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# Public School Financing in the United States: More on the Dark Side of Intermediate Structures

*John C. Reitz\**

## I. INTRODUCTION

Like Professor Inoue's article, *The Poverty of Rights-Blind Communitarity: Looking Through the Window of Japan*,<sup>1</sup> this article provides evidence of the dark side of intermediate structures. The intermediate structure—that is, the social and political structure standing between the individual and the state—which this article describes is the local public school board and its associated property taxing district. The dark side of this structure is the persistence of extraordinary inequities in public school financing. These inequalities persist because local funding through public school districts has been considered vital to ensure local control over schools, and local control has been considered to outweigh the interest in equality of funding. This negative aspect of local school boards seems all the darker because local control by the school boards has proven largely illusory. Although local school districts may be thought to mediate between the individual and the state in positive ways, their actual role in public school finance has come to be one of preventing the significant wealth transfers that are necessary to provide even rough equality in public education.<sup>2</sup>

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\* Professor, University of Iowa College of Law. The author gratefully acknowledges helpful discussions with innumerable colleagues and friends, research advice and comments on written drafts by colleagues Eric Andersen, William G. Buss, and Larry Ward, as well as research assistance on German law from Hermann Pünder, none of whom, however, are to be blamed for the author's opinions and errors. Unless otherwise noted, translations are by the author.

1. 1993 B.Y.U. L. REV. 517.

2. There is a substantial body of literature discussing whether there is any demonstrable correlation between expenditures on education and students' educational achievement. See MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 596-99 (3d ed. 1992). With respect to the magnitude of disparities

There are signs of change on the horizon. A number of states, partly under the pressure of litigation, are increasing state-wide funding of education in order to reduce, if not eliminate, funding disparities. However, this article argues that in rectifying the problem of inequality in public school finance, it will not be possible to restore significant control over schools to the local school boards. Increased state funding is required in order to reduce funding disparities, and an increase in state funding seems very likely to accentuate the current trend toward increased state control over the schools. Voucher plans, which in effect "marketize" education by giving students and their families some choice about which school to attend, may appear to offer an attractive alternative to centralized state control over schools, but marketizing also seems sure to weaken the role of the school boards and the political processes that play out before them. If there is any hope for meaningful community control over schools of the future, that control is likely to come in the form of local advisory councils to the individual schools, a structure that obviously cannot be given the taxing power. Thus the thesis of this article is that the putative benefits of local control over the public schools can no longer justify a system of school financing that permits disparities in district wealth to result in significant disparities in the tax revenues available to each district for education.

This article pursues this argument as follows. Section II outlines the current system of local funding, the disparities that result, and the benefits to society that are thought to result from the system of local school board control. The section concludes with a critical examination of these supposed benefits. Section III describes the litigation that has challenged the current funding system. Section IV examines, with the help of a sidelong glance at Germany, the prospects for meaningful control by local school boards if centralized state funding is substantially increased for the sake of equality. This section highlights the tension between the principles of local control

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discussed in this article, it strains credulity to claim that educational opportunity is not affected. See *infra* notes 7-8 and accompanying text. More importantly, however, doubts about the correlation provide no rationale for dismissing equality concerns. The claim of equality is not limited to academic achievement but includes the general treatment of each student. A disparate allocation of public funds to the rich is simply unjust. Grossly disparate funding of the public schools is an affront to the dignity of the disadvantaged individuals and may produce serious social and psychological harm.

and equal treatment. It also describes current efforts to enhance local control at the level of individual public schools. Section V discusses "marketization" plans for the public schools, the impact such plans are likely to have on school boards, and the dynamics of their political processes. Section VI concludes that the benefits of the traditional self-governing and self-supporting school district cannot be salvaged and that the United States should abandon the effort to do so in order to provide a meaningful degree of equality in the vital areas of primary and secondary education.

## II. THE SYSTEM OF LOCAL FINANCING AND THE RESULTING DISPARITIES

Historically, most public schools in the United States were chiefly financed by local property taxes. With the exception of Hawaii, public schools in the United States still receive a significant portion of their funds from property taxes that are locally assessed and collected.<sup>3</sup> On average, as a rough estimate, about half of the funding comes from the local communities and half from the state,<sup>4</sup> with the federal contribution remaining consistently small.<sup>5</sup> For example, in the late 1970s the average local contribution to public school budgets was sixty percent of nonfederal funding, with the states providing the other forty percent. In the 1980s the local share dropped to forty-six percent of the nonfederal funding. More recently, the local share has been on the rise.<sup>6</sup>

The combination of state and local financing for public schools produces marked disparities in funding. Some of the disparity is due to substantial differences in the level of wealth in the various states. For example, in 1988 Connecticut public schools spent an average of \$6230 per pupil while Mississippi spent an average of \$2548,<sup>7</sup> a difference of about two and one-half times. But the variations between public school funding in different districts of one state show even greater disparities.

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3. YUDOF ET AL., *supra* note 2, at 592.

