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COMMENT

WILL MONTANA BREATHE LIFE INTO ITS POSITIVE CONSTITUTIONAL RIGHT TO EQUAL EDUCATIONAL OPPORTUNITY?

Hillary A. Wandler¹

A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.²

INTRODUCTION

Montana's constitution establishes the positive right of every Montanan to an equal educational opportunity.³ Unfortu-

1. I would like to thank the following people who provided invaluable editorial assistance: Tom Leonard, Malin Stearns, Professor David Aronofsky, Professor Robert G. Natelson, Assistant Professor Stacey Gordon, Professor Thomas P. Huff, Adjunct Professor Kristen Juras, and my mother, Deborah Biehl, a teacher in the Montana public school system since 1972. Any inaccuracies are solely my own.

2. JOHN RAWLS, A THEORY OF JUSTICE 3 (Belknap Press rev. ed. 1999). John Rawls was concerned with the basic structure of political and social institutions that "define men's rights and duties and influence their life prospects." *Id.* at 6. Rawls called for the reformation or abolishment of institutions that were found unjust. *Id.* at 3.

3. MONT. CONST. art. X, § 1. The provision reads:

Educational goals and duties:

(1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.

nately, Montana's courts and legislature have been unable to clearly define the equal opportunity mandated by the constitution. Perhaps the primary reason for this is a failure to recognize the Montana Constitution imposes two interrelated, yet distinct duties upon the state: (1) an obligation to maintain a certain standard of educational quality across the state; and (2) an obligation to offer an equal opportunity to receive an education at that standard.

In *Helena Elementary School District No. 1 v. State*,⁴ the Montana Supreme Court found a connection between the amount of money provided public schools and the quality of educational opportunity afforded public school students.⁵ Accordingly, the court concluded that different funding levels between school districts had resulted in different educational opportunities.⁶ One logical interpretation of the *Helena Elementary* decision is that equal dollars per student should result in equal educational opportunity. The legislative response to *Helena Elementary* indicates that is exactly the interpretation the Montana legislature has adopted.

In contrast to the equality standard, which the court has addressed, there is no clear line in Montana judicial precedent regarding the constitutional reference to quality public schools. The court has not interpreted the state's obligation with respect to quality. As a result, the legislature has shown confusion about the role of quality in school funding and its interaction with the clearly established standard of equal educational opportunity under the Montana Constitution. Montana's current public school funding scheme shows the legislature has seized the only standard Montana courts have defined—the equality standard—and interpreted that to mean equal or near-equal dol-

(2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.

(3) The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.

4. *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 55, 769 P.2d 684, 690 (1989), amended by 236 Mont. 61, 769 P.2d 684 (1990).

5. *Id.* ("We conclude that as a result of the failure to adequately fund the Foundation Program, forcing an excessive reliance on permissive and voted levies, the State has failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed under Art. X, Sec. 1, Mont. Const.").

6. *Id.*

lars per student will meet its constitutional obligation.⁷

Montana needs clarification of the relationship between equality and quality under its constitutional education provisions. The court should make clear that the Montana Constitution requires equality of *quality* educational opportunity, not just equality of *dollars* per student. In other words, equal quality does not result from simple fiscal equality. Part I of this article discusses the theory of equal educational opportunity. Part II traces the historical foundations of Montana school funding. Part III discusses the Montana constitutional guarantee of equal educational opportunity and educational quality, and Montana judicial and legislative interpretations of those constitutional provisions. Part IV looks outward for lessons from other state courts. Part V discusses current issues of inequality and inadequacy in Montana's school funding scheme. Once Montana's courts clarify the state's constitutional obligation with respect to both quality and equality, the legislature will have a framework within which to review per-student funding and set Montana's funding system on a logically sound foundation consistent with underlying constitutional policies and objectives.

I. THEORY OF EQUAL EDUCATIONAL OPPORTUNITY

Article X of the Montana Constitution is based on the theory of equal educational opportunity. However, competing understandings of this theory may cause confusion about the article itself. Does article X guarantee a just system in the sense that equalization will compensate the system's less advantaged members,⁸ or does the provision contemplate an equal minimum

7. Bruce Sievers noted in his essay on equal educational opportunity written for the Montana Constitutional Convention: "The simplest 'equal' distribution plan, of course, is a uniform per student or per capita allotment for an entire state. However, this ignores the expenditure-quality relationship, varying educational needs and questions of effort." BRUCE SIEVERS, STUDY NO. 17, at 60 (Mont. Const'l Convention Comm'n 1971-72).

8. John Rawls, in his book *A THEORY OF JUSTICE*, *supra* note 2, writes of a social contract under which individuals would agree to two basic principles of justice: (1) the principle of "greatest equal liberty;" and (2) the requirement that any inequalities, social or economic, "are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society." *Id.* at 13, 107. The second principle embodies the theory of equal opportunity. The Education and Public Lands Committee of the Montana Constitutional Convention acknowledged that Montana's education system must be based on fundamental principles of justice: "Clearly the [Montana] educational system must be directed to the elimination of blatant injustices which may predetermine [sic] a life-long disadvantage." II MONTANA CONSTITUTIONAL CONVENTION 723 (Mont. Const'l Convention Comm'n 1971-72) [hereinafter CONVENTION].

baseline with the option for some communities to provide more for their children?⁹

