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EDUCATIONAL ISSUES AND JUDICIAL OVERSIGHT

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I. INTRODUCTION

Few services have been more closely associated with the states, both historically and functionally, than public education and all of the auxiliary activities to which it has fallen heir. Support for the operation of public school systems remained among the most costly obligations of the states even as other sources began to materialize. Though educational funding assumed a major role among the budgetary concerns of state and local governments following the close of the Second World War, heated debate accompanied proposals for federal assistance. Education lay within the scope of traditional state functions. The dual functions of control and responsibility still represented seemingly untouchable components.

Fears of federal intervention and of the extension of nationally devised requirements were looked upon as sufficiently disturbing to discourage any quest for major infusions of "outside" support. Yet the states had to confront the consequences of mammoth growth. A multiplicity of services had developed as essential supplements in the instructional process. No longer did it appear possible to maintain all of the old arrangements though supervision and accountability continued to be lodged primarily in the states.

Federal aid to education, when it came to pass in the mid-1960s, threatened to change the image of public education or at least some of its major elements. Theretofore, a national presence had been limited to the military academies and to foreign bases where schools were required to provide for the needs of the children of military personnel and of federal employees who served overseas. But successive acts of Congress changed so limited a perception of

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federal participation in the educational process. Yet if the flow of national monies began to assume more substantial proportions, the states continued to be the principal actors. State initiatives were not replaced despite the introduction of a growing number of federal programs.

Federal courts were reluctant to intervene except on a few occasions when they moved to affirm the constitutional rights of students and teachers. In the course of the turbulent era of the 1960s, the United States Supreme Court demonstrated a commitment to the "safeguarding [of] academic freedom . . . . [as] a special concern of the First Amendment."[1] And, in an unusual display of support for freedom of expression during the Vietnam conflict, the Court sustained the right of students to protest by reminding officials that state-operated schools could not be "enclaves of totalitarianism."[2] Nevertheless, judicial intervention proved to be limited as minimal censorship of student speech and publication was upheld.[3] If the mien of public education had been altered, state control continued to prevail without material change.

The school desegregation cases gave rise to increases in state funding, in some cases for purposes of evasion and in others to assure compliance with judicially prescribed criteria.[4] A marked redistribution of students, especially in the elementary and middle schools, led to budgetary support for busing unparalleled in previous years.[5] Proponents of integration achieved substantial victories in the federal courts and in the states, particularly in the Deep South.[6] Schools were compelled to provide the means necessary to afford a semblance of instructional equality and

[1] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); *see also* Epperson v. Arkansas, 393 U.S. 97, 104–05 (1968) (citing *Keyishian*, 385 U.S. at 603).

[2] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

[3] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[4] *See, e.g.*, Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 201, 79 Stat. 27, 27 (codified as amended in 20 U.S.C. §§ 236–44 (1965)) (repealed 1994) (providing federal financial aid assistance to state educational agencies for grants to local educational agencies).

[5] *See* Emergency School Aid Act, Pub. L. No. 92–318, § 702, 86 Stat. 354, 354 (1972) (codified as amended at 20 U.S.C. §§ 1601–19 (1976)) (repealed 1978).

[6] *See, e.g.*, Graves v. Walton County Bd. of Educ., 300 F. Supp. 188, 198 (M.D. Ga. 1968), *aff'd*, 410 F.2d 1152 (5th Cir. 1969); Franklin v. Quitman County Bd. of Educ., 288 F. Supp. 509, 515 (N.D. Miss. 1968); Carr v. Montgomery County Bd. of Educ., 253 F. Supp. 306, 307 (M.D. Ala. 1966).

adequate physical facilities.[7]

Pressures from the United States Supreme Court continued unabated until the early 1990s, when judicial supervision of school districts began to decline. The Court, in *Board of Education of Oklahoma City Public Schools v. Dowell*, entered upon the first phase of withdrawal with a condemnation of perpetual "judicial tutelage" once the vestiges of de jure segregation had been eliminated.[8] Soon thereafter, the Court redefined steps in the retraction process when, in *Freeman v. Pitts*, it espoused a formula of gradualism predicated on a "good-faith commitment" tempered by the inherent flexibility of equitable principles.[9] Other results associated with the continuing dilemma of the public schools had already taken shape as incremental increases in the cost of desegregation began to recede.[10] "Heroic measures" were no longer said to be required.[11]

II. THE SCHOOL FINANCING IMBROGLIO

Even as a renewed resort to state constitutional law had just begun to appear, efforts to correct school funding inequities became evident. A Texas case that reached the Supreme Court, *San Antonio Independent School District v. Rodriguez*, challenged the validity of the state's system of financing public education.[12] At issue were claims of an excessive reliance on local property taxes and its adverse effects on the poor.[13] Justice Lewis Powell, who wrote for the Court, applied traditional judicial guidelines despite pleas of discrimination by the Mexican-American parents in whose behalf the suit had been brought.[14] The absence of wealth was not

[7] *See, e.g.*, Plaquemines Parish Sch. Bd. v. United States, 415 F.2d 817, 832 (5th Cir. 1969) ("[D]istrict court was justified in ordering the School Board to provide students . . . with full access to all facilities located at that high school and to insure those students the opportunity to engage in extracurricular activities."); United States v. Indianola Mun. Separate Sch. Dist., 410 F.2d 626, 631 (5th Cir. 1969) ("[E]ffective desegregation . . . requires not only integration of faculty, staff and students, but also integration of services, facilities, extracurricular activities including athletics, transportation and all other aspects of a community's educational program."); Kelley v. Altheimer, Ark. Pub. Sch. Dist. No. 22, 378 F.2d 483, 499 (8th Cir. 1967); Boomer v. Beaufort County Bd. of Educ., 294 F. Supp. 179, 182–83 (E.D.N.C. 1968).

[8] 498 U.S. 237, 249 (1991).

[9] 503 U.S. 467, 491 (1992).

[10] *See id.* at 506.

[11] *Id.* at 493.

[12] 411 U.S. 1, 4–5 (1973).

[13] *Id.* at 5, 11–12.

[14] *Id.* at 40.

held to qualify as a suspect classification requiring strict scrutiny.[15] And, as Justice Powell viewed it, education did not rise to the level of a "fundamental" interest when subjected to equal protection tests.[16] Instead, no more than the usual deferential standards of review applied with the Court's inquiry limited to those found in economic and social regulatory controversies.[17] Thus, within this permissive context, the school finance plan was found to be rationally related to a legitimate state purpose.[18]

At times disregarded in *Rodriguez* was Powell's "cautionary postscript" that disavowed any endorsement of then current programs of school funding premised largely on schemes of property taxation.[19] Apparently, the Court had not intended to place "its judicial imprimatur on the status quo."[20] But overt federal intervention, Powell went on to warn, threatened upheaval in inner-city districts without helping the impoverished who suffered most from the inequities.[21] If reform was to be meaningful and to assist those affected, it had to spring from the democratic process, presumably from legislative revision and an overhaul of funding sources.[22] That state legislatures would be reluctant to initiate major changes in patterns of state taxation and the distribution of monies was readily evident in view of the political repercussions that predictably might have resulted.[23] Despite Justice Powell's professed faith in the democratic process,[24] other options, by means less attentive to the foibles of the electorate, seemed to offer better prospects of success.

It was not surprising that a resort to the courts would be attempted in view of the risks and sensitivity attendant upon a popular resolution of the problem. The first major state case, preceding *Rodriguez*, was California's *Serrano v. Priest* (*Serrano I*) that imparted not only substance but a driving force to the movement for reform.[25] In a departure from previous standards of review, the state's highest court described the existing school

[15] *Id.* at 28–29.
[16] *Id.* at 37.
[17] *Id.* at 35, 40.
[18] *Id.* at 54–55.
[19] *Id.* at 56.
[20] *Id.* at 58.
[21] *Id.* at 57–58.
[22] *Id.* at 58–59.
[23] *Id.* at 56 n.111.
[24] *Id.* at 59.
[25] 487 P.2d 1241 (Cal. 1971).

finance system as fatally flawed.[26] Funding requirements were said to affect adversely a "fundamental interest" in education and to discriminate on the basis of a district's wealth, designated a suspect classification calling forth a regimen of strict judicial scrutiny.[27] On the basis of a finding that no compelling state interests were involved, the court went on to declare the system unconstitutional.[28] Particularly noteworthy was the majority's resort to novel perceptions of "substantive" equal protection rarely adverted to by the Federal Supreme Court.[29] It was this "new" equal protection that served as the basis of the system's invalidation—described as a scheme that could not withstand examination by the compelling standards now being applied.[30] Neither the legislature nor the executive branch, bounded as each was by the constraints of the democratic process, seemed likely to embrace a similar posture deviating so conspicuously from accepted norms.[31] And a subsequent version of *Serrano I* made explicit a material grounding in the state constitution and required compliance by a specified date.[32]

A progression of state cases followed during the next two decades founded, for the most part, in arcane provisions of state constitutions. If, as was often the case, California served as the bellwether of state initiatives, New Jersey's contribution was more inclusive, and the consequences of judicial intervention were far more dramatic. The New Jersey Supreme Court set aside the state's system of financing public education in 1973 when, in the first phase of *Robinson v. Cahill* (*Robinson I*), it invoked a "thorough and efficient" clause in the state constitution.[33] An ineffective legislative response led to an impressive clash that moved the court to enjoin the expenditure of school funds until the court's findings were adequately executed.[34] Fears of an impending crisis resulting from the impasse threatened to delay the opening of the school term just a few months away.[35] It was only when, for the first time in the state's history, the legislature enacted an income tax law ensuring

