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ACROSS FOUR APRILS: SCHOOL FINANCE LITIGATION IN VIRGINIA

Ashley McDonald Delja*

I. INTRODUCTION

Thomas Jefferson, in his *Notes on the State of Virginia*, proposed “to diffuse knowledge more generally through the mass of the people” for the purpose of “rendering the people safe, as they are the ultimate guardians of their own liberty.”¹ He said:

Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe their minds must be improved to a certain degree. This indeed is not all that is necessary, though it be essentially necessary. An amendment of our constitution must here come in aid of the public education. The influence over government must be shared among all the people.²

The first Virginia constitutional provision discussing education was included in the 1870 constitution and required a “uniform system of free public schools.”³ Provisions for education in the state constitution have evolved and become more forceful over the years. In 1971, in response to massive resistance to racial integration, an Education Article and the Standards of Quality were added to the constitution.⁴ Prior to 1971, the Virginia Constitution had not required local school boards to operate public schools in their districts or to ensure that their schools met minimum standards. The constitution thus permitted localities to resist

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1. Thomas Jefferson, *Notes on the State of Virginia* 146, 148 (William Peden ed., U.N.C. Press 1982) (internal punctuation altered).

2. *Id.* at 148-149.

3. Norma E. Szakal, *The Governing Structure of Public Education in Virginia*, 73 Va. News Letter 1, 2 (July 1997).

4. Nancy Finch, *Financing Public Education: Northern Virginia Could Lose*, 1 Mason 8, 10 (Spring 1991).

school desegregation by closing all public schools in a district or by operating such low quality public schools that all but the poorest students, who were overwhelmingly African American, attended private schools.⁵ The Education Article of the 1971 constitution ended constitutionally-sanctioned school segregation by requiring that “[t]he General Assembly shall provide for a system of free public elementary education and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.”⁶

It was under that Education Article and the Jefferson-inspired Bill of Rights that a group of students and school boards from rural counties in Virginia brought a school finance suit against the state in 1991. The students brought an “equity suit,” claiming that Virginia’s school funding system violated the state constitution by denying students in poor school districts an educational opportunity substantially equal to that of students in wealthier districts.⁷ Without a trial on the facts of the case, the Virginia Supreme Court found education to be a fundamental right, but nevertheless upheld the inequitable funding scheme, saying that “equal, or substantially equal, funding or programs” were not mandated by the Virginia Constitution.⁸

This case study describes the implications of the equity litigation in Virginia and seeks to show that Virginia is now ripe for an adequacy suit. Historically, school finance litigation in Virginia has been characterized largely by the politics it incited. Part II discusses disparity, and tells that story: the political ambition, money, racial tension, and regional favoritism that led up to the eventual filing of *Scott v. Commonwealth*. *Scott* is described in Part III. Part IV explains that politics and constitutional history were the primary reasons that the litigation failed in Virginia. Part V explores non-judicial responses to the litigation, including a funding package from the legislature and, more significantly, the standards movement. Part VI highlights the great irony of Virginia’s story: the state began to impose curriculum standards to avoid increasing

5. See A.E. Dick Howard, *Commentaries on the Constitution of Virginia Vol. 2*, 883–884 (U. Press of Va. 1974); Commn. on Constitutional Rev., *The Constitution of Virginia: Report of the Commission on Constitutional Revision* 253–254 (1969) [hereinafter *Report of the Commission*].

6. Va. Const. art. VIII, § 1.

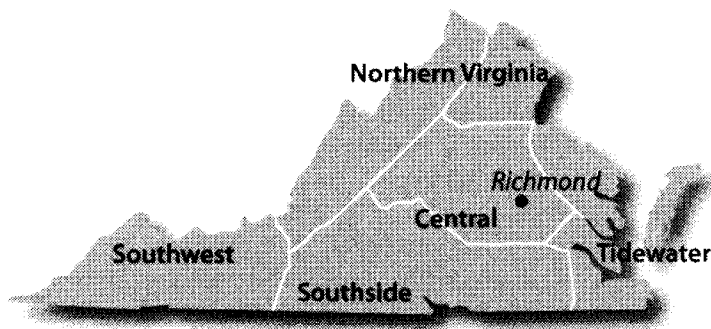
7. Bill of Compl. at 2, *Scott v. Cmmw.*, Ch. No. CH92C00577 (Va. Cir. Ct. Richmond filed June 11, 1992). This Jeffersonian commitment to education is embodied in Virginia’s current Bill of Rights, which states: “That free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth.” *Id.* at 8 (quoting Va. Const. art. I, § 15).

8. *Scott v. Cmmw.*, 443 S.E.2d 138, 142 (Va. 1994).

funding during the equity litigation; now those standards *invite* more litigation because they buttress an adequacy claim. Part VII concludes that, because of the standards movement and other factors, Virginia is ripe for an adequacy suit. As a preface, the paper starts with an overview of the state, including important regional differences and an explanation of the school funding system.

A. Overview of the State

Virginia has a population of over 7 million, ranking it twelfth in the nation.⁹ The state's major population centers are the capital city of Richmond; the suburbs of Washington, D.C., in Northern Virginia; and the coastal areas of Tidewater. The state's economy was based primarily on tobacco before the Civil War.¹⁰ Although tobacco is still an important crop in Virginia, today the state's economy is more broadly based, including other kinds of agriculture, various industries, coal mining, military shipbuilding, technology, and government activity.¹¹ The state can be divided into several distinct regions, characterized largely by their economies.



Southside Virginia is a relatively poor section of the state, characterized by farming and factories. Livestock and tobacco are the state's leading sources of agricultural income, and the largest industry is the manufacturing of chemicals and associated products; although these enterprises are spread across Virginia, they are especially important to

9. U.S. Census Bureau, *Virginia QuickFacts* <<http://quickfacts.census.gov/qfd/states/51000.html>> (last revised July 15, 2003). Virginia shares borders with Maryland, the District of Columbia, West Virginia, Kentucky, Tennessee, and North Carolina. Encarta, *Virginia (state)* <<http://encarta.msn.com/encnet/refpages/refarticle.aspx?refid=761559915>> (accessed Feb. 25, 2004) (follow link to page 3).

10. Encarta, *supra* n. 9 (follow link to page 2).

11. Encarta, *supra* n. 9 (main page).

Southside.¹² Only 35 percent of the farms in the state produce an annual income of \$10,000 or more.¹³

Southwest Virginia, in the heart of the Appalachian Mountains, is coal-mining country.¹⁴ Southwest is mountainous, sparsely populated, and poor. Along with Southside, its small, rural schools are plagued by under-funding and hampered by diseconomies of scale.¹⁵

Central Virginia is the mid-point of the state geographically and economically; the area is characterized by moderate incomes and an economy reliant on a mixture of the enterprises carried out in all other portions of the state. The region was once a major tobacco-marketing center, but it now depends on light industries, including food processing, electronics, paper, and steel products.¹⁶ Most of the employment in Central Virginia is government; trade, transportation, and utilities; and education and health services.¹⁷

The D.C. suburbs of **Northern Virginia** are labeled the “technology corridor” because of the number of telecommunications and computer firms located there, managing the flow of information in and out of Washington, D.C. Also in Northern Virginia is the Pentagon, housing the Department of Defense, the leading federal employer in that part of the state.¹⁸ Northern Virginia is the wealthiest area of the state.

Finally, the **Tidewater** area, including the cities of Norfolk, Virginia Beach, and Newport News, is a leading seaport and houses an immense complex of army, navy, and air force bases.¹⁹ Although Tidewater as a whole is an affluent region, it encompasses some poor school districts, and it does not wield the state political power that Northern Virginia does.

12. *Id.* Included in the “chemicals and associated products” sector are firms making plastic materials and synthetics, drugs, and chemicals used in other industrial processes.

13. *Id.* Farmland is found across the state and covers more than a third of Virginia’s land area. Crops are grown on about half of that land and the rest is pasture or forest. Because many of the farms that did not make over \$10,000 are side-line jobs, many of the families that are dependant, at least in part, on farm income do not have to exist on less than \$10,000 per year.

14. *Id.*

15. See Andrew Grinder & Deborah A. Versteegen, *Legislation, Litigation and Rural & Small Schools: A Survey of the States*, 26 *J. of Educ. Fin.* 103 (2000); Canaan Valley Inst., *Mid-Atlantic Highlands Action Program: Transforming the Legacy* 27–30 (2003) (available at <<http://www.canaanvi.org/hapReport/index.asp>>).

16. Encarta, *supra* n. 9.

17. U.S. Dept. of Labor <http://www.bls.gov/eag/eag.va_charlottesville.htm> (accessed Mar. 22, 2004); U.S. Dept. of Labor <http://www.bls.gov/eag/eag.va_lynchburg.htm> (accessed Mar. 22, 2004). See also City of Lynchburg <<http://www.cityoflynchburg.com/employment/>> (accessed Feb. 25, 2004).

18. Encarta, *supra* n. 9 (follow link to page 3).

19. *Id.*

B. School Governance and Funding

In Virginia, local school divisions have boundaries coterminous with the cities, counties, and towns in which they are located. Generally, each city and county in the state runs a school division; most towns are part of a county-wide system, and some small localities pair with a neighbor to jointly run a school division. The size of school divisions ranges from 379 students in Highland County to 131,771 students in Fairfax County.²⁰ Although there are 137 school divisions statewide,²¹ Fairfax County alone serves more than 13 percent of Virginia's public school children.²² In total, 10 divisions have fewer than 1,000 students.²³

Until 1992, when the legislature authorized a change, Virginia was the only state in which all of its local school boards were appointed rather than elected.²⁴ Now, the decision whether to elect or appoint is made locally by the voters; 96 of 137 localities have voted to institute elected school boards.²⁵ Still today, however, Virginia remains one of the few states in which local school divisions do not have the authority to levy taxes and thus are fiscally dependent on local government.²⁶ In addition, no local tax sources are specifically earmarked for public education; local school boards submit budgets to their county board or city council, which is responsible for approving the budget and appropriating money.²⁷ The relationship between school boards and local government, therefore, is often contentious.²⁸

20. Suzette Denslow, *Education Finance: Implications for Disparity*, U. of Va. News Letter 1, 2 (Nov./Dec. 1995).

21. Kent Dickey & Brian Logwood, Dept. of Educ., *Virginia*, 1 (2000).

22. Denslow, *supra* n. 20, at 2.

23. *Id.*; Dickey, *supra* n. 21, at 1.

24. *For 1st Time, House Backs Bill to Allow Election of Some School Boards in Va.*, Educ. Week (Jan. 30, 1991) (available at <<http://www.edweek.org/ew/ewstory.cfm?slug=10120047.h10&keywords=Brickley>> (accessed Feb. 25, 2004)) [hereinafter *House Backs Bill*]. The General Assembly had fervently opposed efforts to change to elected school boards because they wanted to insulate the schools from politics. Szakal, *supra* n. 3, at 6. In fact, the 1992 bill was introduced and failed numerous times before passing, including in each of the sixteen preceding years. *House Backs Bill*, *supra* n. 24. Interestingly, “[i]n 1947, the legislature passed a measure allowing popularly elected school boards. Arlington County [in Northern Virginia] was the only jurisdiction to install such a board, and it was invalidated in the mid-1950’s after board members refused to go along with the state’s policy of ‘massive resistance’ to school desegregation.” *Id.*

25. Denslow, *supra* n. 20, at 2.

26. *Id.* at 2–3.

27. Dickey, *supra* n. 21, at 1.

28. Denslow, *supra* n. 20, at 2–3.

C. Funding System

Virginia's three-tiered funding system involves mandatory state and local funds, voluntary local funds, and federal funds. The federal funds make up about 5 percent of the school divisions' budget; the state and local funds are the focus of reform efforts.²⁹ The state provides a low level flat grant to local school divisions and then distributes the remaining portion of the state's contribution through a foundation program.³⁰ Localities must contribute a state-specified amount toward education, and then they have unlimited discretion to supplement the program through additional taxes.³¹

1. Mandatory State and Local Funds: Funding the Standards of Quality

The mandatory state and local funds consist principally of instructional and support costs required by the statewide Standards of Quality.³² The Standards of Quality ("SOQ") are minimum standards set by the Board of Education that every local school division must meet. The SOQ define such things as the basic skills students need to gain from their education, required student-teacher-ratios, Standards of Accreditation ("SOA"), requirements for diplomas and certificates, teacher training and professional development, public involvement, and a policy manual.³³ The current method for determining the funding of the Standards of Quality became effective in the 1988-89 school year.³⁴ The state Department of Education attempts to determine the minimum reasonable cost of meeting the SOQ per pupil statewide.³⁵ That cost is then multiplied by the number of pupils in each school division to determine the estimated total cost of meeting the SOQ in each division. That figure is then funded from three sources: the state sales tax, mandatory local funds, and the state share.³⁶

One cent of the state's 4.5 cents sales tax is earmarked for education;

29. Bill of Compl., *supra* n. 7, at 8-9.

30. Deborah A. Versteegen, *Financing the New Adequacy: Towards New Models of State Education Finance Systems That Support Standards Based Reform*, 27 J. of Educ. Fin. 749, 755 (2002).

31. *Id.*; Bill of Compl., *supra* n. 7, at 8-9.

32. Bill of Compl., *supra* n. 7, at 8-9.

33. Va. Code Ann. §§ 22.1-253.13:1 to 22.1-253.13:8 (2003).

34. Dickey, *supra* n. 21, at 1.

35. The formulas for determining the statewide costs include adjustments for special factors, such as a "cost of competing" factor for Northern Virginia to reflect the higher cost of living there and a scarcity factor for the increased transportation costs of geographically large districts. *Id.* at 8; Andrew Grinder & Deborah A. Versteegen, *Legislation, Litigation and Rural & Small Schools: A Survey of the States*, 26 J. of Educ. Fin. 103, 117 (2000).

36. See Joint Legis. Audit and Rev. Commn., *Funding the Standards of Quality, Part I: Assessing SOQ Costs* (1986) [hereinafter JLAR C 1]; Denslow, *supra* n. 20, at 3; Bill of Compl., *supra* n. 7, at 9.

those funds are distributed to the localities as a flat grant on the basis of school-age population residing in the locality.³⁷ Each district's share of the sales tax revenue is subtracted from the cost of funding the SOQ in that district before computing the mandatory state and local shares.³⁸

Virginia uses an ability-to-pay measure called the Local Composite Index ("LCI") to determine the state and local shares of funding the SOQ.³⁹ The LCI is a measure of local fiscal capacity, taking into account the district's real estate values, adjusted gross income, and retail sales.⁴⁰ Divisions with higher LCIs have higher mandatory local expenditures for the funding of the SOQ.⁴¹ As in most states, the major source of local revenue for education is real estate property taxes.⁴²

The state makes up the remaining cost of meeting the SOQ, above what the locality can pay according to its LCI. The "state share" is thus the state-estimated cost of funding the SOQ in a locality, minus the locality's share of the sales tax revenue, minus the mandatory local expenditure.⁴³ The state share is funded through the state general funds appropriated by the General Assembly.⁴⁴

Thus, the composite index segment of the formula calls for more state funding per pupil for school divisions with lower wealth.⁴⁵ However, an 80 percent cap guarantees that no school division ever pays more than 80 percent of the costs for funding the SOQ; the 80 percent limit ensures that the Commonwealth shares the cost of education with all school divisions, including those with fiscal capacities that could otherwise bear the entire cost of funding the SOQ.⁴⁶

2. *Voluntary Local Funds*

In addition to its mandatory local expenditure, a locality may raise

37. Dickey, *supra* n. 21, at 4.

38. Bill of Compl., *supra* n. 7, at 9.

39. *Id.*

40. *Id.* at 9–10. More specifically, the LCI takes into account the value of real estate and public service corporations in a district (weighted 50 percent), the district's adjusted gross income (weighted 40 percent), and its taxable retail sales (weighted 10 percent).

41. *Id.* at 10. In 1998–99, the statewide average local share was 45 percent. Dickey, *supra* n. 21, at 5.