One understanding of equal educational opportunity is that it requires a system to focus attention on its least advantaged members and bring them onto an even playing field with others.¹⁰ It is common sense that some people will be born with a material advantage over others due to “social fortune or their luck in the natural lottery.”¹¹ A system based on equal educational opportunity would take those natural differences and shift them to compensate the disadvantaged.¹² Applying this understanding of equal opportunity to school funding, a funding scheme would only be justified if it improved the situation of educationally disadvantaged children. The state would have to focus its attention and funding on those children arbitrarily placed in poor school districts.¹³

Another understanding of equal educational opportunity is that it requires the educational institution to provide an equal minimum level of opportunity, accompanied by local freedom to

9. Professor Edward Foley takes a different view of equality of opportunity than Rawls. See Edward Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475 (1998). Foley adopts Rawls’ method of determining fundamental principles of justice—the “original position”—but within the context of educational opportunity, he disagrees with the principles of equality and redistribution to which Rawls adheres. *Id.* at 490. In contrast to the Rawlsian notion of equality of opportunity, Foley argues that from an objective unbiased position, an individual would choose “a guarantee of an adequate education, coupled with the parental freedom to spend more” on his or her own child. *Id.* at 492.

10. Anna Lukemeyer calls this the “equality” standard. ANNA LUKEMEYER, COURTS AS POLICYMAKERS: SCHOOL FINANCE REFORM LITIGATION 18 (LFB Scholarly Publishing LLC 2003). She asserts that a strict equality standard “implies no absolute minimum, and is satisfied so long as all districts spend equally (or provide equal resources), regardless of level.” *Id.* John Rawls would not likely endorse this concept of strict equality. He reasons that the expectations of those who are in a better social position are just only if they result in improving the expectations of those who are in the least favored position in society. RAWLS, *supra* note 2, at 87. In the context of educational resources, according to Rawls, the difference principle would focus on a distribution of resources that would “improve the long-term expectation of the least favored.” *Id.*

11. RAWLS, *supra* note 2, at 65. Rawls calls this the “difference principle.”

12. *Id.* Rawls refuses to accept natural positions of advantage or disadvantage as inevitably creating an unjust system.

13. Although Rawls’ theory is one envisioning ultimate mutual benefit or “harmony of interests” of the least and most advantaged, it would not necessarily require that the more advantaged initially benefit from the system. *Id.* at 90. Instead, Rawls suggests that those who are more advantaged have in essence been “compensated” in relation to those who are in a poorer position. *Id.* at 88. He would argue that focusing remedial attention on the least advantaged is the only just approach. *Id.*

provide more.¹⁴ Students are given equal opportunity up to a defined point, after which equality no longer operates. This understanding would endorse a funding scheme so long as it provided an equal minimum baseline. There would be no limit on the amount of resources each community could provide above the minimum baseline—equality would matter only up to the minimum funding amount, however high or low that may be.¹⁵

In deciding which understanding of equal educational opportunity is best for Montana's children, we should analyze the education system from an objective position.¹⁶ We should search for what we believe is a just system by identifying those principles we would agree to be bound by if we could end up any person in Montana—adult, child, rich, or poor. If from this reflection, we choose principles different from those under which we now operate, the injustice of our current practice will be clear. Our discussion about educational equality and quality would no longer be muted by our natural biases; it would be crystallized.¹⁷ The inquiry would become: Would I agree to the public school funding scheme if I were a child in any school in Montana?

One reason we might choose a minimum adequacy standard over a strict equality standard is that strict equality may result in "equalizing down." That is, if forced to focus funding on the

14. Foley, *supra* note 9, at 492. Anna Lukemeyer calls this the "minimum adequacy" standard. LUKEMEYER, *supra* note 10, at 17.

15. See LUKEMEYER, *supra* note 10, at 17-18 (noting that under a "minimum adequacy" standard, "[l]ocal districts are free to provide any amount of educational services beyond the amount defined as 'adequate,' but every district must provide its students some defined level of spending, educational resources, or skills.>").

16. This idea comes from John Rawls' "original position," where individuals agreeing to a social contract choose principles from a position that ensures the outcome is a fair agreement or bargain. RAWLS, *supra* note 2, at 15. In the hypothetical original position, principles are chosen from behind a "veil of ignorance." *Id.* at 118-23. In other words, an individual doesn't know any facts about his social or economic position in life, what natural abilities he has, or his conception of what is right or good. "No one knows his situation in society nor his natural assets, and therefore no one is in a position to tailor principles to his advantage." *Id.* at 120-21. All individuals are classless behind the veil.

17. Jonathan Kozol, noted for his works illustrating educational inequalities across the nation, observes:

'Despite a lot of pious rhetoric about equality of opportunity . . . most parents want their children to have a more than equal chance of success—which means, inevitably, that they want others, not all others but some others, to have less than equal chances.' . . . There is good reason, then . . . that 'discussion about educational inequalities is muted.' . . . The vocal elements of the community . . . 'find it hard to raise their voices on the one issue over which, in the present scheme of things, they can lose most of all.'

JONATHAN KOZOL, *SAVAGE INEQUALITIES 199-200* (1991) (internal citations omitted).

least advantaged students, the state might redistribute educational resources by taking some resources away from more advantaged students.¹⁸ Most would agree that public school students who happened to be in a better position should not be deprived of their resources.¹⁹ Thus, a remedy for an unconstitutional education system that would require the state to focus more attention and funding on the least advantaged students and schools—those who have fewer natural assets—would strike at the very heart of most people’s notion of “liberty.” After all, just because some students happened to end up in a wealthier school district does not mean they should be punished by being deprived of educational opportunities.