[26] *Id.* at 1244, 1260.
[27] *Id.* at 1244, 1249–50.
[28] *Id.* at 1244, 1263.
[29] *Id.* at 1261.
[30] *Id.* at 1263.
[31] Serrano v. Priest (*Serrano II*), 557 P.2d 929, 941 (Cal. 1976).
[32] *Id.* at 951, 958.
[33] 303 A.2d 273, 291 (N.J. 1973).
[34] *See* Robinson v. Cahill (*Robinson II*), 306 A.2d 65, 66 (N.J. 1973).
[35] *See id.*

adequate support to implement a revised school funding distribution formula that the restraining order was lifted.[36] Thus obscure and enigmatic phraseology, derived from a bygone era, had been revived to assume a significant role in fostering reform of an outdated system of educational finance.[37]

Additional challenges were undertaken in New Jersey and, despite substantial alterations made in the wake of *Robinson v. Cahill* in its several stages, the state's highest court returned to the fray.[38] An earlier statute, passed to meet the court's 1973 requirement, was held unconstitutional in 1990 as it applied to impoverished urban school districts.[39] In *Abbott v. Burke*, the court insisted with renewed vigor that substantial parity of educational expenditures had to be achieved.[40] Once again the perceived gap between the special needs and more affluent districts served as the core of the opinion by activist justices intent on budgetary equivalence to the greatest extent possible.[41] The court conceded that a redistribution of available monetary resources might not suffice in view of the impact of existing socioeconomic factors upon those affected.[42] Admitting that such factors lay beyond the remedial powers of school districts, the court went on to assert that dollar input still had a significant effect upon the quality of the educational results.[43] In the wake of *Abbott*, the legislature approved a substantial increase in state income tax rates and a major diversion of funds to meet the needs of the urban poor.[44] Measured in political terms, the response of the suburban districts was rapid and pointed.[45] The governor was swept out of office in the next election and political control of the legislature shifted

[36] Robinson v. Cahill (*Robinson V*), 351 A.2d 713, 722, 724 (N.J. 1975).

[37] *See Robinson I*, 303 A.2d at 295–96.

[38] *See* Abbott v. Burke (*Abbott I*), 575 A.2d 359 (N.J. 1990).

[39] *See id.* at 362–63.

[40] *Id.* at 363.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* Quality Education Act of 1990, ch. 52, §§ 2(a)(6)–(b)(5), 1990 N.J. Sess. Law Serv. 587–88 (West) (codified as amended at N.J. STAT. ANN. §§ 18A:7D-1 to 18A:7D-37 (West 1990)) (repealed 1991, 1996).

[45] *See* BETH D. BADER, ABBOTT V. BURKE VS. NEW JERSEY: POLICY, POLITICS AND POLITICAL ECONOMY 25 (photo. reprint 1991), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/23/39/43.pdf.

markedly.[46] But the electorate's displeasure over the effects of the state constitution's thorough and efficient education formula did not dissuade the court from pursuing the goal of equivalence by way of additional, more compelling remedies.

In the second phase of *Abbott v. Burke*, the court resumed its efforts to provide remedies for special needs districts.[47] The relative disparity in average per-pupil expenditures between these and the wealthier districts was found to be sixteen percent compared to twenty-five percent or thirty percent prior to the legislature's intervention following the decision in the first *Abbott* case.[48] A description of the prevailing school budget formulas prepared the way for a new round of mandatory prescriptions calling for more compelling statutory endeavors to enable disadvantaged students to "function effectively in the same society with their richer peers both as citizens and as competitors in the labor market."[49] But the court seemed more realistic concerning the apparent lack of any correlation between additional funding and the implementation of improvement plans.[50] Indeed, the justices emphasized the need for painstaking state supervision and the identification of targeted services.[51] If the court methodically reaffirmed its adherence to the "thorough and efficient" requirement of the state constitution, its principal message was one of careful management of expenditures toward specified objectives with the state itself being held strictly accountable for the correction of educational disparities.[52]

Similar definitions have been applied to the terms "thorough" and "efficient" even as the means of implementation have differed, at times substantially.[53] Nor have most states sought to require total funding equalization so long as underlying needs have been met.[54] The Washington Supreme Court found that a "general and uniform system" had not been followed because dependable and regular tax

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[46] *See* Rutgers-Newark Inst. on Educ. L. and Pol'y, *New Jersey Governors and Education: Perfect Together?*, Nov. 18, 2005, http://ielp.rutgers.edu/professor/111805100147.

[47] Abbott v. Burke (*Abbott II*), 643 A.2d 575, 576 (N.J. 1994).

[48] *Id.* at 576–77.

[49] *Id.* at 577–78, 580.

[50] *Id.* at 578–79.

[51] *Id.* at 580.

[52] *Id.*

[53] *See, e.g.*, Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).

[54] *See, e.g.*, Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 97 (Wash. 1978); *see also* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 205 (Ky. 1989).

sources were not available to ensure a "basic" education.[55] To like effect, the Supreme Court of Kentucky set aside the state's funding scheme as inadequate and discriminatory in carrying forward the constitutional mandate of an "efficient system of common schools."[56] Yet, in most of the states, the role of the courts as instruments of directed change remained nominal, often confined to declarations of varying potency but usually lacking any additional steps that might be expected to incur the wrath of the legislature. In fact, inequality persisted without any sense of urgency intended to impel an immediate response. Among the exceptions, in addition to California and New Jersey, was Texas, where disparities among districts were flagrant and state funding fell below half of the overall costs.[57] It was only in such circumstances that the state supreme court explicitly held that there existed a lack of consistency with the state constitution's requirement of an "efficient system" of free public schools.[58]

Throughout the school funding cases, questions arose concerning the fundamental nature of education and the level of scrutiny required. Assertions of the existence of a fundamental right, accompanied by diverse supporting language, emerged in a number of states including California, Connecticut, Kentucky, Minnesota, Washington, West Virginia, Wisconsin, and Wyoming. Generally, once a fundamental right was found to exist, courts applied strict scrutiny to a challenged statute or regulation.[59] But such intense inquiry was also resorted to if a "suspect" class was held to be burdened.[60] With respect to the educational function, wealth has often been looked upon as a suspect class and classifications

[55] *Seattle Sch. Dist. No. 1*, 585 P.2d at 97 (internal quotation marks and emphasis omitted).

[56] *Compare Rose*, 790 S.W.2d at 205, 215–16. (placing "an absolute duty on the General Assembly to re-create, re-establish a new system of common schools"), *with* McDuffy v. Sec. of Executive Office of Educ., 615 N.E.2d 516, 548 (Mass. 1993) (leaving it to the political branches to fulfill their constitutional duty, coming after an extensive review of the historical record and of constitutional language held to be "not merely aspirational or hortatory, but obligatory").

[57] Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989).

[58] *Id.* at 393.

[59] *See* Serrano v. Priest (*Serrano II*), 557 P.2d 929, 951 (Cal. 1976); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); *Rose*, 790 S.W.2d at 212; Skeen v. State, 505 N.W.2d 299, 313–15 (Minn. 1993); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980). *But see Seattle Sch. Dist. No. 1*, 585 P.2d at 91 (holding the state constitution imposes a "paramount duty" that is "supreme, preeminent or dominant" (emphasis omitted)); Kukor v. Grover, 436 N.W.2d 568, 579–80 (Wis. 1989) (finding a fundamental right but refusing to apply strict scrutiny).

[60] Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1250 (Cal. 1971).

predicated on it are said to be suspect.[61] Both holdings of education as a fundamental right and definitions of suspect classes appeared to have been responsive to the United States Supreme Court's contrary findings in *San Antonio Independent School District v. Rodriguez*.[62] Nonetheless, the absence of either contrastingly premising opinions on the education clauses or articles of state constitutions as in New Jersey, need not mean any lesser degree of protection for the disadvantaged or the relaxation of compelling standards of judgment. While the doctrinal route selected could not be dismissed as inconsequential, the objectives sought and their ultimate realization were not necessarily impaired because of the choice made. In some instances, equal protection analysis came to prevail. In others, different standards were selected because of possible effects upon other public services provided. Neither the principle of education as a fundamental right nor the invocation of suspect classes always controlled.[63]

That a resort to one or another of the clauses might lead to a different outcome appeared in the ever-growing number of cases decided. The Supreme Court of Arizona, relying on the state constitution's requirement of a "general and uniform public school system," held that existing disparities violated the clause.[64] But, it was emphasized, the inequities ran afoul of the provision when and only because they were the result of the state's statutory financing scheme for public education.[65] The plurality's analysis rejected pleas to found findings of unconstitutionality on state equal protection grounds.[66] Since a specific constitutional provision proved dispositive, the court was persuaded, general language need not and ought not to be reached.[67] By contrast, Tennessee's highest court embraced the state's equal protection clause rather than education guarantees as the basis for a holding of invalidity.[68]

Ancillary claims arose in a controversy of first impression

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[61] *E.g., Skeen*, 505 N.W.2d at 314.