4. However, a tremendous variation on this point from state to state exists. For example, in 1984-85, New Hampshire secured 93% of its public school funding from local taxes and only 7% from state revenues, while California presented virtually the reverse picture, with 9.4% local funding and 90.6% state funding. *Id.*

5. *Id.* at 674 (in 1980 the federal share of primary and secondary education expenditures was 8.7%; by 1988, it had dropped to 6.2%).

6. *Id.* at 592.

7. *Id.* at 591.

"In many states, the level of spending in one district within a state is often three or four times that of another district within the state. There are extremes where the differences are as great as twenty to one or more."<sup>8</sup>

States have historically attempted to alleviate the intrastate discrepancies with some form of state equalization laws, with the result that all states provide some state funding to the public schools. But these attempts to equalize funding have not proved successful. The disparities reported above reflect the financial situation *after* state equalization. As Professors Yudof, Kirp, and Levin comment:

[T]he equalizing effect [of state equalization laws] is often not strong, even when these formulas are not encumbered by special provisions added for political reasons. Typically, however, legislatures have added "save harmless" provisions to their formulas that, for example, guarantee districts the same amount of aid they received the prior year even though a straight application of the formula would indicate a lowering of state aid for that district in the coming year. In short, the formulas in practice have the effect of maintaining the disparities among districts in the amount of money spent per pupil.<sup>9</sup>

### A. *The Arguments for Local Funding*

The arguments in favor of local funding for public schools are all rooted in the alleged virtues of local control, which cover two basic areas: control over the schools themselves, and control over the taxes levied to finance the public schools. The control structure is the local school board. Each local school board is in charge of a school district, which forms a single taxing district as well. The board consists of members who are

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8. *Id.* at 592. For a passionate description of what these differences mean to the students involved, see JONATHAN KOZOL, *SAVAGE INEQUALITIES* (1991). Kozol concludes:

If Americans had to discriminate directly against other people's children, I believe most citizens would find this morally abhorrent. Denial, in an active sense, of other people's children is, however, rarely necessary in this nation. Inequality is mediated for us by a taxing system that most people do not fully understand and seldom scrutinize.

*Id.* at 207.

9. YUDOF ET AL., *supra* note 2, at 594. See also KOZOL, *supra* note 8, at 209 ("[T]he various 'formulas' conceived—and reconceived each time there is a legal challenge—to achieve some equity in public education have been almost total failures.").

locally elected in the great majority of cases.<sup>10</sup> Locally raised funding for the school district is an important way of assuring the independence of the school board, so the argument goes, so that it can function as a truly intermediate structure rather than a mere agent of the state. The disparities produced by local financing are thus seen as the price that has to be paid to secure the benefits of local control.

Locally raised funding even more obviously preserves the second aspect of local control—the power to determine the level of tax burden. Local financing of public schools gives the voters of an individual school district control over a segment of their tax burden by allowing the voters to decide the amount of property tax they wish to devote to public school education.

The arguments in favor of local control over the schools and the taxes levied to finance them track the benefits to society generally asserted to result from healthy intermediate structures.<sup>11</sup> First, local school boards and local property tax funding serve as a buffer against control by the state, permitting local communities to determine the level of their own commitment to public education and to control how the tax money is spent. Second, the local school boards provide a “school for citizenship,” training citizens to run the larger democracies of state and federal governments by first giving them opportunities to manage an important affair on the local level. Third, the local school district provides a “seedbed for republican virtues” by creating a local forum in which citizens can practice the skills of advocacy and compromise necessary to the successful governance of the larger units of state and nation. Fourth, the system of local control and funding teaches individuals independence from government because the local school district is small enough to make many citizens appreciate their direct responsibility for the quality of the public schools. Fifth, local control is more likely than state or federal control to produce a humane delivery of educational services that is attuned to local concerns. Finally, local control over the public schools and their financing increases the individual’s sense of participation in

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10. Some local school boards are appointed, but 85% are elected locally. FREDERICK M. WIRT & MICHAEL W. KIRST, *SCHOOLS IN CONFLICT: THE POLITICS OF EDUCATION* 94 (1982).

11. See Mary A. Glendon, *General Report, Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 B.Y.U. L. REV. 385, 390-91 nn. 14-18 and accompanying text.

society because each individual has a relatively greater chance of affecting locally made decisions than decisions made at the state or federal level.

### B. *Criticisms of the Local Control Arguments*

There are substantial problems with the control arguments for local financing. First, many of the supposed benefits of local control over education are not in fact observable today, and local control over education has been greatly narrowed, perhaps to the vanishing point. Second, local control over the tax burden for financing public schools is not significant today in light of the much larger state and federal tax burdens, and the freedom to determine their own level of tax support for public schools is largely illusory for many districts.<sup>12</sup> Both of these objections raise doubts as to whether local financing, with its attendant interdistrict inequalities, protects anything of value.