Before agreeing to a minimum baseline of educational equality, however, we must recognize that a system in which a student’s natural position in life works to the student’s advantage could create wide gaps between classes based on irrelevant factors. Equal educational opportunity could become an “equal chance to leave the less fortunate behind in the personal quest for influence and social position.”²⁰

Operating from an objective perspective, we would not choose a system allowing some students disparately more opportunities to advance than others because we could end up a disadvantaged student trapped in a financially strapped school. We would likewise reject a system requiring strict equality of dollars because it would likely require stripping resources from some more advantaged schools, one of which may be our own. In

18. Montana constitutional convention delegates voiced this concern: “[W]e recognize that, if in the future it is required that education be equalized across the districts, that this could jeopardize the quality of education, and we would not want to see this happen. And this is what we wish to safeguard against.” VI CONVENTION, *supra* note 8, at 1960 (statement of Delegate Harbaugh).

19. Kozol observes that society’s fear of equalizing down is not unique to the school funding issue, but part of a greater societal pattern of prioritizing personal advancement over the greater good:

[W]hile, on a lofty level, wealthy districts may be fighting in defense of a superb abstraction—‘liberty,’ ‘local control,’ or such—on a mundane level they are fighting for the right to guarantee their children the inheritance of an ascendant role in our society. There is a deep-seated reverence for fair play in the United States, and in many areas of life we see the consequences in a genuine distaste for loaded dice; but this is not the case in education, health care, or inheritance of wealth. In these elemental areas we want the game to be unfair and we have made it so; and it will likely so remain.

KOZOL, *supra* note 17, at 223. Since our advocacy is once removed—we don’t advocate for personal advancement, but rather our child’s best interests—living with a system that allows some children opportunities far beyond others is even easier.

20. RAWLS, *supra* note 2, at 91.

contrast, we would welcome a system that would be sensitive to each student's unique needs, each school's unique needs, and that would be funded accordingly. Then no matter where we fell in the system, we could be sure our individual needs would be addressed. We would also choose a system that, instead of decreasing overall quality in the name of equality, would increase the overall level of quality. Then, equalization would not harm us, regardless of whether we initially had the upper hand or were at a disadvantage. Based on these foundational principles, we can analyze Montana's system of funding public schools to determine if it creates an injustice for Montana's children.

II. HISTORICAL FOUNDATION OF MONTANA EDUCATION

A. Territorial Montana

One early Montanan painted a rosy picture of the future of Montana's education system in an 1865 editorial:

In every inhabited spot, let schools be erected. Humble and deficient in many respects they must be, at first, but in a marvellously short time, if the endeavors of the mothers and fathers of Montana are persistent and well directed, a school system shall arise in our midst, worthy of our name and station, and the riches our children will inherit will fall into hands fitted to receive them, and to apply them intelligently for their good and the welfare of the lands of their birth.²¹

Local support and control of small school districts was the natural beginning to public education in Montana's territorial history.²² The first School Act in 1865 provided for funding from three sources: sale of public lands,²³ a mandatory one-mill tax

21. SIEVERS, *supra* note 7, at 13 (quoting Editorial, MONTANA POST, Sept. 9, 1865). Bruce Sievers was a research analyst on the Constitutional Convention Commission created by the 1971 Legislative Assembly. STUDY NO. 17 was created for the Montana Constitutional Convention delegates.

The delegates to the 1971-1972 Montana Constitutional Convention will need historical, legal and comparative information about the Montana Constitution. Recognizing this need, the 1971 Legislative Assembly created the Constitutional Convention Commission and directed it to assemble and prepare essential information for the Convention. This series of reports by the Commission is in fulfillment of that responsibility.

Id. at iii.

22. *Id.* at 13.

23. C.R. ANDERSON, KNOW YOUR SCHOOLS: PUBLIC EDUCATION IN MONTANA 15 (1972). The public lands were provided by the federal government specifically for public

levy reserved for teachers' salaries, and allocation of criminal fines.²⁴ Individual families were expected to provide students' necessary books and supplies.²⁵ The state's duty to financially provide for a common school system was recognized in territorial statutes, but had no effect before statehood.²⁶

The quality and efficiency of the public educational system quickly became a concern in Montana. Because of sparse population and minimal centralized administration, a primary challenge in the territorial days was the expense of providing teachers' salaries and school buildings to the increasing number of small rural schools.²⁷ Superintendents began to call on the people for more tax support, and they stressed the importance of a more centralized and uniform system of schools.²⁸

B. Early Statehood

The state's role in providing financial support for public education was constitutionally recognized in Montana's initial stages of statehood beginning in 1889; its importance was carried over from the territorial emphasis on the necessity of an educated population.²⁹ In fact, the 1889 Constitution included a guarantee that the state would provide financial assistance to the public schools.³⁰ Article XI mandated that the legislature "establish and maintain a general, uniform and thorough system of public, free, common schools" which "shall be open to all children and youth between the ages of six and twenty-one years."³¹

education purposes, however no funds were derived from the lands until after Montana became a state. *Id.*

24. *Id.* Taxation was not a reliable source of funding because the mandated rate was not always applied or collected equally. *Id.* at 24.

25. *Id.* at 18.

26. SIEVERS, *supra* note 7, at 12-13 (citing THE ORGANIC ACT OF THE TERRITORY OF MONTANA OF 1864).

27. *Id.* at 13-14. Territorial Superintendent Hedges identified substandard school buildings, inadequate school terms, and unqualified teachers as some of the primary concerns during his term. *Id.* at 14. Some territorial schools educated as few as two students. *Id.*

28. *Id.* at 13-14.

29. *Id.* at 14.