[62] 411 U.S. 1, 35 (1973).

[63] A finding that education is a fundamental right does not ineluctably lead to a negative result. *See Skeen*, 505 N.W.2d at 315. On occasion, mixed results ensue when relevant constitutional clauses are presented in tandem. Idaho Schs. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 736 (Idaho 1993).

[64] Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806, 812, 815–816 (Ariz. 1994) (emphasis omitted).

[65] *Id.* at 816.

[66] *Id.* at 811.

[67] *Id.* at 811, 815–16.

[68] Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 156 (Tenn. 1993).

involving the inability of a school district in California to provide sufficient funds to permit completion of the school term.[69] It seemed paradoxical that the earlier *Serrano* decisions, which intended to assure funding equality, worked to prevent local districts from moving to undertake "bailout" financing by way of increased property taxes.[70] To have done so might have exceeded inter-district equalization requirements linked to basic principles established in the *Serrano* cases. And the restraining effects of Proposition 13, the first in a series of critical anti-tax initiatives, precluded emergency financing that would have served district needs.[71] Consequently, the only remaining source appeared to be the state treasury in view of the inaccessibility of accustomed channels.[72]

In the resulting case, *Butt v. State*, the Supreme Court of California sustained a lower court's ruling directing the state to protect student rights to basic educational equality.[73] Discrimination of this nature was said to be warranted only if it served a compelling interest.[74] And, the high court concluded, local control did not constitute such an interest.[75] Instead, the state was obliged to intervene to assure the maintenance of equality in educational resources even if it meant assuming control of the district and supervising its financial recovery.[76] But, as the case developed, the principal points of conflict related to the source of the needed funds and the power of the courts to order a transfer of unused moneys from specified appropriations.[77] Thus the doctrine of the separation of powers and the system of checks and balances came to the fore as major obstacles to an emergency state loan.[78] Old shibboleths and questions emerged, including the untoward diversion of funds, the primacy of legislative authority, and judicial meddling in areas committed to the political branches.[79]

Among the possible operational alternatives that emerged from widespread debate over the efficacy of public education and its

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[69] Butt v. State, 842 P.2d 1240 (Cal. 1992).
[70] *See* Serrano v. Priest (*Serrano II*), 557 P.2d 929, 953 (Cal. 1977).
[71] *See* CAL. CONST. art. XIII A; *see also Butt*, 842 P.2d at 1255 n.17.
[72] *Butt*, 842 P.2d at 1260.
[73] *Id.* at 1264.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 1261 n.25, 1262.
[78] *Id.* at 1258.
[79] *See id.*

future course, the notion of school choice took on far greater significance than theretofore. The Wisconsin legislature adopted a bold plan, the Milwaukee Parental Choice Program, that sought to provide remedies designed to meet the needs of low-income families in an inner city.[80] The pilot project was intended to offer a choice of schools for students and their parents, the assumption being that private schools might be more effective than the public schools in addressing the inadequacies associated with poverty and the privations attendant upon it.[81] Milwaukee was selected because disparities were said to be acute, and statistical data pointed to a notable decline in educational achievement levels.[82] Yet significant public policy issues intruded, perhaps the most important being fear that any proliferation of the program threatened the nation's great experiment in free public education.[83] It was hardly surprising that choice was subjected to a litany of constitutional challenges, many only peripherally related to the wisdom or desirability of the program.[84]

In *Davis v. Grover*, the Supreme Court of Wisconsin concluded that the project passed constitutional scrutiny,[85] but the court was sorely divided as it proceeded in an emotionally charged setting. Several opinions were submitted, largely centering about esoteric charges that the act violated the private/local bill prohibition, the single-subject rule, and the state constitution's uniformity requirement.[86] Beyond this façade lurked more substantial questions over the public purpose doctrine and the long-term effects of using public funds for private ventures.[87] The majority found no violation of the public purpose doctrine in an unconvincing opinion, reliant upon a presumption of constitutionality that at times was difficult to sustain.[88] In the final analysis, the court opted for brief references to public purpose and vague assertions of sufficient and reasonable controls to preserve a measure of accountability and

[80] Davis v. Grover, 480 N.W.2d 460, 462 (Wis. 1992).

[81] *Id.*

[82] *Id.* at 462–63.

[83] *Id.* at 462.

[84] *See id.* at 465.

[85] *Id.* at 477.

[86] *Id.* at 462–63, 477–79 (Ceci, J., concurring), 481–83 (Abrahamson, J., dissenting), 485–86 (Bablitch, J., dissenting).

[87] *Id.* at 474–75 (majority opinion).

[88] *See id.* at 477–78 (Ceci, J., concurring), 484–85 (Abrahamson, J., dissenting), 488–89 (Bablitch, J., dissenting).

supervision.[89]

A variant of Wisconsin's school choice option was an Iowa plan that permitted attendance at schools in districts outside the one in which the student and his or her family resided.[90] Thus the open enrollment law promoted maximum educational choices and opportunities, but the sending district was required to make tuition payments for those of its students attending classes in the receiving district.[91] It was the finance feature that was subjected to constitutional challenge on substantive due process and equal protection grounds.[92] In a lackluster opinion premised on federal guidelines, the Iowa Supreme Court declined to apply any standard more compelling than a rational basis test.[93] No resort to independent state grounds was in evidence as the court applied old formulas to untried contrivances. Had allegations of rights infringements been predicted on some degree of heightened judicial scrutiny, it was possible that different results might have come to pass.

It is of interest that a resort to the initiative and referendum may obviate any reliance on constitutional provisions open to judicial interpretations that would negate the method of funding public schools. The Supreme Court of Oregon, in *Coalition for Equitable School Funding v. State*, set aside claims for relief brought by an organization comprised of school districts, taxpayers, and school-age children and their parents.[94] There were pleas to overrule a previous decision sustaining the school financing system under historic clauses of the state constitution.[95] In response, the court reminded the plaintiffs that the "correctness" of the earlier precedent was no longer at issue, for the people had added a new provision that embraced specifically how the schools were to be funded.[96] Revised language, designated as the "[s]afety [n]et," contemplated and, in effect, permitted the types of disparities to which objection had been taken.[97] Consequently, the challenge failed because of a "later-adopted constitutional provision" that

[89] *See id.* at 476–77.
[90] Exira Cmty. Sch. Dist. v. State, 512 N.W.2d 787, 789 (Iowa 1994).
[91] *Id.*
[92] *Id.* at 792.
[93] *Id.* at 793.
[94] 811 P.2d 116, 117 (Or. 1991).
[95] *Id.* at 118–19; *see also* Olsen v. State, 554 P.2d 139 (Or. 1976).
[96] *Coalition*, 811 P.2d at 118–19.
[97] *Id.* at 120.

required reliance on local property taxes as school funding sources and condoned district-to-district differences in expenditures.[98]

If, in fact, the Oregon opinion, adapted to the overriding processes of the initiative and referendum, was to serve as a paradigm for defenses in other states, a disillusioned electorate and special interest groups could preclude reformist efforts predicated on "thorough and efficient" and kindred constitutional standards. The court made plain that its findings did not support any claim that the school financing system was "politically or educationally desirable."[99] Indeed, it is doubtful that such reasoning could sustain the critique of a concurring opinion in *Coalition* that the system came "perilously close to the edge of the cliff of unconstitutionality."[100] The majority apparently felt no compunctions concerning possible inequalities or of lending implicit support to a simplistic formula of abiding by the last expression of the popular will. Doubtless the justices did so in the realization that adherence to the formula might do no more than lend support to maintenance of existing conditions. Within the constraints of the opinion, the court declined to enter upon an assessment of the state's school financing system apart from a sparse holding of its constitutionality. It was conceivable, if not probable, that a similar course might be pursued elsewhere with similar results.

The increasing frequency of judicial declarations of the unconstitutionality of school funding statutes raised questions concerning the status of school district tax resources during the interim period prior to enactment of acceptable legislative plans. In the early 1990s when the Texas Supreme Court set aside the state's school funding scheme, taxpayers filed a class action in federal district court seeking the return of tax proceeds that continued to be collected under the unconstitutional laws.[101] In its rulings, the state high court had held the tax system unconstitutional, but the justices further announced that this declaration could not be used by taxpayers as a defense to avoid payment or to seek refunds of taxes due.[102] This apparent anomaly prompted taxpayers to invoke federal due process as the basis of a challenge to the loss of property

[98] *Id.*

[99] *Id.* at 122.

[100] *Id.* at 124 (Fadeley, J., concurring).

[101] Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 515 (Tex. 1992).

[102] *Id.* at 522.

claimed to have resulted.[103] It was clear that no state remedy was available since the decision came from the state's highest court, the final state-based interpreter of the state constitution, rather than from the legislature whose acts were subject to judicial review.[104] This was so although the taxes themselves did not violate the Federal Constitution.[105]

The federal district court found that, in the peculiar circumstances of this case, rights guaranteed under the due process clauses of the Fifth and Fourteenth Amendments were compelling, and the action fell within a narrow exception to the Tax Injunction Act.[106] And, it was noted, taxpayers would be irreparably injured if the tax scheme was permitted to continue as an effective mechanism.[107] Plainly, the cause presented many of the essential elements necessary for a preliminary injunction.[108] Education, the district court noted, was not a right protected under the national Constitution while rights of due process were explicitly preserved.[109] What weighed against the issuance of a restraining order, and the factor that ultimately prevailed albeit by a narrow delineative margin, was the fear that the grant of injunctive relief would disserve the public interest.[110] The federal court observed that the invalidated state tax scheme affected more than a thousand local school districts.[111] Thus the denial of generated funds, past and future, was said to be capable of having disastrous effects upon more than three million school children in the state.[112] Should these conditions be replicated elsewhere, the question remained, might a like holding encourage state legislatures to postpone politically unpopular actions on the assumption that courts would not move to enjoin the collection of revenues under state acts despite their obvious and evident unconstitutionality?