A number of features concerning the operation of local school boards suggests that the benefits of local control may not be worth the price exacted by the inequality created in our system of local finance. The school boards have proven, for example, to be rather poor "schools for citizenship." School board elections have notoriously low voter turnout; voters display "even more indifference [for local school board elections] than that for other government offices."<sup>13</sup> This apathy may stem from the fact that school board elections are nonpartisan, often unopposed, or held at inconvenient dates. However, it is clear that "campaigning in school contests is very limited, candidate visibility is very low, and the contest [is] rarely based on specific policies."<sup>14</sup> While public participation before the boards on important issues may be vigorous, it is unclear whether interested parties would be any less likely to participate if such hearings were held by a state agency instead of a local school board, as long as the hearings were held in a place accessible to the local parties.

Even more problematic for the arguments in favor of local financing is the fact that the school boards are increasingly losing control over the substance of education. All state consti-

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12. Unlike the similar arguments that were advanced in *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), my arguments are not addressed to the issue of constitutionality, but solely to the issue of sound social policy and general fairness.

13. WIRT & KIRST, *supra* note 10, at 95.

14. *Id.*

tutions give the state legislature plenary authority over public education.<sup>15</sup> State governments exercise substantial control over such basic questions as the rules for teacher certification and tenure, collective bargaining, basic curriculum requirements, and the number of days school is to be in session.<sup>16</sup> Since 1983 a flood of state statutes has greatly narrowed the discretion left to local officials regarding basic school operations. There are now, for example, state statutes regulating participation in sports, the quality and quantity of homework, how much time is to be devoted to each subject each day, and what topics each class must cover.<sup>17</sup> Some state statutes even govern how often announcements may be made over the school intercom system.<sup>18</sup> In addition, numerous state and federal welfare requirements further diminish local discretion over the allocation of funds for education.<sup>19</sup>

Of course, the situation may vary from state to state, but the trend everywhere is unmistakable—an increase in centralized control at the expense of control by the local school boards.

15. MARTHA M. MCCARTHY & NELDA H. CAMBRON-MCCABE, *PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS* 2 (3d ed. 1992).

16. Thomas B. Timar & David L. Kirp, *Educational Reform and Institutional Competence*, 57 HARV. EDUC. REV. 308, 309 (1987); see generally Charles F. Faber, *Is Local Control of the Schools Still a Viable Option?*, 14 HARV. J.L. & PUB. POL'Y, 447, 449-52 (1991) (reviewing the growth of state control of education).

In some states, even the textbooks have to be approved by the state. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), Justice Marshall said in his dissenting opinion:

In Texas, statewide laws regulate in fact the most minute details of local public education. For example, the State prescribes required courses. All textbooks must be submitted for state approval, and only approved textbooks may be used. The State has established the qualifications necessary for teaching in Texas public schools and the procedures for obtaining certification. The State has even legislated on the length of the school day.

*Id.* at 126-27 (Marshall, J., dissenting) (citations omitted).

17. Timar & Kirp, *supra* note 16, at 309.

18. *Id.*

19. See, e.g., Johanne A. Presser, *Frustrations on the Board*, NEWSWEEK, Sept. 14, 1992, at 11, 11, stating her personal observations:

As a school-board member I am caught between the ever-increasing number of state and federal mandates and the ever-diminishing funding. The state dictates graduation requirements and the minimum time to be spent on subjects at the elementary level. AIDS prevention has been added, but the state insists it be separate from other compulsory drug and health curricula. Special-education statutes require costly individualized educational plans for the mentally, physically and learning-disabled. Failure to comply with these regulations invites lawsuits, hearings and, ultimately, withdrawal of state funding.



As Doyle and Finn wrote almost ten years ago:

"[L]ocal control of public education" as traditionally conceived is in reality disappearing, even though its facade is nearly everywhere intact. What appears to be happening is that local school systems are evolving in practice into something that they always were in a constitutional sense: subordinate administrative units of a state educational system, with some residual power to modify statewide regulations and procedures in order to ease their implementation within a particular community, and with the residual authority (in most states, though not all) to supplement state spending with locally raised revenues.<sup>20</sup>

Nor is local control over the tax burden of the citizens of the local school district very significant because the local property tax burden pales in comparison to other state and federal tax burdens, especially for income taxes.<sup>21</sup> The local district cannot even claim to control the tax burdens attributable *solely* to public school financing because on average state funds constitute roughly half of a school district's operating funds.<sup>22</sup>

More importantly, local control over the tax burden is often cruelly illusory for the poorest school districts. The school districts that have the least valuable taxable property often have the highest property tax rates, yet the school taxes they raise fall far short of the amounts raised by the most affluent school districts that use lower tax rates.<sup>23</sup> Poor school districts are thus restrained from determining the level of expenditures for

20. Denis P. Doyle & Chester E. Finn, Jr., *American Schools and the Future of Local Control*, PUB. INTEREST, Fall 1984, at 77, 90.