30. *Id.* at 14; MONT. CONST. art. XI, § 6 (1889). Article XI, section 5 mandated distribution of funds "in proportion to the number of children and youths between the ages of six (6) and twenty-one (21) residing therein respectively." MONT. CONST. art. XI, § 5 (1889).

31. MONT. CONST. art. XI, §§ 1, 7 (1889). The territorial difficulty with small rural schools underscores the language of the 1889 constitutional education provision. Uniformity and centralization were of paramount concern; the cost of keeping a small school

Despite this mandate, public education continued to be funded substantially by individual communities within counties and school districts.³²

By the 1900s, funding inadequacies were already making their way to the courts.³³ Nevertheless, the Montana public school system basked in the light of national recognition in 1919, when a study of state education systems placed Montana first in the nation for financial support of public education.³⁴ Although there was some concern that the report would breed complacency and stem the progress in Montana's schools,³⁵ writings of the time describe a different reaction. Shortly after the report was published, a questionnaire was given to superintendents and principals in the state, exploring the reactions from individual school systems to the statistical findings.³⁶ The responses showed increased public interest in the education system since the report, and recognition of the challenges that Montana would face in the future:

In general Ayres' study had distinctly helped to increase public interest. It had not produced any community self-complacency. To the question of the validity and usefulness of the index number for determining educational advancement and achievement, there was a frank and discriminating reaction. Almost without exception, it was emphasized that the index number, in the form proposed by Dr. Ayres, omitted many of the vital factors of efficient education. The quality and method of instruction, the extent of supervision, the training and competency of teachers, the variety of educational opportunity, and the success of teaching as determined by its measured results, were most frequently specified.³⁷

Montanans appeared to recognize that substantial problems

open did not decrease simply because only two pupils attended. SIEVERS, *supra* note 7, at 14.

32. See *Helena Elementary Sch. Dist. No. 1 v. State*, 7 Mont. Educ. Law 14, 16 (1st Jud. Dist. Ct. Jan. 13, 1988).

33. See *Jay v. Sch. Dist. No. 1 of Cascade County*, 24 Mont. 219, 61 P. 250 (1900). In *Jay*, a public school teacher sued district trustees for her salary, which had not been paid due to lack of school funds. *Id.*, 24 Mont. at 221, 61 P. at 250. A local bank was paying teachers' salaries, and teachers were then assigning their claims against the district to the bank. *Id.* The court held that since the trustees are not given funding power, "[i]t is the fault of the legislature or the taxing authorities that ample means are not provided to continue the schools." *Id.*, 24 Mont. at 231, 61 P. at 254.

34. SIEVERS, *supra* note 7, at 15. The "Ayres Report" was published by the Russell Sage Foundation. *Id.*

35. *Id.*

36. Edward C. Elliott, *The Ranking of Montana's Educational System*, 62 EDUC. REV. 91, 94-95 (Sept. 1921).

37. *Id.* at 95.

loomed in the background of their purported national success.³⁸ Seven years later, another national study ranked Montana thirteenth in financial educational support.³⁹

The difficulties of equitably supporting both rural and non-rural districts became more pronounced over time.⁴⁰ As in the territorial days, a great portion of the school-aged children in Montana remained in poor, rural school districts.⁴¹ With local taxpayers continuing to assume the bulk of educational expenses, more populous districts were inevitably far better funded than small rural districts.⁴² In 1927, the legislature attempted to address these problems by establishing a State Common School Equalization Fund.⁴³ The equalization fund was designed to make up for lack of financial support in the smaller rural school districts, and it was somewhat successful in that goal.⁴⁴ However, overall financial support waned over the next few years, and the education system took a downward spiral into the Depression and World War II.⁴⁵

C. The School Foundation Program

The state eventually recognized the inequality created by local funding and took on a greater funding role through the School Foundation Program, enacted in 1949.⁴⁶ The Foundation

38. See *id.* at 93 (“Neither was Montana misled into believing that her full duty had yet been done for the educational welfare of the thousands of children of the sparsely settled rural reaches of the state . . .”); SIEVERS, *supra* note 7, at 15 (“[I]n 1924, . . . one Montana county had, in terms of wealth behind each teacher, a district with a figure of \$225,000 and a second district with less than \$25,000.” (quoting Lyle L. Berg, *Montana Department of Public Instruction, in EDUCATION IN THE STATES: HISTORICAL DEVELOPMENT AND OUTLOOK* 713 (Jim B. Pearson & Edgar Fuller eds., NEA 1969))).

39. SIEVERS, *supra* note 7, at 15.

40. *Id.*

41. *Id.*

42. *Id.*

43. 1927 Mont. Laws 119. The “classroom unit” was the first object through which the state distributed funds to schools. 1935 Mont. Laws 175; see also Andrea Merrill, *The Montana School Foundation Program and State Equalization Aid: A Legislative and Financial History, 1949-1991*, at 3 (April 1992) (Prepared for the Joint Interim Subcommittee on School Funding), available at http://leg.state.mt.us/content/publications/research/past_interim/fdnprog.pdf.

44. SIEVERS, *supra* note 7, at 16.

45. See *id.*; Merrill, *supra* note 43, at 2 (noting “meager commitments to the public schools on the part of both society and government” due to a decade of “general economic hardship, drought and its consequences for the agricultural sector, and years of war effort”).