42. Dickey, *supra* n. 21, at 2.

43. Bill of Compl., *supra* n. 7, at 10.

44. Dickey, *supra* n. 21, at 1.

45. Memo. in Support of Resp't's Demr., at 18–19, *Scott v. Cmmw.*, Ch. No. CH92C00577-00 (Va. Cir. Ct. Richmond filed Aug. 14, 1992).

46. Bill of Compl., *supra* n. 7, at 10. For 1998–99, for example, the state share ranged from 81.39 percent to 20 percent of the SOQ cost. Dickey, *supra* n. 21, at 6.

and spend unlimited additional funds on public education.⁴⁷ Such funds pay for additional teachers, staff, course offerings, books, other instructional materials, and equipment, and generally pay for capital outlays.⁴⁸ It is the addition of these voluntary funds that allows wealthier districts to far surpass poorer districts in school spending.

Localities almost always spend more money on public education than the SOQ demands. In 1990–91, when *Scott* was filed, budgeted local expenditures exceeded the mandatory local expenditures by an average of 118 percent. The sum of money localities raised and spent in addition to their Required Local Expenditures ranged from 3 percent to 242 percent across the state.⁴⁹

Vast differences in education funding throughout the state arise because localities differ in their willingness and ability to supplement the mandatory funding. Voters in some areas place a higher value on education than in other areas, and wealthier areas are able to raise far more money for the same tax effort than poorer areas. Revenue capacity is one measure of the ability of a locality to raise tax revenue to support public services. In 1985–86, five localities had revenue capacities of less than \$2,000 per pupil, while four localities had revenue capacities in excess of \$10,000 per pupil.⁵⁰

II. DISPARITY

Disparity first became a widely-debated issue during the integration struggles of the 1950s, and Virginia's governors have been outspoken on the topic ever since. In 1964, former Governor Colgate Darden urged a "first-rate public school education for every child."⁵¹ In the early 1970s, Governor Linwood Holton fought to keep public schools open during integration and led by example, keeping his own children in the tumultuous Richmond public schools.⁵² In 1984, Governor Charles Robb's education commission said, "Equality is an illusion when the ability of Virginia's wealthiest school divisions to support education out of their own resources is ten times greater than that of its poorest school divisions."⁵³ In 1986, Governor Gerald Baliles' education commission

47. See Va. Code Ann. §§ 22.1-94 to 22.1-95 (2003).

48. Bill of Compl., *supra* n. 7, at 10.

49. Bill of Compl., *supra* n. 7, at 10–11.

50. Joint Legis. Audit and Rev. Comm., *Funding the Standards of Quality, Part II: SOQ Costs and Distribution* 50 (1987) [hereinafter JLARC II].

51. Finch, *supra* n. 4, at 12.

52. *Id.*

53. JLARC II, *supra* n. 50, at 21.

said that disparity was a major obstacle to the success of Virginia's education system.⁵⁴

In the early days of the 1990 General Assembly session, disparity was once again a heated topic. In January 1990, the state Board of Education lent their voice to the debate by passing a resolution calling for the General Assembly, the Governor, and the Secretary of Education to study and deal with the statewide disparities in public education.⁵⁵ The resolution quoted the education provisions in the Virginia Constitution and suggested that the state was legally required to address the disparities.⁵⁶ Board members cited consensus among school superintendents and the desire to avoid a court battle as reasons for the resolution. W.L. Lemmon, a former state delegate, and James W. Dyke, Jr., who would become the state's Secretary of Education a few days after the resolution was passed, were both board members.⁵⁷

When Governor Douglas Wilder was inaugurated the following week, he became the first African American governor in the U.S.—a remarkable event for a state that once housed the capital of the Confederacy. Governor Wilder inherited from the previous administration both the disparity debate *and* a budget that called for spending \$2.2 billion more than the state had in revenues.⁵⁸ One of Wilder's first official actions was to appoint the Governor's Commission on Educational Opportunity for All Virginians, chaired by W.L. Lemmon. The "Disparity Commission," as it became known, was directed to study equity in Virginia's education system and issue a report with recommendations in February of 1991.⁵⁹

A. JLARC

The Joint Legislative Audit and Review Commission ("JLARC") is an oversight organization established by the General Assembly to improve government efficiency. JLARC is composed of nine members of the House of Delegates and five members of the Senate; at least half of the Commission members must also serve on their chamber's Appropriations

54. Finch, *supra* n. 4, at 12.

55. Rob Walker, *Education Board Urges Action to End Disparity*, Richmond Times-Dispatch A-1 (Jan. 13, 1990).

56. *Id.* at A-7.

57. *Id.* at A-1.

58. Bill Wasson, *Wilder Faces Future with Record as Issue*, Richmond Times-Dispatch 1 (Sept. 21, 1991); Va. Educ. Assn., *VEA Prescription For Funding a System of High Quality Education in the Commonwealth*, 5 (June 1993) [hereinafter *VEA Prescription*].

59. Tyler Whitley, *School-Fund Suit Would Slow State Efforts, Wilder Says*, Richmond Times-Dispatch 11 (Apr. 17, 1991).

or Finance Committee. JLARC staff members are professionals with experience in legislative budgeting, management analysis, and accounting. The staff conducts performance audits, program evaluations, and other policy and fiscal studies to evaluate the effectiveness of state programs. Based on these studies, the Commission makes recommendations to improve state government performance, to correct problems the studies identify, and to better effectuate legislative intent.⁶⁰

JLARC issued a total of three reports on education. The first two reports (“JLARC I” and “JLARC II”) were presented in 1986 and 1987, respectively, and were in response to complaints that the state was not doing enough to fund the SOQ. JLARC I dealt only with the costs of implementing the existing SOQ, and JLARC II addressed concerns about the equity of funding for school divisions. These two JLARC reports found that state funding to localities was not sufficient for the localities to meet the demands of the SOQ (in fact, state funding to education had actually declined from 1978 to 1982) and that great inequities in school funding existed between wealthy and poor districts. JLARC I recommended a change in the funding formula, and the new formula became effective after its adoption by the General Assembly in 1986.⁶¹ JLARC II recommended both pupil equity and tax equity as goals.⁶²

Unfortunately, the new formula had as many problems as the old one. The new formula did direct more state funds towards funding the SOQ, but it did so, in part, by directing state funds away from other education expenditures, such as employee benefits, that the localities then had to step in and provide.⁶³ In addition, the new JLARC formula focused on aggregated minimum costs in a way that far understated the school districts’ actual costs of funding the SOQ.⁶⁴

B. Coalition for Equity

In early 1990, a group of about ten school superintendents from southwestern Virginia who agreed that the new JLARC formula was failing, and began to meet and discuss what could be done.⁶⁵ The group was formed “out of desperation” because “the disparities were getting worse and worse . . . People were discouraged.”⁶⁶ By May of 1990 the

60. Va. Code Ann. §§ 30.56 *et seq.* (2003); Joint Legis. Audit and Rev. Commn., Va. Information Online <<http://jlarc.state.va.us>> (accessed Jan. 14, 2004).

61. Finch, *supra* n. 4, at 11; see JLARC I, *supra* n. 36; see JLARC II, *supra* n. 50, at 50.

62. JLARC II, *supra* n. 50, at 50.

63. Finch, *supra* n. 4, at 11.

64. *VEA Prescription*, *supra* n. 58, at 2.

65. Finch, *supra* n. 4, at 11.

66. Telephone Interview with Ralph Shotwell, Dir. of Div. of Fin., Research, Retirement, and

group had become the Coalition for Equity in Educational Funding, comprised of forty-one school boards and superintendents, mostly from rural southern and southwestern Virginia. The Coalition intended to put pressure on the state to eliminate the funding inequities.⁶⁷ Coalition members originally defined their role as lobbyists, but court involvement loomed in the background of their discussions.⁶⁸ Disparity Commission chairman W.L. Lemmon was sympathetic to their cause, but he said repeatedly that he hoped they would hold off on filing a suit, “which he expect[ed] the state would lose,” and let the Commission do its work.⁶⁹

Throughout this time, all parties to the state-level discussions about disparity—the Commission, the Coalition, the Governor, the Attorney General, and members of the General Assembly—sought and encouraged non-judicial remedies, but all discussions occurred very much in the shadow of litigation. Interestingly, members of the state administration anticipated an unequivocal loss in court if the funding system was challenged. Experts warned the Disparity Commission that since “Virginia’s educational funding system would not stand up to a legal challenge,” they must “agree on recommendations to close funding gaps and avert a lawsuit.”⁷⁰ State officials noted that similar lawsuits had been successful in other states and believed Virginia would probably lose.⁷¹ At the critical November 1990 meeting of the Commission, members believed that they had to ameliorate the school funding disparities or they would be taken to court and lose: “Either we will do it or someone else will do it for us,” the Secretary of Education said.⁷²

In September of 1990, the Coalition retained former Attorney General Andrew P. Miller, who was then practicing law in Washington, D.C. Members of the Disparity Commission and Education Secretary James W. Dyke urged the Coalition to wait for the Disparity Commission’s report before filing suit. Dr. Mark Pace, president of the Coalition, said that members of the Coalition were divided as to whether or not to commence legal action.⁷³ Virginia’s path to litigation, therefore, differed from that of many of the other states involved in school funding

Spec. Serv., Va. Educ. Assn. (Mar. 31, 2003).

67. Paul Bradley, *School Financing Considerations Moving Closer to Court Solution*, Richmond Times-Dispatch 17 (Sept. 26, 1990).

68. *Id.*; *Suit Challenges Virginia’s School Finance System*, Educ. Week (Nov. 27, 1991).

69. Finch, *supra* n. 4, at 11.

70. Paul Bradley, *Panel Tries to Avert Lawsuit, Close School Funding Gap*, Richmond Times-Dispatch 17 (Nov. 14, 1990).

71. *Id.*

72. Paul Bradley, *Any Way School-Funds Pie Is Sliced, It’s Not Enough, Official Says*, Richmond Times-Dispatch 7 (Nov. 15, 1990).

73. Bradley, *supra* n. 67, at 17.

suits in that it was driven by a coalition of educators and administrators rather than by lawyers.

Members who urged judicial action feared that the \$1.4 billion budget deficit made all of the options that would increase funding politically impossible. Therefore, they were loath to wait for the political system to come to that conclusion on its own, leaving the schools without funding in the interim.⁷⁴ As quoted in a newspaper article at the time, Dr. Pace said, "We aren't going to court [yet], but if we can't find a solution in the Commission and in the legislature, we will go."⁷⁵

C. Disparity Commission's Recommendations

The Commission made its recommendations in February 1991, under strict deadline pressure from Governor Wilder. Late in 1990, the Commission had asked for an extension of their original February 28, 1991 deadline so they could work out issues that proved to be thornier than expected. However, Wilder denied the extension and even pushed up the deadline to February 1, forcing the Commission to come to hurried conclusions and send a report to the General Assembly.⁷⁶

When the Commission submitted its report to the General Assembly, its first conclusion was that "all divisions, regardless of their local wealth, currently exceed the standards . . . suggest[ing] that the divisions view the [SOQ] as too minimal to provide a quality foundation program."⁷⁷ However, none of the thirty-two recommendations in the Commission report specifically called for more money from the state. A \$1.4 billion budget deficit made finding additional funds difficult or impossible, especially considering that Governor Wilder had called for across-the-board cuts in all state agencies.⁷⁸ Consequently, instead of recommending more funds, the Disparity Commission recommended statewide standards and a redistribution of funds from wealthier districts to poorer ones.

1. Standards as a Substitute for Funding

Faced with a state budget deficit, the Disparity Commission was urged to "look beyond money" in making recommendations to improve education in the state, and those non-fiscal recommendations were the

74. *Id.*

75. *Id.*

76. Finch, *supra* n. 4, at 9.

77. Denslow, *supra* n. 20, at 6 (quoting Gov.'s Commn. on Educ. Opportunity for All Virginians, *Final Report 3* (August 1991)).

78. Bradley, *supra* n. 72.

first to gain approval.⁷⁹ For example, the Commission recommended that the General Assembly establish statewide education goals and curriculum by 1995, which would be measured by a common statewide standardized test.⁸⁰ Thus, the current standards movement in Virginia was initiated when state officials attempted to define educational equity as common *standards* across the state rather than common *funding* across the state.⁸¹ The chair of one of the Disparity Commission's three subcommittees was quoted in a newspaper as saying, "If we want to talk about equal opportunity, we have to talk about what students should know."⁸² The recommendation further called for a system of financial penalties for school systems that failed to meet the new statewide goals.⁸³

2. Redistribution

A controversial recommendation called for the redistribution of funds from wealthy Northern Virginia schools to needier schools in the south of the state.⁸⁴ Northern Virginia legislators, predictably, found that recommendation unacceptable.⁸⁵ Under state law, a locality pays a maximum of 80 percent of the cost of meeting the Standards of Quality. Wealthy districts pay the maximum 80 percent, plus they pay additional money to provide students with services and opportunities above the Standards of Quality. Education officials suggested raising that 80 percent cap to 85 or 90 percent and redirecting those funds to poorer, smaller school districts in rural Virginia. However, Senators on the committee worried that the change would be hard for legislators from Northern Virginia to take back to their constituents, even though a state study showed that the wealthy, Northern Virginia localities could bear the costs most easily.⁸⁶ The study, done by the state Commission on Local Government, calculated "fiscal stress" by measuring the locality's tax base, the effort the locality makes to raise revenue, and the residents'

79. *Id.* Interestingly, several other states have tried to use standards as a substitute for funding, including Ohio, West Virginia, Connecticut, and New Jersey.

80. Bradley, *supra* n. 70.

81. In 1990, the state already had literacy passport tests in place, but it was not mandatory for students to pass them before being promoted to high school until 1991. Walker, *supra* n. 55, at A1.

82. Bradley, *supra* n. 70.

83. *Id.*

84. Bradley, *supra* n. 72. Redistributive school finance plans such as this one are often called "recapture" or "Robin Hood" plans and generate great political opposition. Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave: From Equity to Adequacy*, 68 Temp. L. Rev. 1151, 1172 (1995).

85. Bradley, *supra* n. 72.

86. Jean McNair, *Shifting Funds to Poorer Areas Said Way to Save School Money*, Richmond Times-Dispatch 21 (Aug. 9, 1990).

ability to pay taxes. The study showed that the suburban counties in Northern Virginia had the least fiscal stress while the rural counties in southwest and south-central Virginia had the most.⁸⁷ Along with legislators from Northern Virginia, however, Governor Wilder stated repeatedly that he would not support taking money from wealthier school districts to aid the poorer districts.⁸⁸

D. *The Coalition's Ultimatum*

State officials, such as Governor Wilder and Secretary of Education Dyke, clashed with Coalition members repeatedly over the question of whether the legislature could be counted on to eliminate the disparities. The state said that, given time to deliberate, the legislature would adequately address the problem; the serious attention they had given the Disparity Commission's report was evidence of that. Wilder pointed out that "[n]o one had to sue me to create the Commission, or for the legislature to consider its findings."⁸⁹ A lawsuit, he said, would have a "chilling effect" on the current state efforts to solve the problem. Furthermore, if the issue was turned over to the courts, further expenditures on Disparity Commission work could be viewed as wasteful, bringing the Commission's work to an end.⁹⁰

But Coalition members feared that the General Assembly did not have the political will to "find" more money by raising taxes or taking funds from some school districts, and they thought a lawsuit would be necessary to force the Assembly into action.⁹¹ Academics and outside observers agreed that a court decision requiring the state to infuse more money into education could give politicians the political will they needed to raise taxes or redistribute funds.⁹² The Coalition had considered taking legal action in 1990 but agreed to wait for the Disparity Commission report. As discussed above, when the report was released in February 1991, it included twenty-seven recommendations for ending the disparity but it did not include details of where the funding would come from.⁹³ In addition, the Disparity Commission's report defined the problem in terms that were unsatisfactory to the Coalition; the Commission focused on three types of equity—program equity, pupil equity, and fiscal equity—thus diluting the

87. *Id.*

88. Whitley, *supra* n. 59.

89. *Id.*

90. *Id.*

91. Associated Press, *Wilder Plans to Disregard Threat of Suit*, Richmond Times-Dispatch 23 (Aug. 20, 1991).

92. *Id.*

93. *Id.*

funding focus that was paramount to the Coalition. The final report stated that “the Commission did not identify equal per pupil funding across all districts as a goal, or focus on measuring the current level of fiscal disparity in the Commonwealth.”⁹⁴

In April 1991, the Coalition, frustrated by the Disparity Commission’s lack of progress, set a September 13 deadline for Wilder to announce a specific plan to solve school funding disparities. If Wilder missed the deadline, the Coalition promised to file suit. A spokesperson for Wilder declared that he would continue to lead the march toward a solution, but that he would ignore the deadline: “[H]e is not going to be subject to threats or ultimatums.”⁹⁵ Wilder and Dyke characterized the ultimatum as “blackmail” and an effort to “put a gun to the governor’s head.”⁹⁶

The Attorney General during the Wilder administration says that “the last thing that should have been done when dealing with the Governor was issue an ultimatum.”⁹⁷ She describes him as strategic, but unwilling to be bullied by anybody.⁹⁸ A direct ultimatum backfired on the Coalition not only because of the Governor’s personality, but also because of the politics involved: several people close to Governor Wilder and involved in the eventual litigation have described a tense relationship between the Governor and the Coalition, often tinged with racial strain.⁹⁹ The racial undertones of the power struggle between the Coalition and the Governor raised the stakes and provoked the Governor into digging his heels in deeper.¹⁰⁰ On the September 13 deadline the Coalition had set for Wilder to propose a solution to school funding inequities in the state, Wilder did not address the school funding issue. Instead, he announced that he would seek the Democratic presidential nomination.¹⁰¹

A few days after the deadline passed, the Coalition voted to file the threatened lawsuit, styled *Alleghany Highlands v. Virginia*, but not to serve the papers until after the General Assembly considered the

94. Denslow, *supra* n. 20, at 6 (quoting Gov.’s Commn. on Educ. Opportunity for All Virginians, *Final Report* 11).

95. Associated Press, *supra* n. 91.

96. *Disparity’s Sting*, Richmond Times-Dispatch A14 (Apr. 24, 1991).