21. Property taxes have been declining significantly as a proportion of the total tax burden in this country. In 1902, property taxes constituted 41% of all tax revenues raised by all forms of government tax in this country. In 1955, property taxes accounted for 10%; and in 1989, property taxes raised a mere 7.4% of the total tax revenue. State and federal personal income taxes now account for the largest block of tax revenue, 28.3% of the total in both 1955 and 1989. HARVEY S. ROSEN, PUBLIC FINANCE 23 & fig. 2.2 (3d ed. 1992).

22. See *supra* note 4 and accompanying text.

23. For example, in *Serrano v. Priest*, 487 P.2d 1241, 1250 (Cal. 1971), the school district with the highest expenditures per pupil in California in 1968-69 applied a property tax rate of only \$2.38 per \$100 of property valuation, while the school district with the lowest per pupil expenditures taxed itself at the rate of \$5.48 per \$100. Similarly, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 12-13 (1973), the school district with the highest expenditures per pupil in Texas in 1967-68 taxed itself at the rate of \$0.85 per \$100, and the school district with the lowest expenditures per pupil taxed itself at the rate of \$1.05 per \$100, the highest rate in the San Antonio metropolitan area.

schools. As the California Supreme Court said in *Serrano v. Priest*:

[S]o long as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.<sup>24</sup>

Instead of protecting meaningful choice about the level of tax support for public education, the system of local financing operates primarily to prevent the kind of wealth transfers between wealthy and poor districts necessary to achieve greater equality in public school funding. The system of local financing may also result in inadequate overall funding for public education. In one sense this is true axiomatically. Since the adequacy of educational funding for one set of students depends to a large extent on the level of funding for other sets of students (who will be in social and economic competition with them), inequality—particularly severe inequality—in funding necessarily constitutes “inadequate” funding for the disadvantaged students.

In a related manner, one can argue that leaving the choice about the level of tax support for public education to such a small political unit as the school district ensures that the total amount of taxes raised for public schools is lower than it would be if school taxes were raised on a state-wide basis. If schools were financed on a state-wide basis with equal per-student distribution of tax dollars to all school districts,<sup>25</sup> it seems likely that the average voters would not be satisfied with the level of school funding until their students—and hence all students—received at least the same funds as the “average

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24. *Serrano*, 487 P.2d at 1260. For specific details concerning the lack of choice available to school boards in poor districts, see KOZOL, *supra* note 8, at 212 *passim*.

25. However, the level of taxes that would be raised by state-wide financing might be lower where there is massive flight out of the public schools because such a flight is likely to weaken the electorate's support for the public schools. Thus, in order for state-wide financing to reflect the level of financial commitment the state's population really wants to make to education, families should not be free to send their children to private schools.

student" now receives. To reach that level of funding for all students, significant increases in the present tax burden for education would probably be required. If that is so, the current system can be said to be underfunding the public schools.

### III. THE LITIGATION CHALLENGING THE DISPARITIES

The gross disparities in funding between school districts of the same state have prompted a wave of litigation. As of September 1992, twenty-three states faced litigation over public school financing.<sup>26</sup> The plaintiffs in these cases generally raise two different claims. The most common claim is that the inequalities in public school finance violate the equal protection clauses of both federal and state constitutions. In 1971, the California Supreme Court accepted this argument in the landmark case of *Serrano v. Priest*.<sup>27</sup> The flood of litigation that *Serrano* unleashed in other states was dismissed from federal courts by the United States Supreme Court's 1973 decision in *San Antonio Independent School District v. Rodriguez*,<sup>28</sup> which established that the inequalities in public school finance do not violate the federal Equal Protection Clause. *Rodriguez*, however, does not prevent state supreme courts from ruling, as in the *Serrano* case, that state equal protection clauses forbid such inequality in public school funding. School finance litigation has therefore been concentrated in state courts. Most of the pending suits include claims under state equal protection clauses.<sup>29</sup> The supreme courts of at least six states have disagreed with the *Serrano* analysis and rejected state equal protection claims,<sup>30</sup> while at least two state supreme courts have agreed with *Serrano*.<sup>31</sup>

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26. William Celis 3d, 23 *States Face Suits on School Funds*, N.Y. TIMES, Sept. 2, 1992, at B7.

27. 487 P.2d 1241, 1266 (Cal. 1971). After remanding the case for a trial on the merits, the court in *Serrano II*, 557 P.2d 929 (Cal. 1977) upheld the lower court's determination that the public school financing system violated the California Constitution's equal protection provisions.

28. 411 U.S. 1 (1973).

29. Celis, *supra* note 26, at B7.

30. See *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178 (Wash. 1974), *overruled on other grounds by Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978).