46. SIEVERS, *supra* note 7, at 16.

Program began with a team of nine people commissioned by the legislature to study education reform in Montana in 1945.⁴⁷ Their recommendations formed the basis for the Foundation Program, adopted in full in 1949.⁴⁸

Under the Foundation Program, each school district was guaranteed a minimum amount of funding called the “minimum foundation program.”⁴⁹ The minimum amount was based on a district’s “Average Number Belonging,” essentially a count of the students enrolled and attending each school in the district during a specified time.⁵⁰ The original amount of per-student funding was based on studies of how much school districts had spent during the mid-1940s.⁵¹

Each county imposed a tax of a set number of mills to raise minimum foundation funds.⁵² To fill in the deficiency between the county levy and the minimum foundation program, the state paid an amount up to fifty percent of the total statewide foundation program guarantee.⁵³ If still short of the minimum foundation amount, the district had to levy more taxes to make up the difference.⁵⁴ Each school district could impose an additional limited tax—called a “permissive levy”—to raise funds above the minimum guaranteed foundation amount.⁵⁵ Beyond the permissive levy, a school district could raise unlimited funds with voter approval—called the “unlimited voted levy.”⁵⁶

The goal of the Foundation Program was to provide each school with “the amount required to operate and maintain an adequate and efficient school.”⁵⁷ Almost immediately, however, the Foundation Program gave rise to issues of both educational equality and educational quality in Montana. Basing the amount distributed per student on what districts were already

47. Merrill, *supra* note 43, at 1-2.

48. *Id.* at 3-4.

49. *Id.* at 4.

50. See 1947 Mont. Laws 272; Merrill, *supra* note 43, at 5. The ANB student count replaced the “classroom unit” count through which the first equalization fund distributed funds. *Id.* at 3.

51. Merrill, *supra* note 43, at 5.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 8. The permissive levy was limited to the lesser of thirty percent of its guaranteed foundation amount or 15 mills in an elementary district, and twenty-five percent of its foundation amount or ten mills in a high school district.

56. *Id.*

57. *Id.* at 4.

spending assumed that, in the mid-1940s, each district received adequate funds to provide for pupils' educational needs and had spent accordingly. However, the Foundation Program committee was originally commissioned "to stem what was termed at the time a 'crisis situation' in the quality of Montana schools."⁵⁸ Thus, the very foundation of the Foundation Program was arbitrarily set. Rather than studying the actual cost of providing a "general, uniform and thorough system of public, free, common schools"—the 1889 constitutional mandate—the committee relied on amounts spent per student during an educational crisis situation.

The Foundation Program was designed to equalize funding, but over time it began to embed more of the same funding inequality into the public school system.⁵⁹ The primary problem was that local districts were responsible for providing any amount over the guaranteed minimum funding level through permissive and voted mill levies.⁶⁰ Thus, as the state funded less of a district's total budget, that district was forced to burden local property taxpayers more. Since property values naturally differed between districts, some districts were able to raise more dollars-per-mill than others, and with significantly less tax burden.⁶¹ For example, between 1950 and 1986, the amount of state funds for elementary and secondary schools fell from 81.2% to between 54% and 58% of total funding.⁶² School districts began to offer students widely different opportunities because property-rich districts⁶³ were able to raise substantially more funds, and thus equip their schools for a variety of programs the property-poor districts had to rule out.⁶⁴

Declining state support of public schools prompted the state to begin legislatively and administratively analyzing its funding scheme. Between 1957 and 1991, the legislature, the Office of Public Instruction, and the Board of Public Education completed

58. *Id.* at 2.

59. SIEVERS, *supra* note 7, at 16-17.

60. *See* Helena Elementary Sch. Dist. No. 1 v. State, 236 Mont. 44, 47-48, 769 P.2d 684, 686 (1989), *amended by* 236 Mont. 61, 769 P.2d 684 (1990).

61. *See id.*, 236 Mont. at 48-49, 769 P.2d at 686-87 (affirming unchallenged findings of District Court regarding differences in funding levels due to differences in taxable valuation in each district).

62. *See* Helena Elementary Sch. Dist. No. 1 v. State, 7 Mont. Educ. Law 14, 19 (1st Jud. Dist. Ct. Jan. 13, 1988).

63. *See* discussion *infra* Part V regarding property-rich and property-poor districts.

64. *See* Helena Elementary, 7 Mont. Educ. Law at 19; *see also infra* text accompanying notes 117-119.

a number of school funding studies.⁶⁵ Very few of the studies resulted in substantial revision to state guaranteed funding amounts. None of the studies resulted in legislative action based on the cost of providing “quality education” to Montana students.

A study conducted in 1960-1961 resulted in revision to per-pupil funding levels, but was based on the cost of meeting accreditation standards in force at the time.⁶⁶ The School Foundation Program Study Committee compared actual costs of school district “essentials” in 1949 and 1962.⁶⁷ The committee found that “Montana districts could have been justified to spend 2.75 times as much in response to the real effects of the inflation rate, enrollment increases, and state and national educational program expectations.”⁶⁸ The committee recommended increasing guaranteed state funding levels accordingly.

In 1973, the Senate ordered the Board of Public Education to define “basic quality education” under the new 1972 Constitution.⁶⁹ Reporting to the Forty-Fifth Legislature in 1975, the Board of Public Education defined “basic quality education” as follows: “A basic quality education is a process which can enable students to transform their potential into actuality.”⁷⁰ Along with this definition, the Board reported “eight curricular dimensions” and made numerous recommendations to the legislature, including a recommendation to adjust per-pupil funding amounts according to the cost of providing necessary resources.⁷¹ During the same session, the Office of Public Instruction (OPI) recommended another increase in per-pupil funding based on

65. See Merrill, *supra* note 43.

66. See *id.* at 14; 1963 Mont. Laws 267. Similar to the Montana Supreme Court’s finding in *Helena Elementary* that districts were not spending school funds on “frills,” 236 Mont. at 54, 769 P.2d at 690, the School Foundation Program Study Committee found that “at least 70 percent of average district general fund expenditures went toward mandated instructional costs, textbooks, and supplies.” Merrill, *supra* note 43, at 14 (emphasis added).