97. Telephone Interview with Mary Sue Terry, former Atty. Gen. of Va. (Mar. 27, 2003).

98. *Id.*

99. *Id.* However, Wilder opponents note that his administration was apt to find racism in most criticisms. See, e.g., Robert Eure, Op-Ed, *Vindictive Politics Still Alive and Well*, The Virginian-Pilot (Norfolk) A9 (Feb. 14, 1994).

100. Telephone Interview (Terry), *supra* n. 97.

101. Paul Bradley, *School Divisions to Decide on Suit*, Richmond Times-Dispatch 41 (Sept. 13, 1991). In fact, Wilder’s press secretary Laura F. Dillard resigned around the same time as the Coalition deadline because she felt the governor’s priority was the White House and not the state. Wasson, *supra* n. 58.

education budget in early 1992.¹⁰² The Coalition viewed their delay as a compromise that would give the Governor and General Assembly one last chance to close the funding gap without court intervention. The Governor and General Assembly, however, were largely angered by the tactic. Wilder took the offensive by trying to serve the lawsuit on himself, attempting to pick up the legal papers as soon as they were filed in the Richmond Circuit Court rather than waiting for them to be served.¹⁰³ Although the court later ruled that the Governor could pick up the unserved suit from the circuit court, the Coalition decided to withdraw the suit because they were encouraged by the disparity discussions in the legislature. Coalition members publicly stated that they believed the legislature would take the necessary action to close the funding gap.¹⁰⁴

E. The Governor and General Assembly Respond

Days later, still in January of 1992, Governor Wilder submitted his "Plan for Improving Educational Opportunities for All Virginians," a six-year plan that called for programmatic and funding reforms in Virginia's schools.¹⁰⁵ The funding reforms included a \$360 million proposed budget increase for the 1992-94 biennium. However, since budget shortfalls had reduced the state share of funding the SOQ by \$90 million in the 1991-92 school year, \$90 million of the proposed \$360 million was purely to restore that lost funding. The remainder was merely an allotment for the normal increase in operating costs that could be expected over the next two years.¹⁰⁶

In addition to the funding reforms, the Wilder administration called for short-term and long-term programmatic reforms. Short-term reforms, designed to be affordable programs that could be implemented immediately, included at-risk funding for students who received free lunches, funding for instructional materials, assistance for teacher recruitment, and funding for children who spoke English as a second

102. Paul Bradley, *Governor May Force School Issue*, Richmond Times-Dispatch 15 (Sept. 18, 1991); *Suit Challenges Virginia's School Finance System*, *supra* n. 68.

103. Bradley, *supra* n. 101. In late September, the Reverend Jesse Jackson made a trip to Virginia to challenge Governor Wilder to support the lawsuit, saying that the disparity goes beyond race and class because unequal funding results in unequal opportunity. At the time, Jackson denied that his trip was intended as a message to Governor Wilder that he might not be the only African American seeking the presidency, but Jackson announced his candidacy a short time later. See Jeffery St. John, *Jackson Challenges Governor to Revamp Funding for Schools*, Richmond Times-Dispatch 17 (Sept. 26, 1991).

104. Denslow, *supra* n. 20, at 10.

105. *Id.*

106. *Id.* at 7.

language.¹⁰⁷ The long-term reforms, which would require fundamental changes to the system, included standards-based education, a costing-out of education based on student needs, a plan for the state to share capital costs, reduced class sizes in the early grades, and a revised Composite Index for determining the local share of funding the SOQ.¹⁰⁸

In March, the General Assembly appropriated \$74 million in “disparity initiatives.”¹⁰⁹ Although the package was far less than the \$1.3 billion the Coalition said was necessary to close the funding gap, and also less than the \$360 million the Governor had proposed, the Governor and the General Assembly agreed to the initiatives as a “first step” toward addressing the disparity issue.¹¹⁰ The meager funding response did not mollify Coalition members and, in April of 1992, the Coalition voted to re-file its suit.¹¹¹

III. CLOSING A DOOR: VIRGINIA’S EQUITY LITIGATION

A. Reid Scott v. Commonwealth

The Coalition filed *Reid Scott v. Commonwealth of Virginia* in the Richmond City Circuit Court, alleging that the system of funding for public schools in the Commonwealth violated the Virginia Constitution by denying students in the complaining school districts “an educational opportunity substantially equal to that of children who attend public school in wealthier divisions.”¹¹²

The named plaintiff, Reid Scott, was a seventh-grader at a Buchanan County public school. Buchanan County borders West Virginia and Kentucky, in Virginia’s coal country in the southwestern part of the state, and suffered from an under-funded school system.¹¹³ In total, the Bill of Complaint listed eleven public school students and seven local school boards as plaintiffs.¹¹⁴ They asserted that the financing system violated

107. *Id.*

108. *Id.* at 10.

109. *Id.* at 10.

110. *Id.* at 8.

111. *Id.* at 10.

112. Bill of Compl., *supra* n. 7, at 2.

113. In the 1991–92 school year, Buchanan County spent \$4,945 per student, while Falls Church spent \$9,119 per student, Arlington spent \$8,592, and Alexandria spent \$8,525. And Buchanan was not the worst off county in the state: Total per pupil expenditures ranged from \$9,139 in Falls Church to \$3,819 in South Boston. See Joel Turner, *He’s the Kid in the Suit*, The Roanoke Times & World News E1 (Mar. 27, 1994); Joel Turner, *The Difference is Appropriation*, The Roanoke Times & World News E6 (Mar. 27, 1994).

114. *Scott v. Cmmw.*, No. HC-77-1, slip op. at 1 (Va. Cir. Ct. Richmond Nov. 20, 1992). The parties who initiated the suit were members of the Coalition for Equity in Educational Funding,

the constitution because the “Constitution of Virginia requires the General Assembly to provide for a substantially equal public educational opportunity for every child in the Commonwealth by mandating a single, statewide public educational system.”¹¹⁵ As a result of the state funding formulas, school divisions with low fiscal capacities “have less funding per pupil for the education of pupils residing in those divisions than do divisions with high fiscal capacities.”¹¹⁶ Therefore, “the Commonwealth has failed to create a system, *i.e.*, a uniform system, of public education which provides children throughout the Commonwealth with a substantially equal educational opportunity.”¹¹⁷

The Bill of Complaint recited the relevant portion of the Virginia Constitution: “The General Assembly shall provide for a system of free public education and secondary schools for all children of school age *throughout the Commonwealth*, and shall seek to ensure that an educational program of high quality is established and maintained.”¹¹⁸ Furthermore, the Complainants alleged the Virginia Bill of Rights made education a fundamental right, saying:

That free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by *assuring* the opportunity for their fullest development by *an* effective system of education *throughout the Commonwealth*.¹¹⁹

The complainants alleged that Virginia’s method of financing its public schools was resulting in gross disparities in school funding among school divisions.¹²⁰ For the 1989–90 school year (the latest year for which data were available as of the filing of the suit), total state and local per pupil funding for general education ranged from \$2,895 in the poorest district to \$7,268 in the wealthiest district.¹²¹ Funding in the ten poorest school divisions averaged \$2,954 per pupil, while funding in the ten wealthiest school divisions averaged \$6,058 per pupil.¹²² Thus the people of Virginia spent two and a half times more money on some students than on others, solely on the basis of which school division the student

which was comprised of 24 school boards. Bill of Compl., *supra* n. 7, at 5–6.

115. Bill of Compl., *supra* n. 7, at 7.

116. *Id.* at 11.

117. *Id.* at 14.

118. *Id.* at 7 (emphasis supplied) (citing Va. Const. art. VIII, § 1).

119. *Id.* at 8 (emphasis supplied) (citing Va. Bill of Rights. art. I, § 15, ¶ 2).

120. Bill of Compl., *supra* n. 7, at 12.

121. *Id.* at 11–12.

122. *Id.* at 12.

attended.¹²³ The complainants further alleged that the funding gap was increasing.¹²⁴ In the 1987–88 school year, the gap between the highest-funded and lowest-funded division was \$3,844 per pupil. In the 1989–90 school year, the gap was \$4,372 per pupil—an increase of 14 percent.¹²⁵

The Respondents demurred to the Bill of Complaint.¹²⁶ They argued that the constitution does not require equity in funding, but guarantees only a basic education for each child in the state: “The complaint must be dismissed as a matter of law because there are no allegations that the constitutionally required Standards of Quality program is not available in any of the complainant school divisions.”¹²⁷

B. Circuit Court Decision

In the circuit court decision, Judge Hughes first considered the plain meaning of the words used in the relevant provisions of the constitution. He noted the plaintiffs’ argument that the guarantee in Article I, section 15 of “an effective system of education” necessarily means “substantial equality among school divisions in Virginia.”¹²⁸ He disagreed. Hughes said that the title of the article, “Qualities necessary to preservation of free government,” indicated “more of a general statement of objectives rather than an affirmative, enforceable duty.”¹²⁹ Similarly, he wrote, “the language used that the Commonwealth ‘should avail itself . . . by assuring the opportunity . . . by an effective system of education,’ with the use of the word ‘should,’ suggests things traditionally aspirational as opposed to the word ‘shall’ which is not used, and which is traditionally mandatory.”¹³⁰

Moreover, Judge Hughes disagreed with plaintiffs’ assertion that a unitary, equal system is required by the language of “*system of free public . . . schools for all children of school age throughout the Commonwealth.*”¹³¹ Instead, he wrote, “throughout the Commonwealth”

123. *Id.*

124. *Id.* at 14.

125. *Id.*

126. On demurrer, the court must take as true the allegations in the Bill of Complaint (as well as the reasonable inferences from them). See e.g. *Bowman v. St. Bank of Keysville*, 331 S.E.2d 797, 798 (Va. 1985).

127. Demr. at 1–2, *Scott v. Cmmw.*, No. CH92C00577 (Va. Cir. Ct. Richmond July 7, 1992). The Respondents further argued five other points of law, including that the constitution expressly vests ultimate authority for education policy in the General Assembly, not in the courts, and that the suit was barred by sovereign immunity. *Id.* at 2–3.

128. *Scott*, slip op. at 6.

129. *Id.*

130. *Id.*

131. *Id.*

modifies “children of school age,” not “system,” and therefore no requirement of equality can be read into that clause.¹³²

Importantly, Judge Hughes went on to note that the section “does require ‘an educational program of high quality,’ and section 2 requires the General Assembly to develop the scheme to fund such a program.”¹³³ Further, he said that “the only funds which must be provided are those necessary to cover the ‘cost of maintaining an educational program meeting the prescribed standards of quality.’ These standards . . . are the constitution’s own indication of what constitutes ‘high quality,’ and the level of educational opportunity for which funds are constitutionally guaranteed.”¹³⁴ The Judge contrasted *Rose v. Council for Better Education, Inc.*,¹³⁵ the successful school finance case in Kentucky, with this action, saying that the critical difference was the allegation of inadequacy in *Rose* and inequity in *Scott*: “Here the complainants do not allege that the present funding system has failed to reach the Standards of Quality” or the corollary Standards of Accreditation.¹³⁶ Most importantly, plaintiffs “do not allege that the Standards of Quality or Accreditation are inadequate to ensure the ‘high quality’ education mandated by the Virginia Constitution.”¹³⁷

Ultimately, Judge Hughes wrote that the Virginia Constitution “establish[es] education as a fundamental right.”¹³⁸ However, he found no authority requiring a strict scrutiny test to be applied to the state constitutional deprivation asserted, concluding that “the Virginia Constitution does not now mandate equality of funding for school districts in Virginia, except for meeting minimum educational standards.”¹³⁹ Judge Hughes invited Plaintiffs to amend their Bill of Complaint and file an adequacy suit, but the Plaintiffs decided to stand on their original Complaint, and judgment was entered against them in the circuit court.¹⁴⁰

132. *Id.*

133. *Id.* at 7 (internal notations omitted).

134. *Id.* (internal notations omitted).

135. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989)

136. *Scott*, slip op. at 8.

137. *Id.*

138. *Id.* at 7.

139. *Id.* at 9. Given this determination, it was not necessary for the court to decide the other questions raised by the Respondents’ demurrer. See text accompanying n. 115.

140. *Id.* at 9. None of the litigation participants with whom the author spoke provided a clear answer to the question of why they did not amend the suit at Judge Hughes’ invitation. Some suggested that they knew they would lose with the present court anyway, so they did not mind losing on equity rather than adequacy grounds. Others suggested that they wanted to file an adequacy suit all along and were simply outvoted by other members of the Coalition. Still others suggest that the symbolism of an equity suit mattered to them: many poorly-funded schools managed to be *adequate*,

C. Further Irony: Reactions of the Participants

The state officials defending the lawsuit were, ironically, promoters of educational equity and quality themselves. Attorney General Mary Sue Terry, the daughter of two school teachers, was from a poor, rural county in Virginia and, as she describes it, “grew up on salary disparity.” Terry says her heart was with the plaintiff districts, but she had a job to do, and she disagreed with the Coalition’s strategy to file a suit because she had studied the constitutional history in Virginia. Terry even met with Coalition leadership as a last-ditch effort to discuss with them the “dire consequences” of losing the suit; she feared that a loss in court would be a “license to the populace in rich areas to not support the underserved populations in poorer school districts.” She explained:

I believed that fair-minded legislators from across the state believed they had a moral and constitutional obligation to help these children. Now there’s a case telling them that they have no obligation. Before, politicians and others could argue that there was a legal obligation to these children; that option was now gone. Without a legal obligation, it’s politically harder for a legislator to justify increased expenditures for children in other districts.¹⁴¹

Similarly, Secretary of Education Jim Dyke—who, like Governor Wilder, had graduated from a segregated high school—was a strong advocate of quality, and equality, in education.¹⁴² In fact, before taking the post of Secretary of Education, Dyke was a member of the Board of Education that passed the initial resolution to address the disparity issue.¹⁴³ Dyke’s strong commitment to solving disparity problems and working with state legislators was a primary reason cited by the Coalition for their repeated postponements of the suit.¹⁴⁴ Many involved with the suit had the sense that Dyke and others listed as defendants in the suit “would have loved to be required by the court to increase funding.”¹⁴⁵

D. Appeal to the Supreme Court of Virginia

In the fall of 1993, the plaintiffs (hereinafter, “the Students”) filed an appeal with the Supreme Court of Virginia. The Students’ brief alleged that the circuit court erred in two principle ways. First, they alleged that

but what they wanted was to be *equal*.