31. See *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Washakie County Sch.*

The second claim in the public school financing cases is one that can only be asserted under state constitutions, many of which include language explicitly obligating the state legislature to provide a "thorough and efficient" public school system. The seminal case was a 1973 decision issued by the New Jersey Supreme Court in *Robinson v. Cahill*,<sup>32</sup> which held that New Jersey's system of public school financing failed to provide a "thorough and efficient" public school system. The court reasoned that the large disparities in funding resulting from reliance on local taxation indicated that the poor districts were receiving inadequate funding.<sup>33</sup> Although this theory initially found little favor in other states, by the end of 1990 four other state supreme courts had followed New Jersey's lead in finding that a system of public school financing which relies too heavily on local funding fails to provide "adequate" funding to achieve the goal of a "thorough" or "efficient" public school system.<sup>34</sup> This "adequacy" argument also figures prominently in most of the pending cases.<sup>35</sup>

Under the pressure of these lawsuits, a number of states have modified their method of public school financing to provide a larger role for state funding in an attempt to minimize disparities that result from local funding. While it is still too

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Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

32. 303 A.2d 273 (N.J. 1973). The *Robinson* case returned to the New Jersey Supreme Court six more times and resulted in passage of the first New Jersey state income tax. In *Robinson V*, 355 A.2d 129, 136-38 (N.J. 1976), the court somewhat reformulated the constitutional requirement to emphasize that a minimum level of educational opportunity for all was required, not necessarily equality of spending for all students. The cases are summarized and discussed in YUDOF ET AL., *supra* note 2, at 644-45.

In 1990, the New Jersey Supreme Court once again relied on the "thorough and efficient" clause to find that the large interdistrict disparities in public school funding that remained even under the New Jersey system as revised in the wake of the *Robinson* litigation still violated the state constitution. The court interpreted the "thorough and efficient" clause to require the state to provide equalization payments to the poorer urban districts so that, despite local financing, their educational expenditures per pupil would be substantially equivalent to those of the more affluent suburban districts and so that their special disadvantages would be addressed. *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

33. *Robinson v. Cahill*, 303 A.2d 273, 295-97 (N.J. 1973).

34. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491 (Tex. 1991); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978). The cases are discussed in YUDOF ET AL., *supra* note 2, at 645-48.

35. *Celis*, *supra* note 26, at B7.

early to determine whether the manifestly unequal system of local finance for the public school will be eradicated, a modest trend appears to be emerging to reduce these inequalities by increasing the amount of state funding.<sup>36</sup>

#### IV. THE TENSION BETWEEN EQUALITY AND COMMUNITY CONTROL

Intermediate structures are neither intrinsically good nor bad. The foregoing discussion suggests that they can have either effect, perhaps even both at the same time. Comparative work in this area may help us better appreciate the double-edged quality of intermediate structures. I do not claim to have conducted any serious comparative study in the area of primary and secondary public education, but a superficial glance at one foreign model is instructive. It suggests that there is a strong link between funding and control. If that is so, then equality of funding is inevitably in strong tension with local control.

##### A. *The German System*

From the standpoint of equality of educational opportunity, the German example appears laudable. The Germans see their commitment to equal educational opportunities as stemming, not so much from the equal protection clause of their constitution,<sup>37</sup> as from their constitutionally enshrined decision to make Germany a welfare state (*Sozialstaat*).<sup>38</sup> Equality in public school finance is assured in part by relying on the *Länder*, the German version of federal states, to finance the schools. While there is some local component of public school finance, principally for school buildings, the bulk of funds for the schools comes from each *Land*, including virtually all teacher salaries.<sup>39</sup> The Germans carry their commitment to equality in funding so far that their constitution exempts from constitutional protection the right to establish private schools that

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36. The *New York Times* mentions West Virginia, Tennessee, and Kentucky as having taken the lead in equalizing public school financing by (1) increasing the amount of taxes raised at the state level, (2) imposing a cap on how much rich districts may raise locally for their schools, and (3) increasing the amount of state aid dispensed to schools, with larger allocations going to the poorer districts. *Id.*

37. GRUNDGESETZ [Constitution] [GG] art. 3 (F.R.G.).

38. Thomas Oppermann, *Bildung*, in BESONDERES VERWALTUNGSRECHT 625 (Hugo von Münch ed., 5th ed. 1979).

39. *Id.* at 643-44.

would promote a division of students according to the wealth of their parents.<sup>40</sup> As a matter of fact, private schools have even been found constitutionally entitled to receive state subsidies in certain cases to eliminate inequality between public and private financing.<sup>41</sup>

The German system is also characterized by thorough state (*Land*) control over education. The influence of local communities is limited primarily to relatively peripheral issues like the opening, closing, and location of school buildings. The state alone controls choice and level of educational materials, as well as the qualifications of teachers. The general principle is that "the local community builds the (school) house, but the state is the master of the house."<sup>42</sup> In the United States, as already discussed, the trend has been to decrease substantially the degree of local control. The shift in the United States toward greater degrees of state control may have developed for a variety of factors unconnected with funding, not the least of which is the steady loss of cohesion in our local communities,<sup>43</sup> but the German example suggests that control over content of education also tends to be linked to funding. As we move to greater state funding in order to overcome the disparities that result from local funding, it seems likely that we will also inexorably move toward ever greater state control over the substance of education.<sup>44</sup>

### B. Increasing State Control over Education

Increasing state control over education might have its positive side. The recent success of the "adequacy" claim in public school finance litigation shows that beyond the issue of equality lurks the issue of whether U.S. society is devoting an adequate level of resources to primary and secondary educa-

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40. GRUNDGESETZ [Constitution] [GG] art. 7, ¶ 4 (F.R.G.).