67. See Merrill, *supra* note 43, at 13. The recommendations were enacted in Chapter 267, Laws of Montana 1963. See also Merrill, *supra* note 43, at 13-14. The interim committee was made up of legislators, educators, and others—seventy-one members in all. *Id.* at 13.

68. Merrill, *supra* note 43, at 13.

69. *Id.* at 24 (citing S. Res. 14, 1973 Leg., 43d Sess. (Mont. 1973)). Although the study, authorized by senate resolution in the 1973 session, was completed, there is no record of the authorizing resolution in the published Laws of Montana.

70. *Id.* at 26. According to Merrill, the definition was criticized as being too vague and outcome-based. *Id.*

71. *Id.* at 26.

analysis of actual district expenditures.⁷² The legislature increased per-pupil funds according to OPI's recommendation.⁷³

In 1979, OPI again recommended increased per-pupil funding in response to another study showing expenditures had increased beyond the guaranteed funding level.⁷⁴ In addition, OPI recommended an annual study of expenditures in order to guide funding increases.⁷⁵ The legislature enacted OPI's recommended per-pupil increases,⁷⁶ but did not implement the suggested annual expenditure review.

No other studies resulted in either a legislative definition of "quality education," or a cost-based revision to per-pupil funding.⁷⁷ Although the legislature mandated more studies in 1987—one by the Board of Public Education to define a "basic education," and one by a subcommittee to study the costs of meeting current accreditation standards—findings of both studies were overshadowed by the *Helena Elementary* case and subsequent legislative response.⁷⁸

III. MODERN CONSTITUTIONAL PROVISIONS AND INTERPRETATION

A. *Montana Constitutional Education Provisions*

The Montana Constitution explicitly states that Montana citizens are guaranteed "equal educational opportunity."⁷⁹ The constitution also states that the legislature has a duty to provide a "basic system of free quality public elementary and secondary

72. *Id.* at 25-26.

73. 1975 Mont. Laws 518.

74. Merrill, *supra* note 43, at 28-29.

75. *Id.* at 29.

76. 1979 Mont. Laws 481; Merrill, *supra* note 43, at 30.

77. *See generally* Merrill, *supra* note 43.

78. *See id.* at 38-45 (discussing the two studies, the *Helena Elementary* decisions, and the legislative response to those decisions); *see also* *Hearing on H.B. 3 Before the House Comm. on Educ. and Cultural Res.*, 1989 Leg., 51st Sess. 4-7 (Mont. June 20, 1989) (discussing House Bill 3 which attempted to define "basic education"). The bill was tabled in committee the next day, partly due the absence of any reference to "quality" in the bill. *See, e.g., id.* at 5 (Pat Melby comparing H.B. 3 to the 1973 legislatively mandated definition of the Board of Public Education which defined "basic quality education"); *id.* at 6 (Kay McKenna discussing differences in "basic quality education" for different age groups).

79. MONT. CONST. art. X, § 1(1) ("Equality of educational opportunity is guaranteed to each person of the state.").

schools.”⁸⁰ Both the text of Montana’s education clause and the history of its formation show the state has two obligations with regard to public education: (1) an obligation to maintain a certain standard of educational quality across the state; and (2) an obligation to offer an equal opportunity to receive an education at that standard.

The framers understood equal educational opportunity to mean not just an equal opportunity to an education in general, but an equal opportunity to an education of basically equal quality.⁸¹ Bruce Sievers, in his study written for the constitutional convention delegates, noted the pros and cons of guaranteeing equal educational opportunity in the Montana constitution.⁸² One interest was in keeping the new constitution concise and easy to interpret, which, according to Sievers, weighed against including an equal educational opportunity guarantee.⁸³ However, Sievers reasoned that a guarantee of equal educational opportunity “would provide a general statement of aim for the entire educational system, including its methods of financing.”⁸⁴ He also reminded delegates of the recent California Supreme Court equal protection decision *Serrano v. Priest*, which made a constitutional statement of equal protection principles “pertinent at this time, whereas it was not before.”⁸⁵

Ultimately, the framers opted to include a general principle

80. MONT. CONST. art. X, § 1(3).

81. In his essay, *Equal Educational Opportunity*, prepared for the constitutional delegates, Bruce Sievers wrote: “[T]he right to an equal educational opportunity merges into the right to a substantially equal education Equal educational opportunity thus has come to mean in the modern context not only that everyone deserves an equal opportunity for an education but that everyone should have the opportunity for an equal (basic) education.” SIEVERS, *supra* note 7, at 48-49.

82. *Id.* at 61.