141. Telephone Interview (Terry), *supra* n. 97.

142. Denslow, *supra* n. 20, at 9.

143. Walker, *supra* n. 55, at A1.

144. Bradley, *supra* n. 101.

145. Telephone Interview (Terry), *supra* n. 97.

the court erred in ruling that the Virginia Constitution does not require a significant reduction in existing disparities in the funding of public education among the school divisions. Second, they alleged that the court erred in ruling that although education was a fundamental right under the Virginia Constitution, statutory enactments affecting that right were not subject to strict judicial scrutiny.¹⁴⁶

In their appeal, the Students highlighted a point that was implicit in the original complaint:

The Students have not urged that the same amount of public monies be expended on every student in the Commonwealth; rather, the Students asserted, and asked the Circuit Court to hold, that the extent of the current disparities in educational funding among the school divisions of the Commonwealth is constitutionally unsupportable.¹⁴⁷

Further, the Students emphasized that education is a fundamental right, citing the circuit court's decision below as new authority. The Students asserted that because education is a fundamental right, the Commonwealth's statutory funding scheme must be subjected to strict judicial scrutiny:¹⁴⁸ "[U]nder a strict scrutiny test, the law must be a necessary element for achieving a compelling governmental interest."¹⁴⁹ The Students asserted that the circuit court erred in failing to examine the funding scheme with strict judicial scrutiny, and therefore their granting of the Commonwealth's demurrer was also in error.¹⁵⁰

Finally, the Students asserted that even if the strict scrutiny test did not apply, the facts alleged in the Complaint were adequate to require denial of the Commonwealth's Demurrer.¹⁵¹ The Students alleged that because their Bill of Complaint set forth sufficient facts to state a valid cause of action, the circuit court, in sustaining the Demurrer, "essentially concluded that certain acts of the General Assembly are not subject to judicial review, even though they may be unconstitutional."¹⁵²

E. Supreme Court Decision

In its decision, the Virginia Supreme Court agreed with the circuit court that the constitutional provisions at issue were to be examined

146. Br. of Appellants, at 3; *Scott v. Cmmw.*, 443 S.E.2d 141 (Va. 1994).

147. *Id.* at 8.

148. *Id.* at 14

149. *Id.* at 14–15 (citing *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525, 530 (Va. 1989); *Mahan v. Natl. Conservative Pol. Action Comm.*, 315 S.E.2d 829, 830 (Va. 1984)).

150. Br. of Appellants, at 15; *Scott*, 443 S.E.2d 141.

151. *Id.* at 16.

152. *Id.* at 15.

under the plain meaning rule.¹⁵³ The supreme court also upheld the lower court's determination that while Article VIII mandates a free system of public education, the language about "high quality" and an "effective system" is merely aspirational:

In sum, we agree with the trial court that education is a fundamental right under the Constitution. Even applying a strict scrutiny test, as urged by the Students, however, we hold that nowhere does the Constitution require equal, or substantially equal, funding or programs among and within the Commonwealth's school divisions. . . .

Therefore, while the elimination of substantial disparity between school divisions may be a worthy goal, it is simply not required by the Constitution. Consequently, any relief to which the Students may be entitled must come from the General Assembly.¹⁵⁴

And so, on April 15, 1994—three years and four Aprils after the litigation process began—the students were left with no judicial remedy to the inequities in education funding in Virginia.

IV. WHY DID SCHOOL FINANCE LITIGATION FAIL IN VIRGINIA?

Politics and constitutional history are the primary reasons school finance litigation failed in Virginia. Virginia is a politically conservative state, and Virginia's judges, as products of her culture, are unlikely to issue a profoundly redistributive ruling. Similarly, the judges are appointed by the General Assembly for renewable terms, which makes them less likely to rule against the state—their once and future benefactors. In addition, race entered into the disparity litigation in an important and unusual way in Virginia when the debates between the state's African American governor and the predominately-white Coalition for Equity were encumbered by racial tension. Politics across the state—primarily between the affluent, suburban areas of Northern Virginia and the poorer, rural areas of Southwest and Southside—hindered attempts at non-legal solutions to the disparity problems. Finally, the politics of public engagement influenced the failure of Virginia's equity case; because the disparity debates developed as a political match between state officials and Coalition members, the public was largely left out of the debate and hence was unprepared to fully

153. *Scott*, 443 S.E.2d at 141. The court noted that "[w]hen constitutional language is clear and unambiguous, a court must give the language its plain meaning and is not allowed to resort to legislative history or other extrinsic evidence." *Id.* (citing to *Thomson v. Robb*, 328 S.E.2d 136, 139 (Va. 1985); *Harrison v. Day*, 106 S.E.2d 636, 644 (Va. 1959)).

154. *Scott*, 443 S.E.2d at 142–143.

support the efforts for fiscal equity.

The second major factor in the failure of the equity suit was the constitutional history of the state's Education Article. When the General Assembly framed and debated the 1971 Virginia Constitution, they were acutely aware of the school finance litigation going on in other states; they included language and constructed history meant specifically to ensure that the state's education funding scheme was litigation-proof. The first half of this section will explore the five ways politics affected the equity litigation in Virginia and the second half will explore the constitutional history.

A. Politics

1. *Of the People*

The first political factor in the failure of the equity litigation was the politics of the people. Virginia is an extremely conservative state. A common saying is that even the liberals in Virginia are conservative, giving the state's moderate voters the label of "Virginia Democrats." A study by Erikson, Wright, and McIver, which assigned liberalism scores to the states based on an aggregation of polling data, classified Virginia as a conservative state. Even during the period from 1976 to 1988, when more citizens of the state identified themselves as Democrats than as Republicans and when Democrats controlled the General Assembly, Virginia's liberalism score was a -17.9, placing Virginia solidly within the conservative block of states.¹⁵⁵

Many studies suggest that the ideology of the public is often related to judicial decision-making.¹⁵⁶ Karen Swenson's regression analysis demonstrates a strong correlation between the liberalism of the citizenry in a state and the judiciary's willingness to "take school finance policy into their own hands and mandate a change likely to redistribute the wealth in a state."¹⁵⁷ Conversely, "[m]ore conservative states have

155. Robert S. Erikson, Gerald C. Wright, & John P. McIver, *Statehouse Democracy* 16 (Cambridge U. Press 1993). Similarly, Daniel Elazar asserts that Virginia is a strongly traditionalistic state. Daniel Elazar, *American Federalism: A View from the States* 135-136 (3d ed., Harper & Row 1984). Judges in traditionalistic states, as products of that culture, are most likely to uphold the current school funding scheme. *But see* Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 Alb. L. Rev. 1101, 1144 (2000).

156. *See* Herbert Jacob, *Courts: The Least Visible Branch*, in *Politics in the American States: A Comparative Analysis* 253, 281 (Virginia Gray & Herbert Jacob eds., 6th ed., CQ Press 1996) (demonstrating a moderate, positive correlation between a populace's liberal ideology and its supreme court's willingness to expand privacy rights); Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 Alb. L. Rev. 1147, 1167 (2000).

157. Swenson, *supra* n. 156, at 1177-1178.

judiciaries that are more likely to uphold the status quo and defer to the judgment of the legislature and governor in setting education policy.”¹⁵⁸ Swenson’s model, therefore, supports the notion that Virginia courts would uphold the funding scheme as a result of the state’s conservative culture.

2. *On the Court*

The second political factor in the failure of the equity litigation was the politics on the court. Judges in Virginia are appointed by a vote of the General Assembly for terms of twelve years, and at the end of their term, they can be reappointed by the Assembly for unlimited subsequent twelve-year terms.¹⁵⁹ Virginia’s judicial selection process is unusual in that the state legislature selects the justices and the justices never “face the voters” in retention elections.¹⁶⁰ Justices who owe their jobs to state officials, and who can be reappointed by those officials, are less likely to vote against them when they appear before the court as defendants.¹⁶¹ One professor states that because “the justices are appointed, and not for life, it is often difficult for the justices to separate themselves from the political arena in Virginia.”¹⁶²

A recent study exploring why some state courts are activist and others are restrained supports the idea that appointed justices owe allegiance to state officials. In that study, Karen Swenson found that appointed courts uphold school finance schemes more often than elected courts do.¹⁶³ While the difference was only slight in her study, the courts labeled “appointed” in her sample were actually hybrid courts where “the distinction between the two selection methods [elected and appointed] is blurred because many appointed justices face retention elections.”¹⁶⁴ In Virginia, in contrast, justices and judges are *purely* appointive, so it stands to reason that the Virginia courts are among the most likely to uphold school finance schemes.

In addition, the Virginia Supreme Court is a very conservative court.¹⁶⁵ The centralized judicial selection process serves to encourage

158. *Id.* at 1177.

159. Va. Const. art. VI, § 7. However, judges must retire at age 70. Am. Judicature Socy., *Judicial Selection in the States: Virginia* <<http://www.ajs.org/js/VA.htm>> (accessed Feb. 27, 2004).

160. Swenson, *supra* n. 156, at 1153; Va. Const. art. VI, § 7.

161. See Swenson, *supra* n. 156, at 1154.

162. Telephone Interview with Richard G. Salmon, Prof., Educ., Leadership, & Policy Stud., Va. Polytechnic Inst. & St. U. (Feb. 3, 2003).

163. Swenson, *supra* n. 156, at 1174.

164. *Id.* This paper posits that if Swenson’s study looked at purely appointed courts versus purely elected courts, the difference would be far more significant.

165. Telephone Interview with Deborah A. Verstegen, Prof., Educ. Fin. & Policy, Curry Sch. of

politicism on the court; critics and reformers have long contended that the justices are selected on a partisan basis, rather than on a professional and quality basis.¹⁶⁶ Conservative courts are more likely to uphold the school funding status quo and less likely to engage in the redistributive enterprise of requiring equity in funding.¹⁶⁷ Some parties to the *Scott* litigation, knowing the highly conservative nature of the supreme court, even thought it would be better to withdraw the case than to go ahead with that court.¹⁶⁸

3. *Between the Governor and the Coalition*

The third political factor was the politics between the Governor and the Coalition. Every party involved in the litigation describes the extreme antagonism between Governor Wilder and the Coalition. At the time of the litigation, Governor Wilder was seeking the Democratic presidential nomination. He was very concerned with having a good track record in Virginia and he took the disparity suit as a personal affront.¹⁶⁹

Wilder received the governorship during a tremendous budget crisis in Virginia. He was very aware of his place in history as the first African American governor, and he was determined to break stereotypes; specifically, he wanted to challenge the view that African Americans are not good at managing money. Through political negotiations and many hard decisions, Wilder balanced the state budget, and that success became his crowning glory. The *Scott* suit, therefore, was a serious blow, undermining both his national political aspirations and his desire to dispel racial stereotypes about financial mismanagement.¹⁷⁰

Race thus entered Virginia's school finance story in a unique and critical way. As discussed previously, the Coalition gave the Governor a deadline of September 13th by which he had to address the disparity issue or the Coalition would go to court. Wilder was incensed by this ultimatum. He, and those around him, perceived a racial undercurrent to the communications he had with many members of the Coalition.¹⁷¹ Wilder's response to the ultimatum was to visibly and publicly ignore it.

Educ., U. of Va. (Apr. 11, 2003).

166. Harry R. Stumpf & John G. Culver, *The Politics of State Courts* 55 (Longman Publ. Group 1992). The General Assembly welcomes recommendations from bar groups, but there is no formal system such as a nominating committee to forward the names of qualified nominees.

167. Swenson, *supra* n. 156, at 1177.

168. Telephone Interview (Salmon), *supra* n. 162.

169. *Id.*

170. Telephone Interview (Terry), *supra* n. 97.

171. *Id.*

Not only did he *not* address the school funding issue on September 13th, he actually chose that day to announce that he would seek the Democratic nomination for the presidency.¹⁷²

4. Across the State

The fourth political factor was the politics across the state. Northern Virginia has more wealth and political power than any other region of the state. All of the highest spending school districts are in Northern Virginia, and yet schools in that area received increased funds during the disparity debates even while the lower-spending districts that had called for the debates languished. Within the state, Northern Virginia has a reputation as a “fat cat” that can afford to pay for anything its school systems need.¹⁷³ In some ways, that reputation is fair—in 1990, for example, raising the real estate tax by one cent would have generated \$7.8 million in Fairfax County and only \$7,600 in Clifton Forge.¹⁷⁴ Furthermore, 90 percent of Fairfax County public school students go on to higher education—a figure unparalleled throughout the rest of Virginia.¹⁷⁵ But, as the Fairfax County School Board chair testified to the Disparity Commission, many of the Northern Virginia districts have tremendous costs that other districts in the state do not. In Fairfax County in 1991, for example, the school system paid \$8.6 million for an English as a Second Language (“ESL”) program, remedial help, and translators for the more than 5,000 Fairfax children from over 150 countries who speak 100 different languages. In addition, Fairfax had more than 17,000 students in special education in 1991, which was more than the *total enrollment* of all but 11 of Virginia’s school divisions, at a cost of \$110 million per year. The new JLARC formula had made the funding situation much worse in affluent systems, and Northern Virginia school systems at one point had considered joining the Coalition.¹⁷⁶

Some Northern Virginia legislators and voters were angered by the focus on disparity issues in Southwest and Southside Virginia. They contended that their high-cost districts, with higher costs of living, more ESL students, and more special education students, were just as much victims of disparity since they received less than half of the state money that many lower-cost districts received. At a Fairfax County School Board meeting, Northern Virginian school officials were so angered by

172. Bradley, *supra* n. 101, at A1.

173. See Finch, *supra* n. 4, at 12.

174. Denslow, *supra* n. 20, at 4–5.

175. Finch, *supra* n. 4, at 9.

176. *Id.* at 12.

the disparity discussions that they even considered seceding from the state system.¹⁷⁷

Commentators worried that solutions like redistributing funding from Northern Virginia to poorer areas of the state would close the funding gap but create a goodwill gap.¹⁷⁸ Perhaps more influentially, Northern Virginia legislators made it clear that such redistribution was unacceptable, and soon Governor Wilder agreed.¹⁷⁹ Mary Sue Terry, the Attorney General at the time of the *Scott* litigation, explained that “the rural areas and the cities are over-ridden by the suburbs because there are simply more voters and more political power in the ‘burbs.”¹⁸⁰

5. *Of Timing and Public Opinion*

The final political factor in the failure of the equity litigation was the politics of timing and public opinion. Disparity Commission chairman W.L. Lemmon said the slow pace of the Commission’s work was deliberate, even before the pace was questioned. Lemmon felt that to ensure the eventual success of the Commission’s recommendations, he had to win public support for the recommendations before real debate over them began in the General Assembly.¹⁸¹ Many commentators, including school finance veteran Michael Rebell, support Lemmon’s belief about the importance of “extensive public deliberation through public engagement.”¹⁸² Lemmon was adamant that no one should have resorted to a judicial solution until the Commission had time to finish its work, give the report to the General Assembly, and rally the public around its recommendations: “My personal view is that any report we come out with will take a lot of understanding from the general public, and that will take time.”¹⁸³

Research suggests that the effectiveness of court activity in contentious areas depends largely on the existence of broader political support for the activity.¹⁸⁴ In retrospect, some of the people involved

177. *Id.*

178. *Id.*

179. Bradley, *supra* n. 72.

180. Telephone Interview (Terry), *supra* n. 97.

181. Bradley, *supra* n. 72.

182. Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J. of Law & Educ. 167, 188 (2002).