That thorny funding issues are not the sole sources of controversy in education matters is clear from the many cases that have appeared and subsequently reappeared in other areas. Of recent note in a related quarter was the future of services rendered in

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[103] Smith v. Travis County Educ. Dist., 791 F. Supp. 1170, 1176 (W.D. Tex. 1992).
[104] *Id.* at 1176–78.
[105] *Id.* at 1178.
[106] *Id.* at 1199–1200.
[107] *Id.* at 1196.
[108] *Id.* at 1202.
[109] *Id.*
[110] *Id.* at 1203–04.
[111] *Id.* at 1203.
[112] *Id.* at 1203–04.

access to and support of higher education. Indeed, it was higher education that first led to federal intervention in behalf of egalitarian rights as early as the 1930s.[113] Fears of a massive negative response should any effort to require desegregation at the elementary and secondary levels encouraged the Federal Supreme Court to deal first with what appeared to be less explosive issues in public colleges and universities. It was only after the higher education cases had set the stage that the Court moved into the far more tumultuous terrain signified initially by *Brown v. Board of Education*[114] and its progeny. Once having turned to the "lower" schools, the Justices seemed to have cast problems of higher education in a remote category of less contention and perhaps of less importance in the educational fray. And in the states, constitutional predicates, albeit linked to some form of equal protection, were more often premised on obsolete and archaic provisions little used except in outmoded historic accounts. As a result, questions recurred whether higher education issues had become superfluous appendages, at best removed and ancillary in the educational vortex.

That higher education issues were not to be consigned to desuetude became evident in the early 1990s. The United States Supreme Court resumed serious consideration of such controversies when it agreed to reconsider charges leveled against aspects of Mississippi's public university system.[115] Claims were made that the state had failed to comply with its duty to dismantle a dual system contrary to the tenets of the Equal Protection Clause of the Fourteenth Amendment.[116] While the Justices agreed with the lower courts that higher education was distinctively different from primary and secondary schools in many relevant respects, they did find that a critical core of basic principles applied to both.[117] Of particular significance was a need for the state to demonstrate conclusively that the dual system had been completely abandoned.[118] In a programmatic review of universities and their diverse missions, the Court repeatedly noted that the adoption and implementation of racially neutral policies did not suffice.[119] All

[113] *See, e.g.*, Missouri v. Canada, 305 U.S. 337, 342 (1938).
[114] 347 U.S. 483 (1954).
[115] United States v. Fordice, 505 U.S. 717, 723 (1992).
[116] *Id.*
[117] *Id.* at 728–29.
[118] *Id.* at 729.
[119] *Id.*

surviving aspects of the previously discriminatory system had to be discarded before the painstaking requirements of the Fourteenth Amendment could be said to have been met.[120]

Soon after the Supreme Court's return to the racially sensitive problems of higher education, divergent issues arose in a state case which centered about an essentially similar corpus. A class action filed in a trial court in Texas challenged the constitutionality of the state's system of higher education.[121] The plaintiffs contended that the policies and practices of responsible state officials and of those who governed public universities had denied Mexican Americans in the border areas of quality programs and of access to equal higher education resources.[122] The trial court declared the system invalid under applicable provisions of the state constitution.[123] Since the judgment enjoined any reliance upon or resort to the higher education appropriation acts passed by the legislature, the state took a direct appeal to the Supreme Court of Texas which reversed the verdict of the trial court.[124]

From the outset, questions arose concerning the constitutional basis on which appellate findings might be predicated.[125] It was not clear whether national origin and race lay at the root of the controversy and had, in fact, resulted in a denial of equal educational opportunity.[126] Or, as persistent claims were advanced, it was possible that geographical classifications could have been said to be paramount with respect to the allocation of funds and related determinations.[127] If the latter were to prevail as the principal foundation for an equal rights violation, the high court noted, the charges would fail.[128] Equality touches upon the relationship and treatment of persons. It does not require "territorial uniformity" as a "constitutional prerequisite."[129] And, the court pointed out, the distribution of Mexican Americans throughout the state belied claims of discrimination or exclusionary practices associated with or directed at a defined region.[130] What

120 *Id.*
121 Richards v. League of United Latin Am. Citizens, 868 S.W.2d 306, 308 (Tex. 1993).
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.* at 311.
126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.* (quoting McGowan v. Maryland, 366 U.S. 420, 427 (1961)).
130 *Id.*

emerged as all-encompassing, regardless of the range of charges made, was race and national origin.[131] Matters of geography paled by comparison and at most seemed to reflect subsidiary concerns that, while supportive, did not control the outcome.[132]

Proceeding to traditional equal protection tests of disproportionate impact and discriminatory intent, the Texas Supreme Court held that the evidence was insufficient.[133] Support for impact never rose to a level adequate to sustain the charges made, and an intent to discriminate against Mexican Americans had not been demonstrated.[134] Alternatively, and as a buttressing element, claims that higher education was a fundamental right under the state constitution were dismissed.[135] The "[p]ublic [f]ree [s]chools" provision did not apply when, as the court viewed it, three separate types of educational institutions had been recognized.[136] In addition and more generally, constitutional provisions applicable to the elementary and secondary schools, the court declared, did not relate to higher education and its attributes.[137]

The plaintiffs' attempts to rely upon the national Supreme Court's decision in the Mississippi case also proved to be fruitless. The Texas court observed that a "prior *de jure* segregated system" of university education had been pivotal in the Federal high Court's ruling.[138] To the contrary, the remedial action undertaken was not called for in Texas since the practices challenged centered about the location of institutions and the allocation of resources rather than policies traceable to a system of segregation.[139] What is more, the placement of the main campus of the "flagship" university in Austin was the choice of the electorate—a power of selection exercised more than a century earlier.[140] Thus, it appeared unambiguously plain that colleges and universities were legally differentiable from elementary and secondary schools and that, looking to the governing principles of individual choice and like considerations, the constitutional dicta applicable to the lower schools bore no relevance as decisional paradigms.

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131 *Id.* at 312.
132 *Id.*
133 *Id.* at 314.
134 *Id.*
135 *Id.* at 314–15.
136 *Id.* at 316–17.
137 *Id.* at 317.
138 *Id.* at 315 (quoting United States v. Fordice, 505 U.S. 717, 725 (1992)).
139 *Id.*
140 *Id.* at 317.

III. PUBLIC PURPOSE, EQUAL PROTECTION, AND RELATED QUESTIONS

Among the perennial questions to which attention has been directed over the years is the public purpose doctrine. Appropriated state funds cannot be used to assist private institutions unless a compelling purpose is found to exist apart from support of the non-public entity. Implicit in the public purpose doctrine is an aversion to aid to sectarian schools or other religious institutions that are expected to survive without the positive intervention of the state, its agencies or instrumentalities. It should be noted that the doctrine is not intended to prevent the expenditure of funds to ensure adequate services to the public at large. Instead, it focuses upon specific grants designed to assist designated institutions or those in enumerated categories.

A good example of the application of the doctrine, without untoward results, was evident in a Massachusetts case, *Commonwealth v. School Committee of Springfield*.[141] The school board had refused to enter into agreements with private schools to provide special programs for disabled children.[142] As a result, the State sought to compel compliance.[143] The board, in turn, filed a counterclaim for declaratory and injunctive relief prohibiting the commissioner of education from approving the private placements.[144] At issue throughout the proceedings was the meaning and breadth of an anti-aid amendment to the state constitution.[145] As the Massachusetts Supreme Judicial Court framed the inquiry, the outcome depended upon the query whether the service contracts were entered into "for the purpose of founding, maintaining, or aiding" the private institutions concerned.[146] The State contended that the contracts fell within the scope of the "deaf, dumb or blind" exceptions to the amendment's coverage.[147] The court held that the exception did not need to be invoked since answers to the first query exempted the contracts from invalidation.[148]

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[141] 417 N.E.2d 408 (Mass. 1981).
[142] *Id.* at 409.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 412–13.
[147] *Id.* at 413.
[148] *Id.*

By projecting the church-state issue into the decisional calculus, the public purpose doctrine took on a new, more intrusive visage. A challenge to the constitutionality of a state textbook loan act, as it applied to the free loan of secular materials to pupils enrolled in parochial schools, led to an examination of the interface between federal and state criteria. The Supreme Court of Nebraska, in *Gaffney v. State Department of Education*, focused about the relevant wording of the state constitution as its operative fulcrum.[149] In doing so, it departed markedly from the vagaries associated with the religion clauses of the First Amendment.[150] The court emphasized federal-state linguistic differences that, as the majority viewed them, did not permit an assessment of such controversial and highly subjective standards as secular purpose, primary aid, or political divisiveness and state-church entanglement.[151] Instead, the court opted for what it termed findings of "precise . . . meaning, purpose, and terms."[152]

