacity-High Cost schools, strongly supported the legislation, stating in reference to Senator Stabenow's amendment, "You ask to put the challenge forward, the democrats accepted the challenge. We want to put an end to property taxes."²²⁰

Republican Senators found themselves reluctantly supporting Democratic Senator Stabenow's amendment. Senate Majority Leader Posthumus then welcomed the Democrats to join with Republicans in their efforts toward property tax reform,

the bill that we just passed with the help of both sides of the aisle tomorrow and getting it passed in the House will probably be the most important piece of legislation we pass this year. . . . I thought the initial effort was a very cynical effort. I have to apologize to the Minority Leader and to the original sponsor of the amendment. After having talked to them, they were sincere and I think the minority [Democratic Senators] was sincere in joining with us to bring about a real property tax cut to the citizens of this state.²²¹

Finally, senators from wealthy, high-capacity districts found themselves voting for the amendment, even if their school districts could lose funding through reform, because it is difficult for a Republican Senator from a high-property value suburb to vote against property tax reduction. The press explained that wealthier districts that were spending upwards of \$9,500 per student stood to lose with such drastic changes to the status quo.²²² Republican Senator Michael Bouchard, from Oakland County, was concerned about the bill's potential outcome and called the legislation "a train running down the hill and nobody's the engineer."²²³ Bouchard's district is similar to Faxon's with

220. 2 JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN 1987 (July 20, 1993) [hereinafter 2 SENATE JOURNAL].

221. *Id.* at 1991.

222. Peter Luke, *Senate Bets Property Tax Death will Help Schools*, GRAND RAPIDS PRESS, July 21, 1993, at A1.

223. *Id.*

high-capacity cities, higher-than-average incomes and broader-than-average property tax base.²²⁴

B. *Emphasizing Equality, Rather than Equity, Can Wrest Power from Localities*

Proposal A effectively converted the state's school finance system from a guaranteed tax base system (GTB)—one which many think is the most equitable²²⁵—to the more common foundation system which others think more equitable. Although the change has reduced the disparity between districts, it has also centralized and standardized power. Michael Addonizio and others have noted that a GTB program privileges local decisions regarding taxation while equalizing the result, regardless of the district's wealth, whereas the new system does not take into account local effort.²²⁶ This move towards state control (along with standardization in non-finance areas) takes away from localities what has traditionally been theirs, which might make the system more susceptible to legal challenge.

Opponents of reform realized the centralizing effect of P.A. 145, and some legislators were opposed to the reforms for that reason. Senator Faxon was one Democrat voting against the reform. He represented southern Oakland County in the Detroit Metropolitan area. The school classifications in Faxon's district range from High-Capacity-Low Cost to Moderate Capacity-High Cost,²²⁷ and was above both the regional median household income and property tax base.²²⁸ Faxon explained he voted against the Stabenow amendment because

[t]he people in my communities want property tax relief. They do not want to lose control over their schools. . . . And if we are going to just suddenly take away all the money and say everybody is going to get it redistributed and that those districts that have been

224. Orfield & Luce, *supra* note 219, at 14-16.

225. *See supra* note 219.

226. Michael F. Addonizio et al., *Blowing up the System: Some Fiscal and Legal Perspectives on Michigan's School Finance Reform*, 107 ED. L. REP. 15, 21-22 (1996).

227. Orfield & Luce, *supra* note 219, at 16.

228. *Id.* at 14-15.

spending \$8,000 or \$9,000 are going to have to learn to live with less, then I don't know just how you intend to tell that to those people who have been paying for education all those years.²²⁹

VIII. SCHOOL FINANCE AS A TEMPLATE FOR REGIONAL REFORM

School finance litigation and legislation has many lessons for other areas of regional reform. First, it lays bare the false stereotype of absolute local sovereignty. State money flows fulsomely across district boundaries. In fact, for the last decade school districts, with less than half of their funding coming from local sources, can hardly be called local fiscal sovereigns at all. Given the fact that school funding is the largest or second-to-largest local expenditure that local taxpayers encounter, and given the other forms of revenue sharing that exist for counties, cities, special districts, and MPOs, it becomes increasingly hard to think of any of the local governments as truly separate and sovereign. The rubicon of fiscal independence is past, and it is time that we conceive of these local entities as already structurally and clearly fiscally interdependent.