83. *Id.*

84. *Id.*

85. *Id.* While Montana’s constitutional convention was meeting, the national public school community was abuzz about *Serrano v. Priest*, in which the California Supreme Court held the state’s school finance system unconstitutional as a violation of both federal and state equal protection provisions. 487 P.2d 1241 (Cal. 1971). In *Serrano*, the court found California’s funding system made education a “function of . . . wealth.” *Id.* at 1244. Sievers summarized *Serrano* in his report to the delegates. SIEVERS, *supra* note 7, at 57-59. The delegates also referred to *Serrano* during the convention. See, e.g., VI CONVENTION, *supra* note 8, at 1948 (“Delegate Champoux: . . . The most significant revisions [to the 1889 Constitution] are a clear statement of educational goals of the state, a mandate for the support of education allowing increased financial flexibility—and this was an extremely difficult one in light of the *Serrano* case . . .”).

of educational equality in article X, section 1(1).⁸⁶ In discussing article X, section 1(1), the convention delegates expressed concerns about the state's financial limitations,⁸⁷ but stressed the importance of equality of educational *standards* across the state. Delegate Harbaugh stated:

[T]he [Education and Public Lands Committee] does wish to take the position that equality of educational opportunity is a fundamental right of all. And the time is long past when the state can afford to promote one standard of education for those who are members of one geographical area or economic or cultural group and a different standard for those who are members of some other geographical area or economic or cultural group within the borders of this state.⁸⁸

Delegates sent an explanatory packet to voters before the ratification election, explaining that article X, section 1 “[c]reates a right to equal educational opportunity.”⁸⁹

Although one might interpret “quality” as a neutral term, it did not hold a neutral meaning for the framers.⁹⁰ In its majority proposal to the convention, the Education and Public Lands Committee stated: “What do we mean by the words ‘high-quality’? They’ve been used as an instruction here to the Legislature to provide not just a minimum education system, a sub-

86. Sievers offered Montana delegates the New York 1967 proposed constitutional provision as an example: “Equality of educational opportunity shall be guaranteed to all the people of the state. The Legislature shall provide necessary programs to develop the educational potential of each person.” SIEVERS, *supra* note 7, at 61. Article X, section 1(1) of the Montana Constitution is a nearly identical provision: “It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.” While Montana voters accepted the new guarantee of equal educational opportunity, New York voters did not, rejecting the 1967 proposed constitution. See N.Y. CONST. art. XI, § 1.

87. Delegate Harbaugh stated that the guarantee would be limited by “the ability of the state to finance a system of education which guarantees equality; and where the state can show a compelling cause—compelling state interest, such as the preservation of the economic welfare of the state, this would be a limiting factor imposed upon this guarantee.” VI CONVENTION, *supra* note 8, at 1950. This view, however, was notably rejected by the Montana Supreme Court in *Helena Elementary*, 236 Mont. at 53, 769 P.2d at 689-90 (“We hold that the last sentence of subsection (3) is not a limiting provision on the guarantee of equal educational opportunity contained in subsection (1).”).

88. VI CONVENTION, *supra* note 8, at 1950.

89. *Proposed 1972 Constitution for the State of Montana: Official Text with Explanation* (Mont. Const'l Convention 1972) (on file with author).

90. The technical definition of “quality” is also not uniformly neutral. Webster defines the adjective “quality” as “being of high quality.” Merriam-Webster OnLine Dictionary, at <http://www.m-w.com/cgi-bin/dictionary>. This fits well with the Committee's revision removing “high” from “high-quality” due to redundancy. See *infra* note 92 and accompanying text.

standard system, but one that meets a contemporary need and is capable of producing well-informed citizens.”⁹¹ Originally drafted as “high-quality,” the committee’s proposal was later amended, apparently only to take out what it viewed as redundant wording: “It seems obvious that we don’t need ‘high’ when we’re talking about quality, because it contains the same language.”⁹²

B. Judicial and Legislative Interpretation

*State ex rel. Woodahl v. Straub*⁹³ was the first school funding dispute to reach the Montana Supreme Court after Montana adopted the 1972 Constitution. Plaintiffs challenged the newly enacted Chapter 355, Laws of Montana 1973, which formed the basis for the school funding system under the new constitution.⁹⁴ They claimed that if Montana schools were compared with one another, it would be clear that some schools offered more educational opportunities than others because of funding disparities, that Foundation Program funding was being distributed arbitrarily, and that a cap on school budget increases “locked those schools with substandard programs into a position of permanent inequality of educational opportunity.”⁹⁵ The court agreed that some of the allegations may be true.⁹⁶ However, the court was constrained to review the legislation without the benefit of outside evidence proving the law’s inequality or inadequacy as applied.⁹⁷ Ultimately, the court held the Foundation Program under Chapter 355 was “a rational method of providing the

91. VI CONVENTION, *supra* note 8, at 1960 (Delegate Harbaugh describing the majority proposal).

92. *Id.* at 1975 (statement of Delegate Martin).

93. 164 Mont. 141, 520 P.2d 776 (1974).

94. *Id.*, 164 Mont. at 143, 520 P.2d at 777. Plaintiffs alleged that the legislation violated article X, section 1. *Id.*, 164 Mont. at 145, 520 P.2d at 778. The court rejected plaintiffs’ argument that because the legislature chose to use a new method of funding schools—property taxation—it was failing to meet its duty to fully fund the education system. *Id.*, 164 Mont. at 148-49, 520 P.2d at 780. The court also rejected the taxpayer inequity argument that the statewide property tax for public education was invalid because certain taxpayers did not receive direct personal benefit from the tax. *Id.*, 164 Mont. at 149-51, 520 P.2d at 781-82.

95. *Id.*, 164 Mont. at 152-53, 520 P.2d at 782.

96. *Id.*, 164 Mont. at 152, 520 P.2d at 782 (“[R]espondents maintained that a comparison of curricula would demonstrate a wide disparity in the educational opportunities offered by different schools. No doubt this is true. No doubt other comparisons could be made which would show differences in educational opportunity.”).