A literal reading of the Nebraska Constitution resulted in a holding that an extension of aid from public funds to nonpublic schools was prohibited "in any manner, shape, or form" without compelling any determination of "hairline and illusory distinctions of degree."[153] Implicit was a rejection of the "child-benefit" theory that permitted a grant to students rather than to the school as a means of sustaining the validity of aid programs.[154] The state court denied that portraying the student as a conduit had the "cleansing effect" of removing the identity of the ultimate beneficiary.[155] By contrast, the New York textbook case embraced a rationale premised upon tenuous distinctions between a loan and an outright grant of the books to parochial school students.[156] Justice Hugo Black, in one of the dissenting opinions, bitterly attacked the Court's support of the program as a "flat, flagrant, open violation" of the First Amendment's Establishment Clause.[157] But subsequent cases cast serious doubt upon so simplistic a view of child-benefit theory, indicating that there are limits, even in federal

[149] 220 N.W.2d 550, 553 (Neb. 1974).
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 554.
[154] The United States Supreme Court first articulated a "child-benefit" theory in *Cochran v. La. Bd. of Educ.*, 281 U.S. 370, 374–75 (1930).
[155] *Gaffney*, 220 N.W.2d at 557.
[156] Bd. of Educ. v. Allen, 392 U.S. 236, 243–44 (1968).
[157] *Id.* at 250 (Black, J., dissenting).

jurisprudence, to an "accommodationist" line of reasoning.[158] Thus, state and national opinions were not as disparate as first appears, though it is undeniable that a recourse to the explicit phraseology of the state constitution made the basis of decision-making far less arduous and surely more convincing.

If provision for free textbooks in private schools does not necessarily fall within the scope of educational materials that school districts need to supply, the question arises whether auxiliary services must be offered and funded out of tax monies. The depth of the issue is compounded when the service encompasses transportation to and from school and the possible consequences of the assessment of a required fee. A California statute authorized school districts to charge a fixed payment for pupil transportation with a proviso that students who cannot afford to pay will be exempted.[159] When implementation was contemplated, an action was instituted to determine the validity of the enabling act.[160] In *Arcadia Unified School District v. State Department of Education*, the Supreme Court of California was called upon to weigh the constitutionality of the statute against several provisions of the state charter.[161] To those who challenged the validity of the act, any charge for transportation violated the state constitution's free school guarantee and equal protection clause.[162] Supporters responded that transportation is not included within the free school guarantee and that equal protection is not implicated since waivers are available to the indigent.[163]

When the state court moved to sustain the statute, it did so on the basis of the intent of the framers and other dicta that militated in favor of positive findings.[164] A majority admitted the ambiguity of the framers' language and the lack of settled meanings derived from debates in the constitutional convention.[165] What emerged, nevertheless, was the conclusion that the bus transportation was not an educational activity and not protected by the free school

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[158] *See, e.g.*, Norwood v. Harrison, 413 U.S. 455, 463–65 (1973), Lemon v. Kurtzman, 403 U.S. 602, 617 (1971). A return to accommodation was particularly evident in the Rehnquist Court. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8, 13–14 (1993).

[159] *See* CAL. EDUC. CODE § 39807.5 (West 2008) (repealed 1998); Arcadia Unified Sch. Dist. v. State Dep't of Educ., 825 P.2d 438, 439 n.4 (Cal. 1992).

[160] *Arcadia Unified Sch. Dist.*, 825 P.2d at 439–40.

[161] *Id.*

[162] *Id.* at 442, 447.

[163] *See id.* at 446–47.

[164] *Id.* at 443–45.

[165] *Id.* at 443.

guarantee as a necessary element.[166] Indeed, bus transportation was said to be optional—a service inessential to the proper functioning of the educational system.[167] Nor was the provision for a waiver by pupils unable to pay taken to be invalid because a "stigma" attached to those applying.[168] The court denied that the law discriminated against the poor or adversely affected waiver that would facilitate equal access to school-provided transportation.[169] As a result, there was not created a forbidden classification premised upon wealth to the detriment of the exercise of a fundamental right to education under the state constitution.

That economic adversity lay at the root of the act under review and perhaps of the court's disposition of the issues raised did not allay the precedent established and its effects upon the free school stipulation. The guarantee fell short of mandating pupil transportation as a public charge. And, toward the effectuation of like purposes, the equal protection component did not supply an energizing force to fill any remaining lacunae of a judicial negative.

Whether an action in the federal courts would have resulted in a different outcome remains problematic despite the United States Supreme Court's support of a program a half-century ago to reimburse parents for bus fares to enable their children to attend parochial as well as public schools.[170] But the decision in *Everson v. Board of Education* did not convey any obligatory intent since the Establishment Clause of the First Amendment controlled the outcome.[171] No real effort was made to examine the reach of the state constitution's "support" guarantee and any measurement of the standards that it projected.

If there were permissible exceptions to free school guarantees such as variable provisions for unpaid bus transportation in California, questions continued to arise concerning the scope of constitutional mandates more generally assuring a free public education. Efforts to accommodate conflicting interests of the affluent and disadvantaged, often depicted in terms of the needs of inner-city and suburban school districts, traditionally centered about the improvement of students whose performance proved to be

166 *Id.* at 445.
167 *Id.*
168 *Id.* at 446.
169 *Id.* at 447.
170 Everson v. Bd. of Educ., 330 U.S. 1, 17–18 (1947).
171 *Id.*

deficient. By contrast, the rights of the gifted were not usually considered within the same framework in state decisional law. In fact, definitions of "exceptional" children recurrently were limited to the mentally retarded and the physically handicapped.

All the same, legislative designations have been vague and the definition of "exceptional" children customarily extends more broadly without differentiation to all unable to progress effectively in a regular school program.[172] Yet difficulties came into evidence when the categorization was relied upon to encompass those who displayed exceptional learning ability or talent in the creative arts. School boards, more often than not, were reluctant to allocate special funds for the gifted apart from superficial, promotional grants. The state's largesse, it appeared, was to be confined to restorative programs intended to alleviate inadequacies found to exist rather than to advance the interests of those whose capabilities exceeded the norm. But constitutional quandaries persisted, albeit tempered, when measured against equal protection standards.

The Supreme Court of Connecticut was called upon to weigh the claims of the gifted when, in *Broadley v. Board of Education*, a plea was made for individualized attention in addition to the school's regular program.[173] The gifted child, in this instance, declared that he had become bored and frustrated with school and that his state constitutional right to partake of a program designed to meet his special needs had been violated.[174] Indeed, as the court explained, the statutory scheme recognized two groups of exceptional children: those with specified disabilities and those whose development was measurably enhanced.[175] However, the court did not agree with the assertion of the gifted child that he had a right to special education under the state constitution commensurate with that of children with disabilities.[176]

Applying "well-established rules of statutory construction," the Connecticut high court found that the "unambiguous intent" of the legislature was to make special education mandatory only for children with disabilities, not for the gifted.[177] Neither the

[172] *See, e.g.*, CAL. EDUC. CODE § 16191 (West 2002); CONN. GEN. STAT. § 10–76a(3) (2008).
[173] 639 A.2d 502 (Conn. 1994).
[174] *Id.* at 504.
[175] *Id.*
[176] *Id.* at 504–05.
[177] *Id.* at 505.

legislature nor the framers of the state constitution were said to have vested such benefits in the gifted within the right to a free public education.[178] Significant differences between the two groups of students informed the legislative decision, the court maintained, and the disparate treatment in this case had to be sustained though the purpose or rationale underlying its enactment had not been explicitly articulated.[179] Concededly, a characteristic common to both groups had been identified, that is, the need to "progress effectively" in an educational setting, but this in itself did not suffice to provide an equal entitlement to special education under the state constitution.[180]

In arriving at these conclusions, the court had to examine claims projected under the equal rights and equal protection provisions of the state constitution. It was the latter that figured prominently in the decisional course pursued and that, in constitutional terms, led to the results reached.[181] The standards of review prescribed seem to have been selective and differentiable by virtue of the nature of the fundamental rights and classifications at issue. The court adopted no more than a rational basis test, presumably in view of the absence of indicia that required a more exacting assessment.[182] Thus, at this lowest level of scrutiny, there was no reason to probe deeply or to "judge the wisdom, desirability, or logic of the legislative determination."[183] As in the much-reviewed areas of economic and social policy, the legislature had to be accorded broad discretion in the exercise of its powers. A resort to equal protection strictures required nothing more so long as the scheme differentiating the two groups of students did not infringe upon fundamental constitutional rights and the test applied did not exceed a rational basis stipulation.