41. Oppermann, *supra* note 38, at 648.

42. *Id.* at 643. The Germans see the control of the *Land* over the substance of education as necessary to implement the equality of educational opportunity required by their constitution. *Id.*

43. Faber, *supra* note 16, at 468-69.

44. The majority of the California Supreme Court denied this phenomenon in *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971). "[N]o matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts." *Id.* at 1260. While the court's statement is logically defensible, it seems that experience shows how unlikely it is that financial control will not be used to expand state power.

tion. As discussed in sections II and III, local control over the level of school taxes has arguably resulted in inadequate overall funding for most public schools. Moving to state-wide financing and control of education may be the only way to give those most concerned about education, especially the teachers and professional administrators, the visibility and organization to obtain a truly "adequate" expenditure for publicly funded primary and secondary schools.<sup>45</sup>

In any event, it appears impossible to have both fairly-distributed, adequate resources and meaningful local control at the same time. The arguments linking local financing and local control thus have a rational basis: if there is any hope for local school boards to exercise meaningful control over the schools, it would appear to be necessary to safeguard the boards' power through local finance. The trend toward increasing state and federal control, however, suggests that there will be little chance for local school boards to exercise meaningful control over public education in the future.

If the local school board no longer enjoys significant local control, then the disparities of local finance and the accompanying inequities are an unacceptable price to pay. Even in those states in which there is still substantial local school board control, enormous inequality in public school finance is an unacceptably high price to pay. The case law and legislative developments recounted in section III suggest that this perception is spreading in the United States. Perhaps someday our system will look more like the German system, which a leading German commentator proudly describes as one that "guarantees 'in principle (*dem Grunde nach*)' the existence of an equal opportunity, fully developed educational system and forbids

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45. Cf. Larry G. Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L.J. 409, 423 (1973) (arguing that centralization of school finance will lead to the formation of powerful, state-wide teacher unions and an increase in collective bargaining at the state level, with the likely result that overall wages for teachers will rise). It should be noted that Professor Simon regarded the probable enhancement of teacher union power as more negative than positive. He even seemed to regard it as undesirable that teachers' views on educational policy might become controlling, stating, "to the extent that state authorities lack the internalized norms which have tended to stiffen the resistance of local boards to teacher demands, there may be an increased tendency to regard teacher organizations as presumptively correct on educational questions." *Id.* at 438. While Professor Simon appears to view this possibility with alarm, I would think that this kind of development may be necessary to attract good teachers to the public schools and especially to keep them in their jobs.

radical deviation from that principle."<sup>46</sup> Of course, implementing the principle of equality raises its own set of problems, as the nuances of the foregoing quotation seem to indicate.<sup>47</sup> A true commitment to equality through state-wide funding would not end all litigation over school finance.<sup>48</sup> But at this point, Americans cannot claim that our system of school finance guarantees equal opportunity, even "in principle."

The reasons why the United States has been unable to make a meaningful commitment to the principle of equality of educational opportunity are no doubt multiple. Perhaps some view the current system in quite Machiavellian terms as an acceptable cover for blatant discrimination against the poor. More likely, many are honestly persuaded by the appealing list of benefits of local control discussed above in section II and do not realize how illusory these benefits are. Clearly, the alternative of centralized state control is unpalatable to large majorities in the United States.<sup>49</sup> Thus the tension between equality and local control creates a difficult conundrum.

One reform which offers at least a partial way out of the conundrum involves moving the locus of local control from the district level to the level of the individual schools. Thus a number of current reform proposals—often bearing the label "site-based management"—involve transferring greater autonomy to the individual schools themselves, where councils representing the parents and guardians of students could play an advisory or even a governing role.<sup>50</sup> "Site-based management" would

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46. Oppermann, *supra* note 38, at 625.

47. Even equality of expenditures per pupil, for example, may not create real equality of educational opportunity because children from the poorest segments of the population may be among those the most in need of special education.

48. Cf. YUDOF ET AL., *supra* note 2, at 659-67 (describing issues and litigation concerning intradistrict inequalities).

49. Cf. Mary A. Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 525 (1992) ("[I]t is almost obligatory for American politicians of both the right and the left to profess mistrust of government.").

50. Professor Faber describes the "site-based management" systems adopted by Hawaii in 1989 and by Kentucky in 1990 and advocated elsewhere by a variety of scholars. Faber, *supra* note 16, at 469-72. These systems transfer authority to local schools and bring parent representatives into a council with teachers and administrators to determine policies left to the individual schools. Despite his contention that "local school boards will not disappear, because they are too firmly entrenched and too well accepted by American culture," *id.* at 467, Professor Faber does not appear to advocate a very significant role for the district-wide school board. The "local control" for which he pleads appears to consist chiefly of the type of local control represented by "site-based management." See also YUDOF ET AL., *supra* note 2, at 451-58 (describing recent formation of similar local school councils in the Chi-



appear to create a quite different intermediate structure from the traditional district-wide school board. The school councils govern at most one school, not a whole district. As a consequence, while school councils may be given important budgetary powers over their schools, they cannot be given the power to make budgetary decisions involving several schools, and it would clearly be impracticable to give each council taxing power. Moreover, since the local school councils all include substantial representation—in some cases, even a majority—of teachers and administrators, unlike the traditional district-wide school boards, the school councils are much more likely to be dominated in the long-run by the professional educators.