183. Bradley, *supra* n. 67, at 17.

184. See Frederick M. Hess, *Courting Backlash: The Risks of Emphasizing Input Equity Over School Performance*, 6 Va. J. Soc. Policy & L. 11, 17 (Fall 1998). See also Joseph S. Patt, *School Finance Battles: Survey Says? It’s All Just a Change in Attitudes*, 34 Harv. Civ. Rights-Civ. Liberties L. Rev. 547, 550 (1999).

with the litigation say that Virginia was not ready for an equity suit.¹⁸⁵ Public opinion about the suit was mixed. By many accounts, most of the state was at least mildly supportive of the suit, and the editorials in most of the state's major newspapers—including the *Roanoke Times*, the *Virginia Pilot*, and the *Washington Post*—were supportive.¹⁸⁶

In the months before the suit was filed, however, an editorial in the *Richmond Times-Dispatch* came out in strong opposition, declaring the threat of litigation “a tactic of intimidation” by the “so-called Coalition for Equity in Educational Funding, an organization of 41 school divisions hoping to extract more tax money from the state.”¹⁸⁷ The scathing editorial said litigation would be “a bonanza for lawyers, but a costly drain for taxpayers” and cited the litigation costs in neighboring Tennessee.¹⁸⁸ The editorial suggested that the schools would not improve with the addition of more funds, but needed instead, choice and competition, which would be achieved by allowing parents “absolute power to select the school their children will attend.”¹⁸⁹ Thus, one reason some involved in the litigation think it was unsuccessful was that public opinion was not strong enough to demand redistributive attention from the courts.

Politics, therefore, was a main factor in the failure of the equity suit. The second major factor was the constitutional history of the state's education article, which was highly unfavorable to the Students' case.

B. Constitutional History

Academics disagree on whether the wording and constitutional history of a state's education clause generally affects the court's decision to uphold or strike down the state's funding scheme.¹⁹⁰ In Virginia,

185. Telephone Interview (Terry), *supra* n. 97.

186. Telephone Interview (Salmon), *supra* n. 162.

187. *The Great Equalizer?*, *Richmond Times-Dispatch* A12 (Oct. 3, 1990).

188. *Id.*

189. *Id.* As an interesting side note, it is unclear how a school choice proposal would improve the rural schools that were plaintiffs in the suit. The editorial belies how little the *Richmond* paper understood about the situation facing the rural schools.

190. See e.g. Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 *BYU Educ. & L. J.* 1, 19 (“Contrary to what a few uninformed courts and scholars have concluded, there is consistency between success and the use of the education clause.”); Lundberg, *supra* n. 155, at 1135 (finding that “in states where the court has based its ruling primarily on the education clause (as opposed to a ruling based primarily on equal protection grounds), the amount of protection the education clause provides seems to make a difference in the judicial finding”); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 *Tex. L. Rev.* 77 (1985); William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 *Va. L. Rev.* 1639, 1661–1669 (1989) (asserting that the strength of the clause affects the outcome of the case); Bill Swinford, *A Predictive Model of Decision Making in State Supreme Courts: The School Financing Cases*, 19 *Am. Pol. Q.* 336, 347 (1991) (finding a positive correlation between the strength of the education clause

however, the case for the saliency of the Education Article's wording and history is particularly strong because the article was written during the first wave of equity litigation, and the constitutional history was carefully constructed to avoid litigation: "The prospects for more litigation over difficult and complex education quality and school funding issues were prominent in the legislative discussion."¹⁹¹

Unlike all prior constitutions, the 1971 constitution was written by the General Assembly instead of by convention, and it was adopted by the voters in November 1970.¹⁹² With Assembly approval, Governor Godwin had appointed a Commission on Constitutional Revision, comprised of eleven esteemed members.¹⁹³ The Commission reported its recommendations to the Governor and General Assembly in January 1969, and the Assembly considered the Commission's recommendations in 1969 and early 1970.¹⁹⁴ Virginia's voters approved the constitution in November 1970, and the new constitution became effective on July 1, 1971.¹⁹⁵

The 1971 constitution brought an end to constitutionally-sanctioned school segregation and "massive resistance" with the new Education Article. Because the old constitution had not required local school boards to operate public schools in their districts or to ensure that their schools met minimum standards, massive resistance to school desegregation was possible and perpetuated by state law. Such resistance included localities' closing all public schools in a district or operating schools of such poor quality that wealthier white students fled to private schools and only the poorest students, who were usually black, were left attending the public schools.¹⁹⁶ In crafting the Education Article, the constitutional framers placed paramount importance on the retention of local control over schools *and* on creating a "lawsuit-proof constitutional history."¹⁹⁷

The framers recognized the glaring inequities in school funding and quality around the state when they wrote the 1971 constitution and they took steps to create a constitutional history that would protect the new constitution from judicial attack. The recent decision in *Burruss v.*

and the likelihood that the court would strike down the education financing system). *But see* Swenson, *supra* n. 156, at 1156.

191. Memo. in Support of Respt's Demr., *supra* n. 45, at 7; Telephone Interview (Terry), *supra* n. 97 ("It was clear that the legislators were making a lawsuit-proof history.")

192. *Scott*, slip op. at 5.

193. *Id.*

194. Memo. In Support of Respt's Demr., *supra* n. 45, at 2.

195. *Id.* at 2-3.

196. See Howard, *supra* n. 5, at 883-884; *Commn. on Constitutional Rev.*, *supra* n. 5, at 253-254.

197. See Howard, *supra* n. 5, at 896; *Commn. on Constitutional Rev.*, *supra* n. 5, at 256; Telephone Interview (Terry), *supra* n. 97.

Wilkerson,¹⁹⁸ a school funding disparity suit brought by a Virginia county under the federal constitution, focused the attention of the General Assembly on the vulnerability of school funding systems to legal challenge. In addition, *Serrano v. Priest*¹⁹⁹ and *San Antonio Independent School District v. Rodriguez*²⁰⁰ were going on at the time, making the Assembly acutely aware of the potential for future court battles over the language they were constructing. The drafting of the Education Article occurred very much in the shadow of this threat.

1. "Seek to"

A.E. Dick Howard, a professor at the University of Virginia Law School, served as executive director of the Commission and worked with the commissioners to create the draft that was recommended to the General Assembly.²⁰¹ Article VIII, section 1 of the constitution that Howard drafted read, "[t]he General Assembly . . . shall ensure that an educational program of high quality is established and maintained."²⁰² Governor Godwin, who was worried that mandatory language would invite lawsuits, lobbied the General Assembly to insert the words "seek to" before the word "ensure," causing the article to read: "The General Assembly . . . shall seek to ensure that an educational program of high quality is established and continually maintained."²⁰³ Godwin cautioned the Assembly,

The definition of the term "high quality" is so subjective as to invite any citizen who disagreed with the State Board of Education or indeed with the General Assembly to bring suit. It poses the gloomy prospect of endless litigation, and very possibly endless expenditure of public funds to fulfill the courts' decrees.²⁰⁴

Thereafter, the House and Senate both rejected amendments that attempted to repeal the words "seek to" and make Article VIII, Section 1 an enforceable mandate rather than an aspiration.²⁰⁵ In debate over one such amendment, Senator James C. Turk, a Republican, advocated a

198. *Burrus v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969).

199. *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).

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

201. Szakal, *supra* n. 3, at 2.

202. Telephone Interview (Salmon), *supra* n. 162; Szakal, *supra* n. 3, at 2.

203. Va. Const. art. VIII, § 1.

204. Va. H., *Proceedings and Debates Pertaining to Amendment of the Constitution*, Extra Sess. 1969, Reg. Sess. 1970, at 9 (1969, 1970) [hereinafter *House Proceedings*].

205. See *House Proceedings*, *supra* n. 204, at 259–260, 262; Va. Sen., *Proceedings and Debates Pertaining to Amendment of the Constitution*, Extra Sess. 1969, Reg. Sess. 1970, at 209–215 (1969, 1970) [hereinafter *Senate Proceedings*].

repeal of the “seek to” language specifically in order to address the funding disparity issue:

Mr. President, gentlemen of the Senate, I thought one of the best jobs that the Constitutional Revision Commission did was to commit the State wholeheartedly to a system of high quality education. I am mindful of what the Governor told us the first day we were here. But I am also mindful of the fact that this Commission was made up of eminently qualified judges and lawyers. They seem to have no trouble with the problem of what “high quality” meant.

One of the things that has been wrong with our educational system in the State of Virginia has been the difference in the quality of education in different parts of the State. My amendment would merely take out “seek to” which means nothing and leave “high quality education” so that we would ensure to every school-age child in the State of Virginia a high quality education. I, for one, am not worried about any lawsuit that might develop over the words “high quality.”²⁰⁶

But the amendment for which Senator Turk advocated was decisively rejected by a large majority, as was a similar amendment in the House.²⁰⁷ Professor Richard Salmon, who was involved in the *Scott* litigation, laments, “Now it’s said in Virginia that you don’t have to provide a high quality education, you just have to look for one.”²⁰⁸

2. *Divided Equitably?*

The Commission also recommended language that would require the General Assembly to “ensure that funds necessary to establish and maintain an *educational program of high quality* are provided each school division, and it shall take care that the cost of maintaining such programs is *divided equitably* between the localities. . . .”²⁰⁹ The General Assembly, however, rejected the Commission’s language and, instead, approved the phrasing:

The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program

206. *Senate Proceedings*, *supra* n. 205, at 209.

207. Hullihen W. Moore, *In Aid of Public Education: An Analysis of the Education Article of the Virginia Constitution of 1971*, 5 U. Rich. L. Rev. 263, 271 (1970–71). In one debate in the House, Delegate Roy Smith explained why the House Committee substituted the language of aspiration for the language proposed by the Commission: “The committee felt that to put into the draft of the proposed Constitution language mandating an educational program of high quality would take away any future General Assemblies’ right to determine what is high quality and would in all likelihood put that determination in the courts.” *House Proceedings*, *supra* n. 204, at 242.

208. Telephone Interview (Salmon), *supra* n. 162.

209. *Commn. on Constitutional Rev.*, *supra* n. 5, at 259 (emphasis added).

meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions.²¹⁰

The Assembly, therefore, removed the language about “high quality” and “divided equitably” from the section before submitting it to the people of Virginia for ratification.

3. *Expressio Unius*

Furthermore, the framers—the Commission, Governor Godwin, and the General Assembly—were acutely aware of the geographical disparities in funding but chose not to include language that would mandate equity. The statutory interpretation doctrine of *expressio unius est exclusio alterius* means “inclusion of one thing indicates exclusion of the other.”²¹¹ The major criticism of the *expressio unius* doctrine is that it falsely assumes that the legislature thinks through statutory language carefully, considering every possible variation. That criticism is negated, however, in a situation such as this one where history shows the legislature actually did consider the alternatives.

The Commission’s report specifically cited the funding disparities that were occurring across the state in 1966–67²¹² and acknowledged that “[v]ariations in cost per pupil are great, as are variations in taxable local resources per pupil.”²¹³ Similarly, Governor Godwin spoke to the General Assembly about the geographic disparity in funding, saying, “the education gap continues to widen between our better and our poorer schools. Our cities call for still more State aid, and many of our counties are approaching the limit of their own resources.”²¹⁴

Members of the General Assembly also acknowledged the disparities while debating the constitutional revisions, saying, “[a]lmost all of us recognize that one of the more serious problems existing in the Commonwealth today is the disparity in the quality of education offered

210. See Va. Const. art. VIII, § 2 (emphasis added).

211. See e.g. *Tate v. Ogg*, 195 S.E.496, 499 (Va. 1938) (statute covering “any horse, mule, cattle, hog, sheep, or goat” did not cover turkeys).

212. “[I]n the 1966–67 school year in Chesterfield County with a school population of 24,247 the per pupil cost of education was \$439.57; while in Highland County with a school population of 633 the per pupil cost was \$523.00.” *Commn. on Constitutional Rev.*, *supra* n. 5, at 254, fn. 7. “[I]n the 1966–67 school year the relatively sparsely populated county of Buckingham paid only 28% of its educational cost while the Commonwealth paid 55% and the Federal Government paid 17%. Heavily populated Chesterfield County paid 66% of the cost of education in the same year and the Federal Government paid only 3% and the Commonwealth 31%.” *Id.* at 255, fn. 9.

213. *Commn. on Constitutional Rev.*, *supra* n. 5, at 260.

214. *House Proceedings*, *supra* n. 204, at 9.

by the various school divisions.”²¹⁵ Yet the final language of the constitution that the General Assembly presented to the voters did not mandate equality in resources among the school divisions.

The constitutional history of Virginia’s education article, therefore, clearly demonstrates that the framers did not intend to require equity. While the circuit court and the supreme court were both quick to explain that they were using plain meaning only, both courts were briefed extensively on the constitutional history of the article, and both courts were fully aware of what that history contained. In fact, Mary Sue Terry, the Attorney General at the time of the suit, believes that the constitutional history was the critical factor in the courts’ decisions.²¹⁶ The carefully constructed history is thus the second half of the reason why school finance litigation failed in Virginia.

V. RESPONSES AND EFFECTS

Although the equity litigation did not result in a favorable ruling from the court, it succeeded in compelling the legislature to enact a package of “disparity funding” and, more significantly, it incited a fervent movement toward statewide, standards-based education. This section first describes the legislature’s response to the *Scott* litigation and the standards movement that Virginia embraced in the wake of the equity case. This section then focuses on the effects of the failed litigation in terms of current funding and achievement disparities.

A. Legislature’s Response

The General Assembly responded to *Scott* by passing a plan for \$103 million in “school disparity funding” for the 1994–96 budget.²¹⁷ The Assembly provided that funds would be distributed statewide on the basis of numbers of students qualifying for free lunches and would be used principally to reduce student-teacher ratios. The plan called for rural and inner-city schools to receive more funds per pupil than suburban schools, and for schools with more students who qualify for free lunches to get more funds per pupil.²¹⁸

Although the package was billed as a “plan to reduce disparities,” it actually increased disparities in some instances. First, because the

215. *Id.* at 306.

216. Telephone Interview (Terry), *supra* n. 97.

217. Joel Turner, *Coalition: Disparity Plan is Not Enough*, Roanoke Times & World News C1 (Feb. 22, 1994). The funding package was passed while the *Scott* case was still pending in the supreme court. *Id.* See also Denslow, *supra* n. 20.

218. Turner, *supra* n. 217, at C1.

funding was tied to lowering class sizes, some rural counties were unable to qualify for the funds.²¹⁹ Second, because of their large enrollments, some of the wealthiest schools (in the suburbs of Washington, D.C., and Richmond) received more than twice as much as some rural counties in western Virginia. For example, Fairfax County in Northern Virginia received \$2.8 million and Henrico County near Richmond received \$2.3 million, while Roanoke County in Southside Virginia received only \$327,376. Per pupil funding in those schools was \$21 in Fairfax, \$66 in Henrico, and \$24 per student in Roanoke.²²⁰ Even more striking is the disparity between Poquoson, a Tidewater city that was one of the least-funded in the state, which received \$11 per student, and the City of Richmond, which received \$85 per student.²²¹ The funding, therefore, legitimately aided some of Virginia's core cities, where a large number of children qualify for free lunches, but it did little to help the rural Southwest counties who had brought the suit, "where many families who qualify for free lunches are too proud to ask for a handout."²²²

The General Assembly has continued to toy with school funding in the years since *Scott* incited them to enact the \$103 million disparity plan. In fact, Virginia's legislature is one of the most active state legislatures in terms of the number of education bills passed. In a recent study encompassing the years 1994 through 1999, the overall trend in all states is toward an increase in the number of education finance bills.²²³ Virginia was second only to California in the number of state school finance bills passed in the last year of the study; California legislators passed thirty-eight bills, Virginia passed thirty-six, and the next closest state—Oklahoma—passed only twenty-five.²²⁴

None of those many enactments, however, has squarely addressed the funding inequities across the state or the real funding needs of the rural schools. Newspaper editorials at the time of the litigation expressed hope that Governor George Allen and the General Assembly would respond to the suit, even after the supreme court found that they had no constitutional duty to do so, because the alarming disparities had been highlighted and brought to the public's attention.²²⁵ The negative

219. *Failed Suit Doesn't Silence State-Aid Parity Plea*, *The Virginian-Pilot* (Norfolk) A10 (Apr. 20, 1994) [hereinafter *Failed Suit*].

220. Turner, *supra* n. 217, at C1.

221. David M. Poole, *Wink Wink! Don't Let Legislators Fool You on Ethics, School Funding*, *Commentary, Virginian Pilot* (Norfolk) C3 (Apr. 3, 1994).

222. *Id.*

223. Faith E. Crampton, *Financing Education in the Twenty-First Century: What State Legislative Trends of the 1990s Portend*, 27 *J. of Edu. Fin.* 479, 483 (Summer 2001).