IV. EXPRESSIVE LIBERTY, PRIVACY RIGHTS, AND KINDRED INTERESTS

Apart from constitutional restraints affecting external factors associated with the school experience (finance, transportation, and related determinants), questions have arisen during the past

[178] *Id.* at 506.
[179] *Id.* at 506–07.
[180] *Id.* at 505.
[181] *Id.* at 506.
[182] *Id.*
[183] *Id.* at 506–07.

several decades regarding student rights of individual freedom and personal liberty. A decade of protest during the 1960s brought such issues within the purview of judicial review and intervention. In *Tinker v. Des Moines Independent Community School District*, the United States Supreme Court accorded limited support to the notion that the First Amendment applied to protect students' expressive freedom unless valid educational purposes justified a preclusive resort to censorship.[184] The Court subsequently upheld disciplinary action against a student who had delivered an "offensively lewd and indecent speech" to a school assembly.[185] But the reach of acceptable restraints remained largely undefined in a context comparable in many respects to the "fighting words" debacle of earlier decades.[186]

Building upon past precedents while simultaneously introducing untried criteria, the Supreme Court returned to the theme of expressional freedom within a school setting in *Hazelwood School District v. Kuhlmeier* in the late 1980s.[187] The claims advanced, premised once again on the First Amendment, arose from a principal's objections to student newspaper articles touching upon pregnancy, sexual activity, and contraception.[188] In the circumstances, the Court found the absence of a public forum in light of faculty control and supervision of the activities at issue.[189] A restriction on student speech was held to be warranted because of the "pedagogical interests" being served.[190] Educators were entitled to review and, if need be, to censor, the Court declared, when lessons are to be learned in a classroom-related exercise, when immature readers are involved, and when the views may be attributed, however erroneously, to the school itself.[191] Yet the Court did not provide a precise definition of "pedagogical interests." Nor was there any indication of the applicability of the First Amendment should educational concerns be inadequately or vaguely served and linkages to the established curriculum remained essentially undefined or speculative.

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184 393 U.S. 503, 511–13 (1969).

185 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

186 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (holding that a state statute prohibiting "fighting words" did not violate the Constitutional right of free expression).

187 484 U.S. 260 (1988).

188 *Id.* at 262–63.

189 *Id.* at 268–70.

190 *Id.* at 273.

191 *Id.* at 271.

As heightened attention to state constitutional law and judicial federalism grew, it was tempting to predict the effects of efforts to move beyond the First Amendment and to rely upon state charter provisions as the bases for an expansive expressional freedom. That proved to be so in the New Jersey courts, long among the most activist of state judiciaries, which came to pass in a case related to student rights, disclosing striking similarities to the factual pattern associated with *Hazelwood*. In *Desilets v. Clearview Regional Board of Education*, a school superintendent and principal refused to permit publication in the extracurricular student newspaper of a student's review of R-rated films.[192] The trial court held that expressional rights under the First Amendment had not been violated because of valid pedagogical concerns described in *Hazelwood*.[193] But the court found that the student's rights had been infringed under the counterpart section of the state constitution[194] that, as the trial judge perceived it, afforded a broader scope to expressive liberties.[195] The way was open for a new approach to expression in the public schools. Yet, although the ultimate decision affirmed the student's right to publish, it was the First Amendment that prevailed as the predicate of choice, not the state constitution's declaration of rights.

The New Jersey Supreme Court, in a brief per curiam opinion, offered little that was novel regarding the breadth of expressional liberties. Instead, the locus shifted from the lofty, if at times esoteric, level of speech and press freedom to that of administrative responsibility, at least initially, for the resolution of educational controversies. The court decided the case on federal constitutional grounds primarily because the school district's publication policy was vague and its educational concerns were largely "undefined and speculative."[196] As if to minimize the judicial role in decision-making, the justices noted that "[a]dministrative agencies [were] clearly empowered to determine issues within their jurisdiction even though the resolution of those issues implicates constitutional claims."[197] A separate opinion went even further in emphasizing the need for the State Commissioner of Education to "review[] the

[192] 647 A.2d 150, 151 (N.J. 1994).
[193] *Id.*
[194] *See* N.J. CONST. art. I, § 6.
[195] *Desilets*, 647 A.2d at 151.
[196] *Id.* at 154.
[197] *Id.* at 155.

policies of local boards"—a process that, it was hoped, might preclude litigation before suits were filed.[198]

It was disappointing that the New Jersey Supreme Court dismissed so cavalierly the opportunity to elaborate upon state guarantees of expressional liberty. The First Amendment, as expounded in *Hazelwood*, did not offer precedents that led ineluctably to the result sought and achieved in *Desilets*. Indeed, a more expansive and doctrinally persuasive outcome could have come to pass had the court elected to premise its findings on provisions of the state's declaration of rights. The resort to administrative law seemed a pretense for a laconic holding in an area long known for its lack of novel or creative decision-making. Far more could have been attained if the path pursued by the trial court had been followed and the state constitution had been construed as a "cognate source" of individual freedom.[199] It was undoubtedly true that "no reported decision ha[d relied upon] the New Jersey Constitution in the context of students' rights."[200] But this was no reason to reject such an alternative, albeit that relief was granted the complainant by reference to federal constitutional standards. [201]

If expressional freedom did not fare well in an educational setting, it remained conjectural whether other liberties, more often associated with "outside" events or happenings, would be treated with like disdain. In recent years, searches by school authorities have become the objects of review both in the state and federal courts. Questions have recurred concerning the measure of constitutional protection to be accorded student rights. A need to balance basic personal rights against the social necessities of maintaining order in the schools permeated early consideration of the criteria of reasonableness to be applied. In view of what were often looked upon as "grave" threats detrimental to appropriate discipline, the basis for sufficient cause in a school search was held to be less exacting than that required outside the school grounds. Expectations of privacy and personal security have been made to yield to the obligation of school officials to deal effectively with breaches of public order.

When, in the mid-1980s, the New Jersey Supreme Court decided

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[198] *Id.* at 157 (Pollock, J., concurring in part and dissenting in part).

[199] Desilets v. Clearview Reg'l Bd. of Educ., 630 A.2d 333, 337 n.3 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 647 A.2d 150 (N.J. 1994).

[200] *Id.*

[201] *See id.*; *see also Desilets*, 647 A.2d at 154.

to eschew state constitutional predicates and to rule on the basis of the Fourth Amendment, it opened the way for federal intervention and, in many respects, invited reversal by the United States Supreme Court. The cases, decided in a single opinion, were drug-related and, therefore, raised peculiarly sensitive issues touching upon the preservation and defense of student rights.[202] In an effort to adapt constitutional strictures to the school environment, the New Jersey Supreme Court condoned a "narrow band" of warrantless searches linked to a requirement of reasonableness, defined as reasonable suspicion or reasonable grounds to believe that a suspect has evidence of illegal activity.[203] The probable cause standard was modified, though it was made clear that a closer reliance on traditional criteria might be sanctioned "as the intrusiveness of the search intensifie[d]."[204] If, as the court contemplated, "student[] right[s] to be free from unreasonable searches" were to be left largely intact, such rights had to be balanced against state constitutional assurances of a "thorough and efficient education."[205]

The preservation of student privacy interests remained a paramount consideration in both cases. In particular, the *T.L.O.* case, ultimately decided by the Federal Supreme Court, involved the search of a female student's purse amidst charges that a school administrator had engaged in "rummaging" absent reasonable grounds to suspect the presence of evidence tied to criminal law violations or to activities disruptive of internal order and discipline.[206] That the search revealed illegal drugs and pointed to dealings in drugs did not suffice to sustain a viable standard of reasonableness necessary at the inception of the inquiry.[207] "Good hunches," offered as the basis for the intensive search, were found to be unacceptable as equatable with reasonable suspicion.[208] Consequently, despite what appeared to be some misgivings, the court directed suppression of the evidence.[209]

An appeal to the United States Supreme Court, initiated by the State, was limited to the question whether the exclusionary rule

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[202] State *ex rel.* T.L.O. v. Engerud, 463 A.2d 934 (N.J. 1983), *rev'd*, 469 U.S. 325 (1985).
[203] *Id.* at 940–42.
[204] *Id.* at 942.
[205] *Id.*
[206] *Id.* at 943.
[207] *Id.* at 942.
[208] *Id.* at 942–43.
[209] *Id.* at 944.

had applicability to school searches.[210] The State did not take issue with the guidelines suggested by the New Jersey Supreme Court.[211] Instead, it developed in the course of oral argument that the guidelines were "workable."[212] But the Federal Court, for its own reasons, decided to seek out broader Fourth Amendment issues and, to that end, it ordered the filing of new briefs and scheduled reargument.[213] Such a marked departure from conventional procedures prompted Justice John Paul Stevens to denounce his colleagues' "voracious appetite" for Fourth Amendment activism, predictably intended to be restrictive of constitutional rights and privileges.[214] The resulting opinion, written by Justice Byron White, was moderate in its treatment of search requirements within a school setting and even condemned the state court's standard as having "reflect[ed] a somewhat crabbed notion of reasonableness."[215] What seemed to be critical to the State, within a drug-related setting, was the Supreme Court's reversal of the judgment and announcement of findings adverse to the student.[216]

If the standard finally adopted differed little from that established by the state court, why did the Federal Supreme Court go to such lengths to review? It is doubtful that the choice of the New Jersey case was a random one unrelated to prevailing trends. The framing of an explicit balancing test represented a significant, though not an especially novel, step in developing a school search pattern. As expected, the test weighed a child's privacy expectations against governmental needs linked to the achievement of appropriate educational objectives.[217] Perhaps, more importantly, it served a pragmatic purpose—reversal of a decision that had favored a drug offender. For that reason, if for no other, the Supreme Court's intervention probably was welcomed by the state court. A reliance on independent state grounds need not always be the stratagem of choice when judicial "buck passing" is found to be better adapted to the attainment of policy goals or public relations objectives.[218]

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[210] New Jersey v. T.L.O, 468 U.S. 1214, 1215 n.1 (1984) (Stevens, J., dissenting).
[211] *Id.* at 1215.
[212] *Id.* at 1215 n.1.
[213] *Id.* at 1214 (majority opinion).
[214] *Id.* at 1215 (Stevens, J., dissenting).
[215] New Jersey v. T.L.O., 469 U.S. 325, 327, 343 (1985).
[216] *Id.* at 347–48.
[217] *Id.* at 339–40.
[218] *See* Stanley H. Friedelbaum, *Reactive Responses: The Complementary Role of Federal and State Courts*, Publius: J. OF FEDERALISM, Winter 1987, at 33, 45.