None of these observations is meant to be an argument against “site-based management.” This approach arguably injects local influence or control at the level at which it is most appropriate. I merely wish to point out that the school councils will represent a much less independent level of self-governance than the district-wide school boards have traditionally aspired to. The nature of the political interaction will presumably be different, and consequently, the benefits to political culture to be expected from such intermediate structures should be more modest than those traditionally claimed for the district-wide school board. Most importantly, because the individual school is an impractically small taxing district, revitalization of local control at the level of individual schools would serve as no justification for continuing the present system of local financing of school districts.

##### V. THE IMPACT OF MARKETIZING EDUCATION

The other reform movement that may appear to offer a way out of the dilemma between equality of funding and local control over education is comprised of plans to marketize primary and secondary education, generally through some kind of voucher system. All of these proposals share the idea of forcing the public schools to compete for students, just as private schools presently do. Equality concerns can—and must—be addressed by providing public subsidies through “vouchers” for each student, thereby giving even the poorest students rough parity of “purchasing” power for education. The more expansive proposals would force the public schools to compete directly

with the private schools by permitting the state vouchers to be "spent" at any school. This type of proposal could even be accompanied by complete privatization of the public schools, though that may not be necessary or even wise. More modest versions of the marketization concept would simply force public schools to compete against each other by limiting state-provided vouchers to the public schools. Some school districts, especially in large urban areas, have already partially implemented this idea through the use of "magnet" schools, which accept applications from the entire school district and differentiate themselves from other schools in the district according to some specialty (like science) or special pedagogical approach.<sup>51</sup>

No matter what form the proposal takes, there are three principal benefits that marketization might bring. First, marketization would be a way to break the link between state financing and state control. Even if massive state subsidies are necessary to equalize educational opportunity, marketization may be expected to reduce state regulation by empowering the individual buyers—in this case the parents and guardians of children—in effect to regulate the providers of services—the schools—through their collective action of giving business to the preferred providers. The regulation provided by a market approach arguably may be superior to direct state regulation because it is likely to result in greater flexibility than state regulation. Schools pursuing many different mixes of educational goals will be able to coexist in the market as long as there are corresponding groups of buyers willing to spend their allocated resources in sufficient quantity to support these different kinds of schools. Second, one might also argue that competition is the best tool to stimulate creativity on the part of teachers and administrators. Thus we might attempt more and better experiments to improve the quality of education under a competitive system. Third, freeing each school to compete in this manner may make careers in education more desirable for dedicated teachers and administrators by granting them more autonomy in designing the educational curriculum than they would have under a system of rigorous state control.

Because marketization proposals raise very complex questions, a comprehensive review of these issues is beyond the scope of this article. Instead, this article concludes with a few

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51. For a description of various voucher plans, see generally YUDOF ET AL., *supra* note 2, at 420-38.

observations about the marketization of education in light of the foregoing discussion about the benefits and disadvantages of intermediate control structures for public education. First, marketization is indefensible if it does not embrace the concept of equality of educational opportunity as a guiding principle. It follows, therefore, that marketization proposals should not necessarily be regarded as ways to reduce tax burdens for education because, like any proposal for reforming education in the United States, marketization proposals have to include substantial wealth transfers to create greater equality of educational opportunities. Whatever waste may currently exist because of the lack of open competition among schools will likely be more than offset by the magnitude of the subsidy for the poor that is necessary to implement the principle of equality. However, if marketization proposals are able to garner substantial public support, they may prove to be the best tool to pry out of the ever weary taxpaying public the funds necessary to provide an "adequate" education to all children in the United States.

Second, marketization proposals also need to be scrutinized carefully with respect to the claim that they will reduce state regulation. Marketization cannot be expected to produce such an effect unless, at a minimum, meaningful competition among schools is created. This is another reason that marketization plans have to be accompanied by a form of vouchers to provide substantial subsidies for the poor. In addition, fostering effective competition in many localities may require other kinds of public investment, such as improving and increasing the subsidies for public transportation. Even if there is adequate competition to permit meaningful choice, the experience with private, for-profit schools suggests that state regulation must continue to set educational and social minimum standards and to guard consumers against fraud and similar kinds of abuse.