224. *Id.* at 482-483.

225. *Failed Suit, supra* n. 219, at A10.

decisions in the circuit court and supreme court, however, gave the state government little incentive to engage in the politically-costly work of closing the funding gap. The Coalition and their supporters had much more political capital when they were murmuring about a lawsuit that the state expected to lose than they did after they had filed and lost.²²⁶ But while the legislative response engendered by the *Scott* case was weak, the standards movement the case incited was vigorous and extensive.

B. Standards Movement

1. Standards of Quality

The 1971 Virginia Constitution mandated, for the first time, standards of quality that the public schools must meet.²²⁷ Section 2 of the Education Article requires that:

Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly.

The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds.²²⁸

The standards mandated by the constitution were originally drafted by the Board of Education and approved by the General Assembly in 1971, and a new Basic Aid formula was developed in 1972 to fund the new Standards.²²⁹ Both the Standards of Quality and the formula have been revised many times since their inception. Provisions in the original SOQ were relatively easy to quantify, but as the SOQ was revised to be more and more comprehensive, the requirements became harder and harder to cost out.²³⁰ The JLARC reports, discussed above, were an attempt to accurately

226. Telephone Interview (Terry), *supra* n. 97.

227. Finch, *supra* n. 4, at 10.

228. Va. Const. art. VIII, § 2.

229. Joint Legis. Audit and Rev. Commn., *Review of Elementary and Secondary School Funding* xiv (2001) [hereinafter JLARC III]. The Basic Aid formula was developed by a task force created by the Governor to determine the methodology for financing the SOQ. The task force included members of the General Assembly, staff members of the Attorney General's office, and DOE officials, and they based their calculations primarily on statewide average costs.

230. Va. Educ. Assn., *Report on Financing the Standards of Quality and Improving Teacher Salaries* iii (1982).

determine the cost of funding the more comprehensive SOQ.²³¹

The SOQ defines such things as the basic skills students need to gain from their education, the required student-teacher ratios for different classes and groups of students, the Standards of Accreditation, requirements for diplomas and certificates, teacher training and professional development, public involvement, and a policy manual.²³²

In addition, the SOQ directs the Board of Education to establish the Standards of Learning educational objectives in all subjects, including basic skills in communication, computation, critical thinking, problem solving, decision-making, computer and technology proficiency, personal finances, self-esteem, self-management, sociability, integrity, and honesty.²³³ These Standards of Learning (“SOLs”), adopted in the summer of 1995, represent the culmination of the standards movement in Virginia; with the SOLs, the Virginia Board of Education accomplished “a wholesale adoption of a new and very specific list of standards.”²³⁴

The state of Virginia, therefore, has had educational standards in place for several decades. However, the current standards movement in the state, which mirrors the nation-wide movement, is distinct from previous efforts at standardization in both the specificity of the standards and in the high stakes, to students and schools, of test results. This current standards movement was touched off in 1990 when the Disparity Commission urged the adoption of statewide standards as a substitute for an increase in funding. The Commission recommended that the General Assembly establish statewide education goals and curriculum by 1995, which would be measured by a common statewide standardized test.²³⁵ The SOLs were the realization of that standardization effort.

2. *Standards of Learning*

The Standards of Learning are minimum requirements in each grade level, kindergarten through twelfth grade, in the four core subjects of English, mathematics, science, and history and social science. As explained in state Board of Education materials, “[t]he standards set reasonable targets and expectations for what teachers need to teach and students need to learn. Schools are encouraged to go beyond the prescribed standards and to enrich the curriculum to meet the needs of

231. See JLARC I, *supra* n. 36, at Preface.

232. Va. Code §§ 22.1-253.13:1 to 22.1-253.13:8.

233. Va. Code § 22.1-253.13:1(B).

234. Telephone Interview with Mickey VanDerwerker, Pres., Parents Across Va. United to Reform SOLs (Apr. 12, 2003).

235. Bradley, *supra* n. 70, at 17.

all students.²³⁶ The SOLs were developed through public hearings and with the input of over five thousand people, including education experts, parents, teachers, interested community members, and business people.²³⁷

School boards are required to implement the SOLs in their schools by developing a program of instruction for kindergarten through the twelfth grade that emphasizes “reading, writing, speaking, mathematical concepts, computations, computer and technology proficiency, scientific concepts and processes, citizenship, Virginia history, world history, U.S. history, economics, government, foreign languages, international cultures, health and physical education, environmental issues...”, geography, fine arts, and practical arts.²³⁸

Testing is a major tenet of the standards movement. SOL testing began in 1998 and includes end-of-course or end-of-grade tests in English, mathematics, science, and social studies.²³⁹ Schools, students, and school districts are all evaluated on the basis of student scores on these assessments, which commentators have called “draconian, high stakes tests.”²⁴⁰ Any student who fails all four of the SOL tests in third grade, fifth grade, or eighth grade must attend a summer school program or other remediation program, and all students must pass at least six exams in high school courses to be eligible for graduation.²⁴¹

In addition to the consequences for the individual student, student achievement on the SOLs is now the primary basis of evaluating schools for accreditation.²⁴² The Board of Education sets the Standards of Accreditation, which are required by the SOQ to include student outcome measures. Local school boards are responsible for maintaining schools that meet the Standards of Accreditation and all schools are reviewed annually to determine their accreditation status.²⁴³ Schools

236. Va. Bd. of Educ., *Standards of Learning Currently in Effect for Virginia Public Schools, Foreword*, <<http://www.pen.k12.va.us/VDOE/Superintendent/Sols/foreword.pdf>> (current version available at <<http://www.pen.k12.va.us/VDOE/Superintendent/Sols/home.shtml>> (accessed Feb. 28, 2004)).

237. *Id.*

238. Va. Code Ann. § 22.1-253.13:1(C).

239. Va. Code Ann. § 22.1-253.13:3.

240. Telephone Interview (Salmon), *supra* n. 162.

241. Va. Code Ann. § 22.1-253.13:1; Va. Bd. of Educ., *Requirements of the Standards of Accreditation for Students, High School Graduation Requirements* <<http://www.pen.k12.va.us/VDOE/Parents/soastude.html>> (last updated in Sept. 2001); Telephone Interview (VanDerwerker), *supra* n. 234.

242. Bd. of Educ., *Brief Summary Final Regulations, Regulations Establishing Standards for Accrediting Public Schools in Virginia* <<http://www.pen.k12.va.us/VDOE/Accountability/soabriefsum.pdf>> (accessed Feb. 28, 2004); 8 Va. Code Ann. § 20-131 *et seq.*

243. Va. Code Ann. § 22.1-253.13:3 (D).

identified for improvement submit corrective action plans and are assisted by the Superintendent of Public Instruction in meeting the goals of their plan.²⁴⁴ By the 2003–04 school year, 75 percent of the third and fifth graders in a school will have to pass the English test for the school to be Fully Accredited.²⁴⁵

3. *Are the Standards of Learning a Subset of the Standards of Quality?*

The relationship between the SOLs and the SOQ is unclear. The Board of Education and JLARC both understand the SOLs to be part of the SOQ, and the structure of the multiple standards suggests that they are to be read as one comprehensive system. Two provisions in the SOQ themselves, however, suggest that the SOLs are not to be read as a subset of the SOQ.

The first provision in the SOQ that suggests the General Assembly may not have intended for the SOLs to be part of the SOQ says that the SOLs shall not be construed to be regulations as defined in § 2.2 4001 of the Administrative Process Act. That section says: “‘Rule’ or ‘regulation’ means any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.” The second provision says, “The standards of quality shall be the only standards of quality required by Article VIII, Section 2 of the Constitution of Virginia.”²⁴⁶ Presumably, the intent of these two provisions is to attempt to eliminate any ability to sue based on the SOLs. But many government bodies do not seem convinced: Despite these provisions, two authoritative bodies—the Board of Education, which writes and enforces the SOLs, and JLARC, a legislative commission—nonetheless believe the SOLs *are* part of the SOQ.

The Standards of Quality direct the Board of Education to determine and prescribe Standards of Learning educational objectives for students and local school divisions.²⁴⁷ The Board of Education understands those SOLs to be part of the SOQ: “As specified by the SOQ, the Standards of Learning are the minimum grade level and subject matter educational objectives that students are expected to meet in Virginia public schools. The educational objectives describe the knowledge and skills ‘necessary for success in school and for preparation for life.’”²⁴⁸ The fact that the

244. Va. Code Ann. § 22.1-253.13:3.

245. Bd. of Educ., *supra* n. 242.

246. Va. Code Ann. § 22.1-253.13:8.

247. Va. Code Ann. § 22.1-253.13:1.

248. Bd. of Educ., *Glossary of Terms Related to Public Education in Virginia* <<http://www.pen.k12.va.us/VDOE/Parents/glossary.html>> (accessed Jan. 15, 2004). The quoted

body in charge of establishing the Standards of Learning understands them as part of the SOQ is quite persuasive. Similarly, JLARC—which also has persuasive authority as a General Assembly commission—understands the SOLs as part of the SOQ. The JLARC report says:

The Standards of Learning have been incorporated into the State's SOQ framework. For example, the SOL are now important parts of standards 1 (basic skills, selected programs, and instructional personnel), 3 (accreditation), 5 (training and professional development), and 6 (planning and public involvement) in the codified SOQ.

While it is understandable that the SOL effort has required a substantial portion of the time and attention of recent boards, it appears that *other aspects of the SOQ* have experienced some neglect.²⁴⁹

Thus, according to JLARC's understanding as laid out in its official report, the SOLs are one aspect of the SOQ.

Furthermore, the structure of the Standards of Quality, Standards of Learning, and Standards of Accreditation suggest that they form one unitary system. The constitution requires that the Board of Education determine and prescribe “[s]tandards of quality for the several school divisions,” subject to revision by the General Assembly.²⁵⁰ Those Standards of Quality are codified in §§ 22.1-253.13:1 through 22.1-253.13:8 of the Code of Virginia. The Standards of Quality provide a statutory basis for both the Standards of Learning and the Standards of Accreditation. Standard 1 of the SOQ states that the Board of Education shall establish educational objectives called the Standards of Learning to carry out the goals of the SOQ and Standard 3 of the SOQ states that Board of Education shall promulgate regulations establishing standards for accreditation.²⁵¹ Thus, the Standards of Learning are the vehicle for carrying out the Standards of Quality. The Standards of Accreditation, in turn, rely on the Standards of Learning tests by conditioning school accreditation and student graduation on SOL test performance.²⁵² Thus the SOQ, SOLs, and SOA form an integrated structure of Standards.

language—“necessary for success in school and for preparation for life”—comes from the first paragraph of §22.1-253.13:1 of the Code of Virginia, which says, “The General Assembly and the Board of Education believe that the fundamental goal of the public schools of the Commonwealth must be to enable each student to develop the skills that are necessary for success in school and preparation for life. . . .” (internal citation omitted).

249. JLARC III, *supra* n. 229, at 41 (emphasis added).

250. Va. Const. art. VIII, § 2.

251. Va. Code §§ 22.1-253.13:1 to 22.1-253.13:8; *see also* JLARC III, *supra* n. 229, at 3.

252. Va. Code Ann. § 22.1-253.13:1.

C. State of Education Today

Neither the legislative response nor the standards movement has solved the funding problems that brought students and school districts into court in the early 1990s. The overall level of spending *has* increased somewhat since the *Scott* suit, but that's not saying much: state funding, measured on a constant dollars per-pupil basis, dropped from 1990 to 1992, and not until 1998 did state funding again roughly equal 1990 levels. Furthermore, budget numbers from the most recent years suggest the state is again sliding backwards: the state's planned spending level for 2002 was \$4.015 billion, which is a 1 percent increase in actual dollars over the 2001 spending level. On an inflation-adjusted, per pupil basis, however, state funds were approximately \$3,339 per pupil in 2002 as compared to \$3,389 per pupil in 2001.²⁵³

The percentage of school funding that comes from the state is below the national average. In Virginia, the state pays about 42 percent of education costs, while the national state average is 50 percent.²⁵⁴ Since 1993, the state has committed to paying 55 percent of the SOQ costs. The total operating costs for schools, however, greatly exceed the SOQ costs, resulting in a dilution of the state SOQ funds.²⁵⁵ The result is that the state actually pays only 42 to 47 percent of education costs.²⁵⁶ Virginia's average teacher salary of \$38,744 is also below the national average, \$41,820.²⁵⁷

1. Funding Disparities

In addition, the funding disparities among school districts have not decreased. In 2000, the lowest spending school district spent \$6,164 per pupil, while the highest-spending district spent \$11,697.²⁵⁸ Back when the *Scott* suit was filed, the numbers were \$3,819 in the lowest-spending district and \$9,119 in the highest-spending district.²⁵⁹ Thus, the overall level of spending per student has increased since *Scott*, but the \$5,533 disparity in 2000 is remarkably similar to the \$5,320 disparity in 1991.²⁶⁰

253. JLARC III, *supra* n. 229, at 18–19.

254. *Id.* at 19–21.

255. *Id.* at ii, 5.

256. *Id.* at iii, 19–21.

257. *Id.* at 19–21.

258. *Id.* at xxix.

259. Turner, *The Difference is Appropriation*, *supra* n. 113, at E6.

260. In the 1991–92 school year, total per pupil expenditures ranged from \$9,119 in Falls Church to \$3,819 in South Boston. *Id.*

Comparison of Lowest and Highest Composite Index Localities in 2000²⁶¹

Locality	Composite Index	Local	State	Federal	State Sales Tax	Total
Lee County	.19	\$601	\$4,543	\$1,172	\$675	\$6,991
Petersburg City	.23	\$776	\$3,960	\$842	\$587	\$6,164
Falls Church	.80	\$8,798	\$1,137	\$179	\$596	\$10,710
Arlington County	.80	\$9,385	\$1,182	\$453	\$677	\$11,697

Strong evidence suggests that these funding differences are making a difference. Virginia has identified thirty-four schools in nine districts as needing improvement under the federal *No Child Left Behind Act of 2001*. Under the Act, a school is identified as needing improvement if it fails to meet state achievement objectives in reading or math for two consecutive years. Schools in Lee County, Petersburg City, and Portsmouth City—three of the five lowest spending districts and, interestingly, three of the plaintiff districts in the *Scott* case—account for twelve of the thirty-four schools listed. Schools in the city of Richmond account for seventeen, leaving only five schools that need improvement throughout the rest of the entire state.²⁶²

Funding disparities, therefore, are as wide as they were before the *Scott* litigation despite an apparent increase in the overall level of funding. Paralleling the funding disparity story is a similar story of achievement disparity: Despite apparent increases in student achievement on test scores and other measures, achievement disparities between the highest-achieving students and the lowest-achieving students continue.

2. Achievement Disparities

According to standardized test scores from the mid-1970s (when the Standards of Quality were enacted) through the present, Virginia's students have consistently performed at or above the national average.²⁶³

261. JLARC III, *supra* n. 229, at xxix.

262. Va. Dept. of Educ., *State Summary: Virginia Schools Identified for Improvement Under the No Child Left Behind Act of 2001* < <http://www.pen.k12.va.us/VDOE/src/vasrc-nclb.shtml>>; see also JLARC III, *supra* n. 229, at xxix.

263. The tests Virginia students have taken over the years include the Science Research

Because the standardized tests used to assess students have changed over time, and because students' scores tend to increase from the first year of any given test until a new test is administered, it is difficult to compare scores across a span of years. The table below excerpts the beginning and ending years on two tests, the Science Research Associates Achievement in 1974 (representing the beginning of the SOQ) and in 1980, and the Stanford 9 in 1998 and 2000. It appears that since 1974, students' scores have dropped significantly in reading in grade 4; increased significantly in reading in the later grades; remained about the same or increased slightly in grade 4 math; and increased in later-grade math.²⁶⁴

Nationally Normed Scores of Virginia Students on Standardized Tests²⁶⁵

(National Avg. = 50)

Year	Reading, Grade 4	Reading, Grade 9	Reading, Grade 11	Math, Grade 4	Math, Grade 9	Math, Grade 11
1974-75	51	-	47	45	-	50
1980-81	63	-	47	59	-	50
Fall 1998	50	58	-	53	54	-
Fall 2000	53	60	-	60	55	-

These test scores paint a mixed picture of student achievement in Virginia; unfortunately, even that picture is deceptively cheery because state averages do not show the poor job Virginia is doing educating certain groups of children. The SOL tests, which were not instituted until 1998, can illustrate the test score gaps between ethnic groups.