A New York case, *In re Gregory M.*, revisited search and seizure law within the still developing context of a school setting and the principles applicable to it.[219] The state's highest court affirmed a ruling below denying a motion to suppress evidence of a gun found in a student's book bag that had been used to sustain charges of criminal possession of a weapon.[220] An unusual "metallic thud," heard when the bag was flung down, was taken to warrant the "investigative touching" of the bag's outside surface.[221] Applying a "graduated" standard of reasonableness said to be derived from *T.L.O.*, a majority held that less cause was required to justify the search than what would have been binding upon law enforcement officers conducting a search outside school premises.[222] A diminished expectation of privacy sufficed—outweighed, it appeared, by a "governmental interest of the highest urgency" tied to the "prevention of the introduction of . . . weapons into [the] schools."[223] Thus, the limited search undertaken invoked a less exacting criterion than the "reasonable suspicion standard applicable [in] more intrusive searches."[224] Nor was there a requirement of "individualized suspicion" that provided a "constitutional floor" in a criminal investigation.[225]

In response to these guidelines, a dissenting judge charged that protections of the Fourth Amendment and of counterpart state provisions had been reduced "below all previously recognized minimum thresholds."[226] The court was reminded of its responsibilities as a "citadel for [the preservation of] constitutional rights," especially in times of adversity when government might be moved to overreach the boundaries of effective law enforcement.[227] More narrowly tailored remedies were said to be available in coping with weapon-related activities.[228] Even a "flexible balancing of expectations," it was claimed, would not permit the intrusions evident here.[229] Diluted constitutional predicates may have proved acceptable in the schools but, the dissent alleged, their adoption did

[219] 627 N.E.2d 500 (N.Y. 1993).
[220] *Id.* at 501.
[221] *Id.*
[222] *Id.* at 503.
[223] *Id.* at 502.
[224] *Id.*
[225] *Id.*
[226] *Id.* at 504 (Titone, J., dissenting).
[227] *Id.* at 507.
[228] *Id.* at 506.
[229] *Id.* at 507.

not suffice to sanction the elimination of all articulable standards.[230]

That school law continues to develop and to take on a variety of guises is apparent in the multiform content of cases that have arisen. Less than two years following the decision in *Gregory M.*, the United States Supreme Court considered the validity of a drug-testing program for athletes instituted in the public schools. At issue in *Vernonia School District 47J v. Acton* was the constitutionality of urinalysis tests, the extent to which they might be invasive of protected privacy interests, "the nature and immediacy of [] governmental concern[s]" in the circumstances, and "the efficacy of [the] means" employed.[231]

Much depended upon the Court's assumptions regarding suspicionless drug testing when government acted as "guardian and tutor."[232] Were the district's operational needs so compelling as to justify a departure from a regime premised upon individualized suspicion, doubtless a course more compatible with the design of the Fourth Amendment and its state constitutional analogues? Justice Antonin Scalia, writing for the majority, opted for the district's blanket search alternative, finding that the measures undertaken were reasonably in the interest of the students.[233] To the contrary, Justice Sandra Day O'Connor, for the dissenters, while agreeing that decreased expectations of privacy prevail in a school setting, denied that anything more coercive than an "individualized suspicion requirement" was called for under the conditions noted.[234] Justice O'Connor cautioned against "hysterical overreactions" and concluded that the suspicionless testing policy swept "too broadly and . . . imprecisely" to merit any characterization as reasonable.[235]

It is always intriguing to speculate regarding the changed outcome that might have resulted from a reliance on state constitutional provisions instead of the Fourth Amendment. To this end, the suit filed by the student and his parents had challenged the drug-testing program as violative both of the Fourth Amendment and of the applicable Oregon constitutional provision.[236] Had the latter been pursued as the functional predicate, the discretion afforded the district in its choice of school athletes as the objects of a

[230] *Id.* at 506.
[231] 515 U.S. 646, 660 (1995).
[232] *Id.* at 665.
[233] *Id.* at 648, 664–65.
[234] *Id.* at 666, 680–81 (O'Connor, J., dissenting).
[235] *Id.* at 686.
[236] *Id.* at 651–52 (majority opinion).

suspicionless search might have been narrowed substantially and concomitant privacy interests expanded. Indeed, the Court of Appeals for the Ninth Circuit, reversing the district court's judgment dismissing the suit, had embraced both the Fourth Amendment and the state proviso.[237] Thus, it must remain open to conjecture what would have transpired had the complainants initially elected to resort to the state courts, premising their action solely on the state constitution. If the resulting opinion had materially favored privacy rights and adhered to the concept of individualized suspicion, an explicit dependence on independent state grounds could have shielded the findings from any likelihood of review in the Supreme Court.

The status of minors and, more generally, of persons under the supervision of school officials has continued to pose questions concerning the breadth of regulatory authority and its reach. In a case reminiscent of the era of the 1960s and its aftermath, a school's grooming code came under review in the Texas Supreme Court, a tribunal that has veered into the "liberal" category in recent years. A challenge to the code, centering about hair length and earring restrictions imposed upon male high school students, invoked the state constitution's equal rights amendment and rights to privacy, to freedom of expression, and to an education.[238] In response, school administrators defended the code as essential to teach students a sense of discipline, respect for authority, community values, and personal grooming and hygiene.[239] The trial court rendered judgment against the district solely on the basis of the state's equal rights amendment.[240] An appeals court reversed, and the state's highest court held that the claims advanced did not offend constitutional rights to such an extent as to merit judicial intervention.[241] In *Barber v. Colorado Independent School District*, the Supreme Court of Texas distinguished between the constitutional rights of students and those of adults, citing cases in the Fifth Circuit Court of Appeals for the proposition that hairstyle regulations did not warrant plenary review.[242] Striking a note of judicial self-abnegation, the court proclaimed its refusal "to use the

[237] Acton v. Vernonia Sch. Dist., 23 F.3d 1514, 1516 (9th Cir. 1994).

[238] Barber v. Colo. Indep. Sch. Dist., 901 S.W.2d 447, 447, 449 (Tex. 1995).
[239] *Id.* at 448.
[240] Colo. Indep. Sch. Dist. v. Barber, 864 S.W.2d 806, 806 (Tex. Ct. App. 1993).
[241] *Barber*, 901 S.W.2d at 447, 450.
[242] *Id.*

Texas Constitution to micro-manage Texas high schools."[243]

Critical of such a summary dismissal of the constitutional claims, two members of the court filed vigorous dissents. Both focused about the state's equal rights amendment. The different treatment accorded males and females was said to constitute gender discrimination.[244] Accordingly, since gender was recognized as a suspect classification, the regulations were presumed to be subject to strict judicial scrutiny with any deviations sustainable only toward the achievement of compelling educational goals.[245]

The first of the dissenting opinions took issue with the majority's reliance on federal precedents as inappropriate and not controlling when the constraints of state constitutional provisions were cited exclusively as the basis for an action brought in the state courts and no federal constitutional counterpart existed.[246] The dissent attacked the prevailing opinion as an "extrajudicial nonintervention policy" in school grooming code cases, disregarding the will of the people in the adoption of an equal rights amendment.[247]

The second dissent found that the district was teaching nothing more than obedience to arbitrary rules of conduct, that the court's reluctance to intervene unashamedly condoned an act of sex discrimination, and that, in effect, school officials were being immunized from judicial intervention regardless of the irrationality and unconstitutionality of the policy being espoused.[248] Both dissenting opinions made much of the majority's failure to comport with prescribed mandates, thereby ignoring the responsibilities of courts as preservers and defenders of constitutional rights.