It is also important to realize that state court equal protection litigation, something unique in the areas of schools, has made a huge difference in pushing equity through the political process. This equity is not perfect and more often in the eye of the litigant than in the purposes of the general public. Nevertheless, these court cases have forced otherwise deadlocked and sclerotic legislatures to change and even reform complex state and local systems.

Whether analogous kinds of litigation strategies can be transferred to other areas of regional reform, such as municipal finance, land-use law, housing, and regional government structures, stands as a further area of inquiry. Clearly, judicial equalization of city finance does not have the same textual hooks or talismans, such as education clauses,²³⁰ which inhabit most state constitutions. But there

229. 2 SENATE JOURNAL, *supra* note 220, at 1991.

230. At least one scholar sees legal theory upon which recent school litigation is based (i.e., state constitution education clauses) as not portable, distinguishing or relying on Emel Gökyigit Wadhvani, *Achieving Greater Inter-Local Equity in Financing Municipal Services: What We Can Learn From*

are rights to health, safety, and general welfare, which local government scholars are beginning to explore. In the area of land use and housing, the *Mount Laurel* case, though seldom re-litigated in other states, is much admired by legal scholars and could perhaps become the *Serano* of state general welfare clause litigation. Fair housing lawsuits such as *Gautreaux* and the most recent *Thompson* case in Baltimore suggest bold metropolitan remedies in terms of housing. State constitutional school desegregation cases such as *Sheff v. O'Neil* and the *Xiong* case in Minnesota, suggest other civil rights venues. All of this is more speculative than certain and depends on both developing a clear metropolitan civil rights agenda and the philanthropic and political support to bring complex litigation.

One clear message is that these lawsuits, if they ever occur, must be matched with aggressive public education and organizing strategies. They cannot exist in isolation like so much of the bussing and civil rights litigation in the late 1970s. Kentucky showed that using litigation as a vital part of the public process produced a much more far reaching and satisfying result than Michigan gimmicks and one-upmanship.

Finally, the Michigan case shows us the anger of a property tax revolt can be channeled to change policy in a positive way. So many times these revolts, particularly in the western United States, have led to state constitutional tax limitations that have fallen disproportionately on the property-poor parts of metropolitan areas. Michigan's Debby Stabenow shows how one of these revolts, more and more common in the nation, can be channeled for good purposes—good purposes which could also potentially reform urban finance and local land use decisions.

CONCLUSION

Educational equity efforts may have a more clear constitutional basis and hence judicial remedy. However, the problem of inequality among local governments with zoning powers is probably far more systematically important to regional equity and stability. Cities and local units with land-use powers to exclude create concentrations

School Finance Litigation, 7 TEX. F. ON C.L. & C.R. 91 (2002).

of poverty competition with each other for tax ratables. Through court mandated equity, schools get money and property taxes are equalized—but the cities with whom they share space continue to exclude and compete, undermining all.

Growing state financial support of local school districts demonstrates that, at least financially, these places are not in any real sense, local sovereigns. Schools are often the part of local government spending, particularly in the suburbs. They interrelated in term of total tax rate and quality of life, with all the the other forms of local government. Thus is a very important to understand how significantly school equity has undermined the concept of local sovereignty of all local government that pervades much of legislative politics, case law, and public understanding of cities and suburbs. These decisions have crossed the boundaries of separate governments within a metropolitan area and created equity—they made services and taxes more equal within a region and took pressure off the competition between municipalities for ratables. In this sense the model of public education-organizing, litigation, and legislative action is important for additional fiscal and collateral land use and governance reform.

While understanding the importance of the cases, they should not be oversold. They are a necessary, but not sufficient, and as they are, they are not a panacea for growing urban inequality in school performance. While the newest theories of adequacy purport to provide equal results with increased school funding to the poorest and most segregated districts, it is clear that they will never achieve this, within the broadest political/judicial concept of fiscal equality, given the profound harms of racial and social segregation to opportunity in this society. This is not to say that money does not help poor school districts or students. It clearly can. But racial and social integration, while far more difficult to achieve, are fundamentally more likely to make an opportunity difference for children.