Standards of Learning tests (discussed above) are given in grades three, five, and eight, and in high school. The tests were first given in 1998, and students' scores have increased on all tests in the ensuing years, including double-digit increases on twenty-three of the twenty-eight assessments.²⁶⁶ In 2002, the performance of Virginia's students improved on twenty-three tests compared with the results from 2001, with increases on some test scores as large as twenty-two and twenty-five percentage points *in that one year alone*. In addition, none of the scores on the remaining five tests decreased by more than four points.

Associates Achievement tests, the Virginia State Assessment Program tests, the Iowa Test of Basic Skills, and the Stanford 9. JLARC III, *supra* n. 229, at 23.

264. *Id.*

265. *Id.*

266. Va. Bd. of Educ., *Raising Student Achievement: A Standards of Learning Update*, 1 (Feb. 2002) [hereinafter *Raising Student Achievement*].

Cumulative improvements on SOL tests since the first tests were given in 1998 are even more dramatic.²⁶⁷ The improvements are most pronounced in the following classes:

SOL Test	1998 Pass Rate (%) ²⁶⁸	2002 Pass Rate (%)	Change 2001–2002	Change 1998–2002
Grade 5 history and social studies	33	72	+9	+39
Grade 8 history and social studies	35	78	+22	+43
High school Algebra II	31	77	+3	+46
High school World History II	41	79	+14	+38

Thus, statewide, Virginia's students are improving dramatically as measured by the SOL tests. Furthermore, 2002 pass rates are above 70 percent—the pass rate each school must have to be fully accredited—on *all* tests except eighth grade English.²⁶⁹ These results, however, mask two deficiencies: First, while statewide average scores are above 70 percent, the scores of students who are ethnic minorities are well below 70 percent on many tests. Second, while SOL test scores are improving, students' scores on other standardized tests are stagnant or even decreasing.

The racial gap in SOL test scores is profound. Virginia appears to be doing a particularly poor job of educating its African American and Hispanic students. Because the black–white gap is most often talked about, it is instructive to look at the tests showing the largest gap in test scores between Caucasian students and African American students in 2002. They are:

- Grade 5 science, with a gap of thirty-two points. Caucasian students had a passage rate of 86 percent and African American students had a passage rate of 54 percent. Next to African American students, Hispanic students had the lowest passage rate at 64 percent.
- High school earth science, with a gap of thirty-one points. Caucasian students had a passage rate of 80 percent and African American students had a passage rate of 49 percent. Next to African

267. Va. Dept. of Educ., Div. of Assessment and Reporting, *Virginia Standards of Learning Assessments: Statewide Spring Passing Rates* (Oct. 2002).

268. *Id.*

269. *Id.*

American students, Hispanic students had the lowest passage rate at 56 percent.

- High school geometry, with a gap of thirty points. Caucasian students had a passage rate of 83 percent and African American students had a passage rate of 53 percent. Of the students whose ethnicity was known, Hispanic students had the next lowest passage rate at 71 percent.²⁷⁰

The average black–white gap across all SOL tests in 2002 was twenty-three points, and the smallest black–white gap was fourteen points in high school English writing. The Hispanic–white gap on that test was 9 points.²⁷¹ More shocking, but also encouraging, is the finding that the racial gap used to be even higher for the three tests detailed above; for example, the 1998 black–white gaps were thirty-six points, thirty-eight points, and thirty-four points, respectively.²⁷²

But while the gap in SOL pass rates between black and white students has been shrinking during the past five years, the SAT gap has widened: black males' average SAT scores were lower in 2002 than in 1998, while white males' average scores have risen since 1998. The resulting gap is more than one hundred points.²⁷³

The Southern Regional Education Board (“SREB”) issued a report comparing SAT scores from 1992 with scores from 2002. Virginia showed slight improvements in both measures for the decade studied, with a 3.5 percent increase in scores and a 2 percent increase in number of test-takers. The average score in Virginia is still slightly lower than the national average score, but the percentage of students taking the test is much higher.²⁷⁴

Comparison of SAT Scores and Percentage of Students Tested in 1992 and 2002²⁷⁵

	1992 % tested	1992 Avg. score	2002 % tested	2002 Avg. score	Point increase from 1992–2002
Virginia	66	995	68	1016	21

270. Va. Dept. of Educ., Div. of Assessment and Reporting, *Virginia Standards of Learning Assessments: Percent of Students Passing SOL Tests Spring 1998–2002, by Ethnicity* (Oct. 2002) [hereinafter *Percent Passing by Ethnicity*].

271. *Id.*

272. *Id.*

273. Parents Across Va. United to Reform SOLs <<http://www.solreform.com/SATlook.htm>> (accessed Feb. 28, 2004).

274. S. Regl. Educ. Bd., *ACT and SAT Scores in the South: The Challenge to Lead 5–6* (2003) (available at <http://www.sreb.org/main/highschools/college/ACT_and_SAT.asp> (accessed Feb. 28, 2004)). The SREB notes that the lower the participation rate, the higher the average score will be.

275. *Id.*

Nation	42	1001	46	1020	19
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Critics of the study complain that because students self-select to take the SAT, and because the only students who need SAT scores are those who plan to apply to college, SAT test results can only reveal the attainments of the highest-achieving students. In addition, the SREB report looks at only two snap-shots in time, separated by a ten-year span. Parents Across Virginia United to Reform SOLs addressed this shortcoming by dividing the data into two five-year periods: the five years pre-SOL testing and the five years post-SOL testing. Parents Across Virginia discovered that while Virginia's SAT scores did rise over the ten-year periods, they were already rising in the years before the SOL testing started, and they have not risen any faster since then. The rate of increase during the post-SOL years was no greater than during the pre-SOL years.²⁷⁶ More disturbing is the trend apparent in the SAT participation rate. As noted by SREB, the participation rate rose slightly during the ten-year period. However, "[i]n the first five years of the 1992–2002 decade, participation rates rose by about 9.5 percent and in the last five years of the decade, *participation rates have actually declined*."²⁷⁷

Finally, while SOL scores have risen, scores on other standardized tests do not reflect those gains. National Assessment of Educational Progress ("NAEP") tests are given in math, reading, science, and writing. Each subject area is not assessed annually and not every student takes the test or answers all of the questions on a given test. Instead, the tests are administered in the fourth and eighth grades and groups of students take a sampling of the questions rather than the entire test. Based on those scores, the NAEP makes inferences about achievement of the statewide student population as a whole.²⁷⁸

The NAEP reading tests were administered in 1992, 1994, and 1998. Scores on the reading test dropped precipitously from 1992 to 1994, and then increased from 1994 to 1998 but not to 1992 levels. Because scores dropped nation-wide in 1994, it is difficult to make comparisons based on this NAEP data.²⁷⁹ The Virginia Board of Education does rely on this

276. Parents Across Va. United to Reform SOLs, *supra* n. 273.

277. *Id.* (emphasis in original).

278. Parents United Across Va. to Reform SOLs, *How Are Virginia Students Faring on Other Measures of Student Achievement?* < www.solreform.com/achievement.htm > [hereinafter *How Are Virginia Students Faring*].

279. When NAEP reading scores dropped across the nation in 1994, it was widely believed that the drop had more to do with technical problems with the tests rather than a drop in student achievement. *How Are Virginia Students Faring*, *supra* n. 278.

data, however, to misleadingly state: "Since the adoption of the revised Standards of Learning in 1995, the average score of Virginia fourth graders on the National Assessment of Educational Progress (NAEP) reading test has risen five points and is now three points higher than the national average."²⁸⁰

NAEP math tests were given in 1990, 1992, 1996, and 2000. NAEP scores rose between 1996 and 2000 for both fourth grade and eighth grade, but, importantly, the percentage of students excluded from NAEP testing increased as well. The more students that are excluded, the more likely it is that mean scores will increase, because the excluded students tend to be the lowest performers. Virginia's rate of exclusion of students increased at one of the fastest rates in the nation. Finally, NAEP science tests were given in 1996 and 2000 to 8th graders. Despite SOL pass rates that rose from 71 percent in 1998 to 82 percent in 2000, NAEP Science scores did not differ significantly from 1996 to 2000. Thus rising SOL scores are not completely reflected in NAEP scores.²⁸¹

Similarly, the Stanford 9 test scores do not strongly reflect the rising SOL scores.²⁸² The Stanford 9 is a standardized test that has been administered in fourth, sixth, and ninth grade in reading, math, and language.²⁸³ Scoring is reported as a percentile ranking, comparing each child to a normed sample, and the average score is 50. In the fourth grade, Stanford 9 scores are up four percentile points since 1998 (from fiftieth percentile to fifty-fourth percentile), while third grade SOL reading pass rates have risen from 55 percent to 72 percent. Math has gone up from the fifty-third percentile to the sixty-first percentile on the Stanford 9, while the rise in third grade math SOL pass rates skyrocketed from 63 percent to 80 percent. Similarly, in grade six, the Stanford 9 scores in reading rose one percentile point from 1998 to 1999 and then have stagnated since then at the fifty-ninth percentile; fifth grade pass rates on the reading SOL, however, rose from 68 percent to 78 percent. In math, Stanford 9 results showed a jump from the fifty-eighth to sixty-sixth percentile between 1998 and 2001; fifth grade math SOL results showed a tremendous increase in students passing from 47 percent to 71 percent. Finally, in the ninth grade, average percentiles on the Stanford 9 math and reading tests have remained invariable at the sixtieth percentile in reading and the fifty-fifth percentile in math. Meanwhile, pass rates on the SOL reading test between 1998 and 2002 rose from 65 percent to

280. *Raising Student Achievement*, *supra* n. 266, at 1.

281. *See How Are Virginia Students Faring*, *supra* n. 278.

282. Interestingly, the Stanford 9 and SOL tests are developed by the same company. *See id.*

283. The General Assembly stopped funding Stanford 9, so students will no longer be taking these tests. *See Telephone Interview (VanDerwerker)*, *supra* n. 234.

69 percent, and SOL math pass rates rose from 53 percent to 71 percent. Thus the Stanford 9 test scores do not reflect the gains that the SOL test scores report; while there have been increases in fourth grade Stanford 9 scores, scores in the upper grades have remained stagnant.²⁸⁴

Finally, other measures of achievement also suggest that Virginia's students are not doing as well as the SOL test results suggest. The percentage of students earning standard and advanced diplomas are dropping; the percentage of Virginia students making a three or better on advance placement ("AP") tests is dropping and Virginia is not keeping pace with national gains in AP test participation rates; and the participation rate in SAT II is dropping while national participation is going up.²⁸⁵ These funding and achievement disparities could be the factual basis for a successful adequacy suit in Virginia today.

VI. OPENING A WINDOW: VIRGINIA IS RIPE FOR AN ADEQUACY SUIT

It is generally far easier for a court to look at a funding system and declare that the numbers are not equal than it is for the court to look at an educational system and say that it is not adequate.²⁸⁶ In Virginia, however, several factors may make the courts especially likely to be receptive to adequacy claims, including precedent set by the *Scott* case, state politics and balance of power issues, favorable language in the JLARC report, and the structure of state standards currently in place.

A. Precedent Set by *Scott*

While the history of the constitution demonstrated the framers' intention not to require equity, the constitution's adequacy requirement is clear and, importantly, confirmed by the Virginia Supreme Court's decision in *Scott*.²⁸⁷ In that decision, the court said that some portions of the Education Article were aspirational and other portions were mandatory. The court held that in Section 1, the language requiring a

284. Parents United Across Va. to Reform SOLs, Homepage <<http://www.solreform.com>> (accessed Feb. 28, 2004).

285. See Parents United Across Va. to Reform SOLs, *Beyond [R]ising SOL [P]ass [R]ates* <<http://www.solreform.com>>.

286. Patt, *supra* n. 184, at 562.

287. In addition, the lower court decision in *Scott*, which was upheld by the supreme court, contains strong language supporting an adequacy claim. Judge Hughes wrote in his opinion letter that "the only funds which must be provided are those necessary to cover the 'cost of maintaining an educational program meeting the prescribed standards of quality.'" *Scott*, slip op. at 7 (internal notations omitted). Judge Hughes concluded that "the Virginia Constitution does not now mandate equality of funding for school districts in Virginia, *except for meeting minimum educational standards.*" *Id.* at 9.

system of free education was mandatory, but the language regarding seeking to ensure an educational program of high quality was aspirational.²⁸⁸ All of the language of Section 2 concerning the standards of quality, however, was mandatory. Therefore, the court stated, “the provisions of Article VIII plainly mandate that each school division provide an educational program meeting standards of quality as determined and prescribed by the General Assembly.”²⁸⁹ In finding against the Students, the court reiterated that “the Constitution requires the General Assembly to determine the manner of funding to provide the cost of maintaining an educational program that meets the prescribed standards of quality . . . and the Students do not contend that the manner of funding prevents their schools from meeting the standards of quality.”²⁹⁰ Thus the supreme court decision—along with a plain reading of the constitutional language and an understanding of the segregation-ending constitutional history—suggests that an adequacy suit would succeed in Virginia.

B. State Politics and Balance of Power

In addition to strong factual and legal bases, an adequacy suit in Virginia stands a better chance than the equity suit did because of state politics and balance of power issues. Adequacy appeals to norms of fairness and opportunity and speaks to assisting the most troubled school systems rather than making the high-achieving school districts a focus.²⁹¹ As discussed in a previous section, the high-spending Northern Virginia school systems resented being labeled the state’s “fat cats,” and legislators and voters from those areas balked at any equity proposals that would level-down the state’s education funding and achievement. An adequacy suit, in contrast, leaves room to applaud high-achieving districts while assisting less successful ones.

In addition, adequacy litigation appeals to many high cost urban school districts. During the *Scott* litigation, Richmond and Fairfax complained that they must educate more free-lunch kids and more kids for whom English is a second language, making their costs higher and justifying the greater expenditure on their schools. With adequacy remedies, aid can be directed to schools with students who are not achieving, not just to the poorest school districts over all.²⁹²

288. *Scott*, 443 S.E.2d at 142.

289. *Id.* at 141–142.

290. *Id.* at 142.

291. Heise, *supra* n. 84, at 1175.

292. *Id.*

On the balance of the power front, the Virginia courts are more likely to deal with adequacy than to punt it back to the legislature the way they did with equity. Taxing, funding, and spending claims raise political and policy questions for which the legislature was designed, making some courts hesitant to override the legislative funding scheme for separation of powers reasons.²⁹³ In the *Scott* equity suit the supreme court said, “[W]hile the elimination of substantial disparity may be a worthy goal, it is simply not required by the Constitution. Consequently, any relief to which the Students may be entitled must come from the General Assembly.”²⁹⁴ The court thought the *Scott* case presented a nonjusticiable policy question rather than a constitutional question. Because the adequacy question is more clearly constitutional than the equity question was, the courts may be more comfortable deciding for plaintiffs:²⁹⁵ “Though it may be true that most education cases feel the heat of separation of powers issues, plaintiffs that give the court a road of adjudication clearly within its jurisdiction and responsibility . . . most often lead the court to a decision in favor of the education clause.”²⁹⁶ An adequacy question under the education clause grounds the court’s work in concrete constitutional language that “gives the courts a measuring stick and leaves them to constitutional interpretation.”²⁹⁷

C. JLARC III

In 2001, the Joint Legislative Audit and Review Commission issued its third report on school funding in Virginia. This most recent JLARC study was more comprehensive than the earlier studies, and its findings are more dramatic: JLARC III recommended that the state address its funding of the state standards, the sufficiency of the standards, and state recognition of costs beyond SOQ levels—changes that would, in total, amount to \$2.7 billion in additional state funds to education over the 2003–04 biennium.²⁹⁸

293. Jensen, *supra* n. 190, at 34–35.

294. 443 S.E.2d at 142–143.

295. Jensen, *supra* n. 190, at 34–36.

296. *Id.* at 37.