If, in *Barber*, a fractious Texas Supreme Court adhered to the presumed distinction between minors and adults, a unanimous court insisted upon the extension of all of the requirements of due process to a graduate student enrolled in a medical education program at a state-supported university.[249] The charges brought against the student were grave—charges alleging academic dishonesty, that is, cheating on a board-sponsored examination in surgery.[250] Despite proceedings that, by the court's own criteria,

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[243] *Id.* at 447.
[244] *Id.* at 455 (Gammage, J., dissenting); *id.* at 455 (Spector, J., dissenting).
[245] *Id.* at 451 (Gammage, J., dissenting).
[246] *Id.* at 454.
[247] *Id.* at 455.
[248] *Id.* at 456 (Spector, J., dissenting).
[249] Univ. of Tex. Med. Sch. at Houston v. Than, 901 S.W.2d 926, 930 (Tex. 1995).
[250] *Id.* at 928.

had afforded the student a "high level of due process," the court, in *University of Texas Medical School at Houston v. Than*, held that the hearing had failed to comport with all of the elements guaranteed by the state constitution's due course of law provision.[251]

The action taken did not represent an expansion of accepted due process requirements since, irrespective of the reliance on the state provision, federal due process interpretations were said to be "persuasive authority" in applying the state guarantee.[252] Textual differences were held not to be meaningful. Instead, it appeared that the interests involved and the status of the person were the compelling factors. The threat of expulsion and the deprivation of education and of professional opportunities prompted the justices to call for a heightened level of due process.[253] Thus, the graduate student's liberty interest entitled him to greater deference than needed to be accorded other persons or sanctions.[254] With respect to this disciplinary action for misconduct, the court declined to decide whether graduate students had a property interest in pursuing their studies.[255] But there was an implicit admission, by way of a footnote, that such students had no constitutional assurances comparable to those arising in public elementary and secondary education.[256]

Even if it be conceded that important distinctions existed between a challenge based upon a grooming code and the interests at stake in *Than*, the nature of the standards resorted to reflected the status of the individuals. It was their status that was controlling in affecting the course of the litigation. A "high level" of due process did not suffice since the student had been denied participation in the inspection of the examination room.[257] A new hearing was ordered on the charge of academic dishonesty.[258] Consequently, it was apparent that standards for determining the applicability of constitutional rights and the scope and intensity of the rights themselves differed according to the status of the persons and rights involved. This was so even as the court cautioned that judicial intervention ought not to be undertaken cavalierly and that "courts

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[251] *Id.* at 931–32.
[252] *Id.* at 929.
[253] *Id.* at 931.
[254] *Id.*
[255] *Id.* at 930 n.1.
[256] *Id.*
[257] *Id.* at 931–32.
[258] *Id.* at 934.

should tread lightly in fashioning remedies."[259]

V. CONCLUDING COMMENTS

Myriad developments in public education have contributed to the evolution of judicial federalism in a variety of ways, though perhaps less dramatically than treatment of the major conflicts conveys. A "municipal complaint," asserting the invalidity of New York State's public school financing system, occasioned inquiries into such ancillary issues as the substantive right of municipalities and school boards to challenge the constitutionality of acts of the state legislature.[260] Though additional questions related to discriminatory impact created diversionary departures from the central themes, the case attracted a number of traditional interest groups filing as amici curiae.[261] Dismissal of the basic complaint occurred only because of an earlier precedent rejecting claims of disparities in per pupil expenditures and applying a rational basis test despite allegations of wide differences between affluent and poor school districts.[262] To like effect, the Supreme Judicial Court of Maine declined to sustain challenges to statutory reductions in state aid appropriations in support of public education.[263] No more than a rational basis analysis was found to be applicable even if, as had been alleged but not proved, a fundamental right to education was implicated.[264] The desired result, the justices pointed out, was a matter for the legislature, not for the courts.[265]

Apart from the volatile area of public school finance, other questions have arisen, if at times peripherally, in a number of contexts. The Supreme Court of California returned to what a dissenting opinion termed the "tortuous" course of legal proceedings touching upon free school guarantees, including transportation.[266] Though the court had upheld the constitutionality of district charges of fees for pupil transportation several years earlier,[267] problems of implementation reappeared with important

[259] *Id.*

[260] Campaign for Fiscal Equity, Inc. v. State, 616 N.Y.S.2d 851, 853 (Sup. Ct. 1994).

[261] *Id.* at 856.

[262] *Id.* at 855 (citing Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 364 (N.Y. 1982)).

[263] Sch. Admin. Dist. No. 1 v. Dep't of Educ., 659 A.2d 854, 858 (Me. 1995).

[264] *Id.* at 857.

[265] *Id.* at 858.

[266] Salazar v. Eastin, 890 P.2d 43, 59 (Cal. 1995) (Mosk, J., dissenting).

[267] Arcadia Unified Sch. Dist. v. State Dep't of Educ., 825 P.2d 438, 439 (Cal. 1992).

ramifications concerning the finality of judicial rulings.[268] Issues affecting compulsory education have recurred, especially as these relate to home instruction and teacher certification requirements,[269] though more arcane inquiries have involved separation of powers provisions of a state constitution.[270] And a state court sustained an action for damages against a board of education for student injuries resulting from an assault by a fellow student.[271] Schools were held liable for "foreseeable injuries proximately related to the absence of adequate supervision," especially at dismissal.[272] Public schools, it appears, are not only an integral part of society; they are significant social units in themselves.

The origins of much of educational case law dealt with now familiar doctrines of separation of church and state applied to day-to-day school operations. More recently, Establishment Clause controversies have extended beyond their usually difficult, but well-traversed, parameters to encompass new programs unknown half a century ago. A federal district court considered such a conflict between federal and state standards and precedents that stemmed from a Missouri school district's claimed violation of a parochial student's rights under the Federal Individuals with Disabilities Education Act.[273] The federal court found for the handicapped student who required publicly funded transportation from the sidewalk of her parochial school to special education classes at a public school.[274]

What complicated the court's holding, however, apart from Federal Establishment Clause issues, were provisions of the Missouri Constitution[275] and state precedents that prohibited transportation to and from parochial schools for parochial school students.[276] Indeed, the State sought and was granted reconsideration on these grounds.[277] While the federal district court did not turn away from its initial ruling, it did emphasize the

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[268] *Salazar*, 890 P.2d at 46–47.

[269] A recent series of Michigan cases is of substantial interest. *See* Clonlara, Inc. v. State Bd. of Educ., 501 N.W.2d 88, 91 (Mich. 1993); People v. Bennett, 501 N.W.2d 106, 107–08 (Mich. 1993); People v. DeJonge, 501 N.W.2d 127, 129 (Mich. 1993).

[270] *See In re* R.G., 632 So. 2d 953, 953–54 (Miss. 1994).

[271] Mirand v. City of N.Y., 637 N.E.2d 263, 267 (N.Y. 1994).

[272] *Id.* at 266–67.

[273] Felter v. Cape Girardeau Sch. Dist., 810 F. Supp. 1062, 1063 (E.D. Mo. 1993).

[274] *Id.* at 1070–71.

[275] MO. CONST. art. 9, § 5.

[276] *Felter*, 810 F. Supp. at 1069–70.

[277] *Id.* at 1071–72.

peculiar circumstances of this case, the narrowness of the decision rendered, and the special dual status of the handicapped child as both a public school and private school student.[278] By comparison, a teacher's challenge to a state's designation of Good Friday as a mandated school holiday was readily disposed of as unconstitutional despite what a federal court referred to as the "slippery dictates" of the Religion Clauses.[279]

Though much of public education litigation is closely attentive to student activities, tangential elements like public employee law often intrude. The right of school personnel to strike has been much debated in state legislatures and in other public fora. A common-law rule forbidding strikes in the public sector has often been cited as contrary to public employee rights to engage in collective bargaining.[280] It remains problematic whether the rule can be wholly abrogated by way of legislation, but at least a qualified right of teachers to strike has been sustained in several state courts.[281] Despite the recital of a plethora of misgivings attesting to the disruptive effects and adverse educational consequences of teacher strikes, the Supreme Court of Pennsylvania declined to set aside an enabling act as inconsistent with the state's basic duty to provide a system of public education.[282] Instead, the court elected to defer to the legislature as the most suitable body to weigh policy considerations and, if need be, to enact corrective laws.[283]

The miscellany of state decisions associated with various facets of public education is noteworthy in view of the limited time period during which courts have been active participants. Less than three decades of litigation mark a judicial movement of broad scope and geographic diversity. Yet it must be recalled that public education is traditionally and distinctly a state responsibility—one that ranks among the states' most compelling commitments when measured in terms of efficacy and the level of funding required. Whether there will be an accretion of rulings depicting education as a fundamental right continues to be an open question. It is doubtful that many additional courts will be moved to adopt strict scrutiny analysis in educational controversies though it is increasingly probable that an

[278] *Id.*

[279] Metzl v. Leininger, 850 F. Supp. 740, 750 (N.D. Ill. 1994).

[280] *See* Martin v. Montezuma-Cortez Sch. Dist., 841 P.2d 237, 247–48 (Colo. 1992).

[281] See, e.g., the Colorado Supreme Court's lengthy consideration of such factors in *Martin*, 841 P.2d at 241–51.

[282] Reichley *ex rel.* Wall v. North Penn Sch. Dist., 626 A.2d 123, 128–29 (Pa. 1993).

[283] *Id.* at 129.

intermediate standard of review will be made applicable. In any event, school-related issues, with funding still of primary concern, will remain among the major matters affecting the course of judicial federalism.

It is not surprising that New Jersey, perhaps the most persistent and far-reaching advocate of enhanced educational funding in support of impoverished school districts, is about to consider significant alterations of the state's allocation formula. Whether the New Jersey Supreme Court will be persuaded to acquiesce in the proposed changes continues, as always, to pose substantial hurdles. That the state's burgeoning local property taxes, district-by-district disparities in the receipt of state aid, and the state's economic distress respecting its revenue sources and mounting indebtedness all require a change of course cannot be disputed. Yet the governor and the legislature are confronted not only by recurring policy differences, but also by the need to meet judicially prescribed criteria and to resolve the problems of implementation in a state still encumbered by a duplication of functions resulting from more than six hundred individual school districts. The success or failure of New Jersey's experiment, viewed within the framework of an energized judicial federalism, may well serve as a touchstone for other state-sponsored efforts throughout the nation.