Third, marketization plans are likely to reduce further the governance role of district school boards. The more expansive marketization plans would make school districts—and their school boards—largely irrelevant by permitting competition among schools across district lines. Even if competition is limited to the school district, marketization seems likely to reinforce the trend toward moving local influence over educational policy from the district level to the level of the individual schools. Marketization plans are premised on the assumption that the individual schools should have significant autonomy so that

they are free to compete in the educational "market." The greater the autonomy of the local schools, the weaker the power of the district school board to set educational policy. Moreover, the individual schools will have an incentive to create parent-guardian advisory councils as a way of promoting customer satisfaction and loyalty. The result should be a shift in local control from the district level to the school level, just as in the case of "site-based management."

Finally, if marketization permits private schools to compete with public ones, marketization seems likely to change the nature of the community within the school district. As a result, marketization can be expected to change somewhat the nature of civic participation at the district school board level and to diminish the societal benefits of that participation.

Marketization will change the nature of the community by virtue of the way market mechanisms affect personal relationships. The market mechanism is individualistic and atomistic, the very opposite of a communitarian vision of society. Markets are structured to give buyers power over the services offered in the market through the device of "exit," that is, by choosing to purchase from a different provider of services when they are dissatisfied with their current provider's services. When exit is quite expensive—as is generally true under our current system of publicly funded schools from which one can exit only by agreeing to pay tuition for a private education in addition to taxes for public education—then dissatisfied subjects of public education have a strong incentive to use "voice" as their control mechanism by publicly complaining and seeking to persuade school teachers, administration, and even the school board to make the changes they desire.<sup>52</sup>

Non-market systems that force the participants to rely on "voice" would thus appear to be better designed to secure the putative benefits of intermediate structures than market systems that facilitate control through "exit." Easy exit would

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52. The obligatory citation for the terms "exit" and "voice" is ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970). I, however, first learned of these terms through the very interesting application to financial systems in JOHN ZYSMAN, *GOVERNMENTS, MARKETS, AND GROWTH* 57-95 (1983).

Of course, some parents or guardians may have little opportunity for exit because of their low level of education and their poverty and yet feel that they cannot exercise voice for the same reasons. Lack of opportunity to exit does not ensure meaningful voice. It only means that the parties have a strong incentive to use voice.

appear to be especially inimical to the formation of community, yet in order to obtain meaningful competition in the market, exit has to be made fairly easy. In a community from which it is relatively easy to exit, parties who hold very different views about the kind of education desirable are not necessarily compelled to negotiate with each other.<sup>53</sup> The atomizing impact of the market may even minimize the benefits of community participation in advisory committees for the local schools since there, too, exit will provide an alternative to voice. Thus, instead of "schools for citizenship" and "seedbeds for republican virtue," marketization plans promise to create "schools for smart shopping."

Marketization therefore cannot be expected to revitalize district school board control. It may produce a measure of significant local control over educational policy. However, to the extent that district school boards or local school advisory councils play a role in the governance of marketized schools, one can expect that benefits to the political culture will be attenuated by the ready availability of exit.

## VI. CONCLUSION

The traditional system of governing and financing the public schools through local community school districts thus cannot be salvaged. The inequality inherent in finance based on local district wealth is too pernicious to be tolerated any longer. To eliminate the gross disparities, substantial state-wide tax revenues are required. The options for control are then (1) greater centralized state control over the schools, (2) greater autonomy for individual schools with local control exercised, though probably only in a relatively weak fashion, through advisory councils for each school, or (3) marketization. It does not appear reasonable to expect that the local school boards can be given back substantial power over education, especially if significant state taxes are going to be used to eliminate interdistrict funding disparities.

The control issues will undoubtedly continue to be debated quite heatedly in the United States. The situation calls for bold experimentation.<sup>54</sup> It seems that the dominant and character-

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53. Cf. AMY GUTMANN, *DEMOCRATIC EDUCATION* 68 (1987) ("Voucher plans attempt to avoid rather than settle our disagreements over how to develop democratic character through schooling").

54. It is surprising to discover, for example, that a number of other countries

istic American tradition of skepticism toward bureaucracy will lead the nation to reject the first option. The second and third options both provide for some measure of local control, but this article has argued that the benefits to the political culture from such local control may not be large in either case. If that is so, there is little prospect of recreating at the level of individual schools the benefits for political life of the traditional system of self-governing district school boards. In any event, it seems clear that broad, meaningful control by the school boards themselves cannot be revitalized. The desirability of local control being exercised by district school boards therefore no longer can justify the discrimination inherent in a system of school finance in which the determinative factor is the wealth of the local school district.

This is not to argue that local school boards must necessarily be abolished. There may be a role for them to play (a) as a coordinator of the various schools in the district, or (b) as a shield protecting the administration and teaching staff from overly intrusive state government regulation. It is simply necessary to recognize that they do not and cannot in the future wield the kind of control that might justify insisting on the principle of local funding for the schools. Only then can the dark side of this intermediate structure be overcome by a genuine commitment to equality of educational opportunity in the United States.

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are experimenting with forms of marketization for primary and secondary education. The Danes are apparently the leaders in creating a free market in schools, but Great Britain and Singapore have also experimented with marketization plans recently. See *A Survey of Education: Coming Top*, *ECONOMIST*, Nov. 21, 1992, Supplement, at 12-15.