297. *Id.* at 36–37.

298. JLARC III, *supra* n. 229, at vii, xxiii. JLARC identifies a variety of actions the state could pursue to “enhance its support of elementary and secondary education” and divides them into three tiers. *Id.* at xxii. Tier One involves adjusting the methodology for estimating the SOQ costs (*infra*) and meeting the state share of those costs; completing the objectives in the first tier would cost \$480 million more in 2003 and \$580 million more in 2004 than what the state spent in 2002. Tier Two would provide state funding for operating costs that are not now part of the SOQ but that are being funded by the majority of school divisions; the second tier would cost \$361–\$508 million more in 2003 and \$375–\$526 million more in 2004 than what the state spent in 2002. JLARC made recommendations

The results of this most recent JLARC study are reported at length below, but it is important to note here that the findings and language of the report are highly favorable to proponents of an adequacy suit. The study declares that the state's estimation of the cost to fund the SOQ is too low because it is outdated and inaccurate. For example, after tracing the messy history of the state's current costing-out approach, JLARC states: "As a result, the State appears to be in a weaker position to defend its cost estimates as being realistic in relation to current costs for education."²⁹⁹ Furthermore, the report finds that the SOQ standards themselves are set too low compared to the schools' prevailing practices.³⁰⁰ Such findings, by the legislature's own committee, seem to make an adequacy claim especially likely to succeed.

D. Ironically, the Standards Themselves

The people of Virginia added the Standards of Quality to their constitution in 1971 and in 1995, the Board of Education added the Standards of Learning. The Standards give Virginia, in effect, an "educational standard of care" courts can rely on when assessing the adequacy of a school funding system.³⁰¹ Not only will such standards give the courts concrete measures to look to in invalidating the current scheme, but they will guide the court in determining what scheme would be constitutionally valid.

One of the biggest criticisms of school finance litigation deals with judicial competency to define what an "adequate education" is. The Standards already in place in Virginia will allow state courts to rely on legislative and executive branch definitions of adequacy rather than having to craft their own. Thus, the Virginia courts can adopt the state's own definition of adequacy and simply direct the legislature to provide the funding for students and districts to meet the standards. Relying on existing standards does not completely solve the judicial competency problem, however, because the Virginia courts still must determine the relationship between standards and inputs. Which standards define

under Tier Two that the General Assembly consider funding a state share of the cost of the prevailing levels of elementary resource teachers and/or a twenty-one to one pupil-teacher ratio at the secondary school level. *Id.* at xxv. In addition, JLARC recommended that the General Assembly consider expanding support for at-risk preschool. *Id.* at xxvi. Tier Three addresses the policy goals of increasing state funding of capital costs (debt service) and increasing teacher salaries to meet the national average; funding the final tier would cost \$43-\$296 million more in 2003 and \$44 to 331 more in 2004 than what the state spent in 2002. The total estimated increased cost for funding all three tiers is \$884 million to \$1.3 billion in 2003 and \$1 to \$1.4 billion in 2004. *Id.* at xxiii.

299. *Id.* at 52.

300. *Id.* at xxii.

301. Heise, *supra* n. 84, at 1175-1176.

“adequate” in Virginia? And, what resources are necessary to achieve adequacy?

1. *Defining Adequacy*

Standards-based adequacy can be defined by *output standards*, such as a requirement that all students demonstrate reading and math proficiency, or by *input standards*, also called “opportunity to learn” standards, that require minimal levels of school funding, resources, and conditions.³⁰² The court in Kentucky, for example, used an output standard based on student achievement, stating that an adequate system must provide a child with seven essential competencies listed in the decision.³⁰³ The *Abbott* decisions in New Jersey, on the other hand, used an input standard, requiring wealthy and poor districts to be funded at the same level for regular education, plus poor districts to get additional funds and programs for special needs children in those districts.³⁰⁴

Some commentators have defined a hybrid system, called a *content and resource standard*, like the one used in Wyoming. There the court directed the legislature to define the best educational system, cost it out, and then fund it. The court made clear that lack of resources was not an excuse to under-fund education, and they included additional revenue for legitimate educational needs and variances among individuals, groups, and local conditions.³⁰⁵ Virginia would most likely define adequacy using a hybrid system similar to Wyoming’s. In Wyoming, the court directed the legislature to define the *best* educational system and fund it. In Virginia, by contrast, the court would look to the previously-established Standards of Quality and Standards of Learning as the state’s definition of an *adequate* or *minimum* education and require the legislature to fund it.³⁰⁶

The state repeatedly calls the requirements of the SOQ and SOLs a “minimum” that school divisions must provide. The statutory scheme that establishes the SOQ, for example, says: “Each local school board shall provide, *as a minimum*, the programs and services, as provided in the standards of quality prescribed above, with state and local funds as

302. Deborah A. Versteegen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education*, 24 J. of Educ. Fin. 51 (1998).

303. See *Rose*, 790 S.W.2d at 212. See also Versteegen, *supra* n. 302.

304. See Alexandra Greif, *Politics, Priorities, and Practicalities: New Jersey’s Experience Implementing the Abbott V Mandates* (unpublished paper on file with author).

305. See Versteegen, *supra* n. 302.

306. While the Standards of Learning are clearly output-based measures, the Standards of Quality are a combination of output criteria (basic skills students must acquire) and input criteria (student-teacher ratios).

apportioned by the General Assembly.”³⁰⁷ Information the Board of Education released to explain the SOLs to the public defines the SOLs as “*minimum requirements* in each grade level, kindergarten through twelfth grade, in the four core subjects.”³⁰⁸ The materials further explain that the SOLs set a foundation level only: “The standards set reasonable targets and expectations for what teachers need to teach and students need to learn. Schools are encouraged to go beyond the prescribed standards and to enrich the curriculum to meet the needs of all students.”³⁰⁹ Finally, the decisions in *Scott* understand the Standards as setting the minimum that the schools must provide: the circuit court repeatedly called the SOQ “*minimum educational standards*” that are required by the Virginia Constitution.³¹⁰ Similarly, the supreme court reiterated that the General Assembly must devise a system that “meets the prescribed standards of quality” and said that the students do not have a claim against the state because they “do not contend that the manner of funding prevents their schools from meeting the standards of quality.”³¹¹ Virginia, therefore, is ripe for an adequacy case that would ask the courts to declare the minimum educational standards embodied in the SOQ and SOLs to be the state’s own definition of “adequacy” and require the legislature to provide a system that fully funds those Standards.

2. *Setting an Adequate Level of Funding*

What does it mean to require the legislature to devise a system that fully funds the Standards? As mandated by the constitution, the Board of Education prescribes the Standards (subject to revision by the General Assembly) and the General Assembly determines how the Standards are to be funded. Currently, the Board of Education attempts to determine the minimum reasonable cost per pupil statewide of meeting the SOQ, and that cost is multiplied by the number of pupils in each school division to determine the estimated total cost of meeting the SOQ in each division. That estimated cost of meeting the SOQ for each division is then divided between the division and the state according to the composite index.³¹² The primary criticisms of this scheme are, first, that

307. Va. Code Ann. § 22.1-253.13:8 (emphasis added).

308. Va. Bd. of Educ., *supra* n. 241 (emphasis added).

309. *Id.*

310. *Scott*, slip op. at 9 (“For the foregoing reasons the Court finds that the Virginia Constitution does not now mandate equality of funding for school districts in Virginia, except for meeting minimum educational standards.”).

311. *Scott*, 443 S.E.2d at 142.

312. Dickey, *supra* n. 21, at 8.

the state's estimation of the *cost to fund* the SOQ is too low because it is outdated and inaccurate and, second, that the SOQ *standards themselves* are set too low compared to the schools' prevailing practices.

First, the state's estimation of the cost to fund the current Standards is unreasonably low.³¹³ The current approach is the result of a complex history that started in 1972 when a task force and the Board of Education recommended using statewide averages to calculate the costs.³¹⁴ The General Assembly never fully funded that estimate, however, so there has always been a funding gap between the actual, average costs and the state funding.³¹⁵ The method for determining the level of funding underwent further revisions in 1986 when JLARC recommended a new formula, based on aggregated minimum costs in a way that far understated the

313. The Virginia Education Association believes that the SOQ have been under-funded since their inception, citing a difference in the number of teachers included in the formula versus the number needed to teach students what the SOQ require; unrealistic assumptions about teacher salaries and inflation rates; and the General Assembly's reduction in funding below the level requested by the Board of Education. Va. Educ. Assn., *supra* n. 230, at iii (1982). The attorney general who defended the state in *Scott* says, "Everyone knows the state formula costs out the cost of education very low, so really a locality has to expend some tax effort on schooling if they want it to be funded adequately." Telephone Interview (Terry), *supra* n. 97.

314. JLARC III explained many of the deficiencies of the current funding system through an examination of the history of SOQ funding. The first method of estimating the cost of funding the SOQ was developed by a task force in 1972. The task force included members of the General Assembly, staff members of the Attorney General's Office, and Department of Education (DOE) officials, and they based their calculations primarily on statewide average costs. The DOE adopted the task force's methods and presented their estimation of the costs of funding the SOQ to the General Assembly. The General Assembly, however, did not fully fund the estimated cost, electing, instead, to set a lesser amount in the Appropriations Act. The difference between the Board of Education's estimated SOQ and the Assembly's estimated SOQ was known as the "funding gap." JLARC III, *supra* n. 229, at xiv. The funding gap caused considerable controversy and dissatisfaction, and in 1985, the General Assembly asked JLARC to develop a new methodology for estimating SOQ costs. The JLARC methodology—based on complex formulas that took actual school division costs into account, rather than being based on available funds, as the first SOQ estimation had been—was adopted the General Assembly in 1986. JLARC III, *supra* n. 229, at xvi.

The JLARC formula has been used since 1986, but changes made to the calculations in the 1990s have made the foundation cost estimates less realistic. The state dropped support costs for professional, administrative, and clerical staff from the cost estimating process entirely. Now the SOQ specifically state that school divisions are to employ the support personnel necessary to the operation of a school system, yet the state does not include those costs in estimating what it takes to fund the SOQ. JLARC III, *supra* n. 229, at 39. In addition, the state's present approach to estimating costs fails to keep cost estimates current. Under the state's approach, costs are only inflated from the first year of a biennium to the second year of that same biennium, and not for future years. For example, the budget accounts for inflation from 2000 to 2002 in estimating costs for the upcoming biennium, but then uses the 2002 costs to represent SOQ costs in 2003 and 2004. *Id.* Similarly, the SOQ systematically estimates teacher salaries too low. The state's approach to estimating SOQ teacher salaries for each new biennium begins with the assumption of no increase in salaries, even though average teacher salaries have increased in twenty-six of the last twenty-seven years. JLARC III, *supra* n. 229, at 39–40.

315. JLARC III, *supra* n. 229, at xiv.

actual costs to school districts of funding the SOQ.³¹⁶ Finally, during the fiscal crisis of the 1990s, the state made several changes that further reduced the estimated SOQ costs, including dropping support costs for professional, administrative, and clerical staff from the cost estimating process entirely (while retaining the mandate that schools employ such personnel).³¹⁷ The result is an unreasonably low estimation of the costs to fund the SOQ.

The JLARC report provides recommendations for adjusting the state's current approach to estimating SOQ costs in order to provide a more accurate and more current estimate. If those adjustments are implemented, the state's 55 percent share of SOQ costs for the 2003–2004 biennium would be \$1.06 billion more than what the state spent in 2002.³¹⁸

It is worth noting that the General Assembly has the authority to set the SOQ funding level at whatever level they choose.³¹⁹ However, the state's long-standing presumption has been that SOQ costs must be realistic in relation to prevailing costs.³²⁰ In 1972, the Task Force on Financing the Standards of Quality said implicit in the constitution are the ideas that “the Standards of Quality must be realistic in relation to current education practice” and that the “estimate of the cost of the Standards of Quality must be realistic in relation to the current costs for education.”³²¹ Opinions from the Attorneys General of the state, at each time when the issue has been examined, repeatedly assert that the cost estimation must be realistic. In 1973, the Attorney General stated that in “estimating the cost of implementing the Standards, the General Assembly must take into account the actual cost of education rather than developing cost estimates based on arbitrary figures bearing no relationship to the actual expense of education prevailing in the Commonwealth.”³²² Similarly, the Attorney General in 1983 said: “The legislative determination of cost may not be based upon arbitrary estimates with no reasonable relationship to the actual expense.”³²³

The second major criticism of the SOQ funding is that the SOQ

316. *VEA Prescription*, *supra* n. 58, at 2.

317. JLARC III, *supra* n. 229, at 39.

318. *Id.* at 40. The JLARC-revised foundation program would entail \$480 million more in 2003 and \$580 million more in 2004 as compared to 2002. This cost includes the \$389 million that is needed to fully fund the SOQ based on the state's current cost approach. *Id.*

319. JLARC III, *supra* n. 229, at 51.

320. *Id.* at 38, 51.

321. JLARC III, *supra* n. 229, at 38, 51 (quoting Task Force on Financing the Standards of Quality for Virginia Public Schools (Dec. 1972 and July 1973)).

322. JLARC III, *supra* n. 229, at 38.

323. *Id.* at 38, 51.

standards themselves are set too low compared to the schools' prevailing practices. In 1991, the Disparity Commission's first conclusion was that "all divisions, regardless of their local wealth, currently exceed the standards . . . suggest[ing] that the divisions view the [SOQ] as too minimal to provide a quality foundation program."³²⁴ Subsequent studies have found that, even during the financial crisis of the early 1990s, all schools exceeded the SOQ for course offerings and staffing.³²⁵ Today, the great majority of schools provide more instructional and resource staff and smaller classrooms than are recognized by the SOQ. In the aggregate, *all* school divisions employ more instructional staff than are calculated by the state model.³²⁶ Schools also provide smaller class sizes—while the SOQ for first grade maximum class size is thirty students, in 1999–2000, *not a single school in any division* in the state had a first grade classroom of thirty students. Ninety-five percent of school divisions had no first grade classrooms with more than twenty-six students, and half of the school divisions had first grade classrooms no larger than twenty-two students.³²⁷

These reports indicate that the Standards of Quality are not adequately defining a foundation program for Virginia. And although the Board of Education has free reign to set the Standards, subject to revision by the General Assembly, "the Standards cannot be prescribed in a vacuum but must be realistic in relation to the Commonwealth's current educational needs and practices."³²⁸ To be realistic in relation to the state's current needs and practices, the state must raise the Standards to include the practices and personnel that the schools consider minimally adequate. The JLARC report recommends increasing funding to include costs for practices that the majority of school divisions already engage in, including employing substantially more instructional and resource staff than are recognized by the SOQ cost model and having much smaller class sizes than are allowed under the SOQ.³²⁹

VII. CONCLUSION

The story of equity litigation in Virginia runs across four Aprils: from April 1991, when the Coalition issued its ultimatum to the

324. Denslow, *supra* n. 20, at 6 (quoting Gov.'s Commn. on Educ. Opportunity for All Virginians, *Final Report* 3).

325. *VEA Prescription*, *supra* n. 58, at 5. See also JLARC III, *supra* n. 229, at 104.

326. JLARC III, *supra* n. 229, at 122.

327. *Id.* at 125.

328. *Id.* at 43, quoting Attorney General opinion in 1973.

329. *Id.* at xxii, 122–125.

governor, to April 1992, when the Coalition voted to file the *Scott* suit, to April 1994, when the Virginia Supreme Court ruled that the state constitution does not require equity in school funding. However, the larger story of school finance in Virginia runs across many more Aprils than four. With its beginnings in the Education Article of the 1971 constitution, the statewide debate about education funding continues today. On May 28, 2003, the Board of Education invited the latest round of debate when they voted to expand the definition of a “basic education” and to increase funding by an additional \$323 million a year.³³⁰ Just as the disparity debates in the 1990s occurred in the shadow of threatened equity litigation, the current debates over the Standards of Quality and state funding occur in the shadow of possible adequacy litigation—litigation for which Virginia appears especially ripe, given the invitation in *Scott* and the claim-buttressing effect of the state standards.

330. Rosalind S. Helderman, *Virginia Board Rethinks Basics of Education*, Washington Post B4 (May 29, 2003).