97. *Id.*, 164 Mont. at 153, 520 P.2d at 782.

required basic public education.”⁹⁸

In *Straub*, the court cited *San Antonio Independent School District v. Rodriguez*⁹⁹ in which the United States Supreme Court concluded that the Constitution only required the legislature to adopt a “rational method” of funding public schools.¹⁰⁰ However, the guarantee of equal educational opportunity in the newly ratified Montana Constitution was a stark contrast to the federal Constitution in that it provided a positive guarantee of rights.¹⁰¹ Montana courts recognized this fact in the late 1980s in *Helena Elementary School District No. 1 v. State*,¹⁰² when plaintiffs provided ample evidence to support the inequities alluded to but not directly addressed in *Straub*. In 1985, sixty-five public school districts, and eight individual parents of students in various school districts filed suit against the State, the Montana Board of Public Education, and the Superintendent of Public Instruction.¹⁰³ The Plaintiffs alleged Foundation Program funding violated article II, section 4, and article X of the Montana Constitution.¹⁰⁴

District Judge Loble heard the case and declared education a fundamental right under the Montana Constitution.¹⁰⁵ He found that education formed a crucial foundation to an individual’s prospects in life: “The quality of an individual’s life is increasingly dependent on the level and quality of that individual’s education.”¹⁰⁶ Students in poorer school districts were being deprived of that important right under the state’s public funding scheme, “regardless of the efforts made by local admin-

98. *Id.*, 164 Mont. at 153, 520 P.2d at 783 (noting the per student basis of distribution, slightly larger allowance for smaller schools, provision for budget increases with enrollment increases, and empowerment of the trustees to supplement the local budget with permissive local levies). The court specified that it was “not foreclosing a consideration of the foundation program and the budget limitations of Chapter 355 as applied,” and it noted that “no assertions of substandard programs” had been made in this case. *Id.*, 164 Mont. at 153-54, 520 P.2d at 782-83.

99. 411 U.S. 1 (1973).

100. *Straub*, 164 Mont. at 153, 520 P.2d at 782.

101. The United States Supreme Court did not find a guarantee of equal educational opportunity in the federal Constitution (or constitutional penumbras) in *Rodriguez*. See 411 U.S. at 35.

102. See *Helena Elementary Sch. Dist. No. 1 v. State*, 7 Mont. Educ. Law 14, 27 (1st Jud. Dist. Ct. Jan. 13, 1988).

103. *Id.* There were 35 elementary and 30 secondary school districts party to the suit.

104. *Id.* at 28. Article II, section 4 is Montana’s equal protection clause.

105. *Id.* at 86.

106. *Id.* at 28-29.

istrators and teachers.”¹⁰⁷ According to Judge Loble, poorer students were being “shortchanged.”¹⁰⁸ He concluded that “dollars make a difference in the quality of educational opportunities afforded in Montana’s schools.”¹⁰⁹

Judge Loble held that the public school funding scheme violated the Montana Constitution.¹¹⁰ He made explicit findings to support his conclusion, but he did not provide or define a specific remedy.¹¹¹ Using an equal protection analysis, Judge Loble held that any disparity between districts in per-pupil expenditures “may be permissible if they are the result of, and are closely tailored to, educationally-relevant factors.”¹¹² He ordered that his decision be “prospective” and have a delayed effect, “in order to provide the Legislature with the opportunity to search for and present an equitable system of school financing in this State.”¹¹³

On appeal, the Montana Supreme Court affirmed Judge Loble’s conclusion that the state’s system of funding public schools was unconstitutional.¹¹⁴ Like Judge Loble, the supreme court left the remedy entirely to the legislature.¹¹⁵

The court “specifically affirmed” Loble’s conclusion of law that “spending differences among similarly sized school districts in the State result in unequal educational opportunities for students.”¹¹⁶ The court noted evidence from two teams of experts showing that “better-funded” schools offered more and better curricula, equipment, and facilities to students than schools of similar size with less funding.¹¹⁷ For example, wealthier school districts consistently offered more and better-equipped opportu-

107. *Id.* at 22.

108. *Helena Elementary*, 7 Mont. Educ. Law at 20.

109. *Id.* at 81.

110. *Id.* at 22.

111. *Id.* at 22-23 (“Solutions to the problems inherent in Montana’s school finance system are not simple. However, they can be solved. It would be presumptuous of me to order specific remedies at this time. Those solutions must await careful study by the Legislature with the assistance of administrators, State executives, and other professionals.”).

112. *Id.* at 86 (noting local property wealth is “absolutely irrelevant to education”).

113. *Id.* at 90. Judge Loble set October 1, 1989, as the effective date of his decision rendered in January of 1988.

114. *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 55, 769 P.2d 684, 690 (1989), *amended by* 236 Mont. 61, 769 P.2d 684 (1990).

115. *Id.*, 236 Mont. at 59, 769 P.2d at 693. The Supreme Court extended the effective date of its decision to July 1, 1989, again in order to allow the legislature to bring the funding system into compliance.

116. *Id.*, 236 Mont. at 51, 769 P.2d at 688.

117. *Id.*, 236 Mont. at 48-52, 769 P.2d at 686-89.

nities in areas of scientific studies,¹¹⁸ hands-on learning experiences, foreign language, physical education, music, art, gifted and talented programs, technological resources, library and media resources, and extracurricular activities.¹¹⁹

The court emphasized the clear equality standard mandated by the Montana Constitution. “We conclude that the plain meaning of the second sentence of subsection (1) is that each person *is guaranteed* equality of educational opportunity.”¹²⁰ It found this the only place where the constitution “‘guarantees’ a particular right.”¹²¹

The State argued that its only constitutional obligation was equitable distribution of available funds. Reiterating that all parties agreed the Foundation Program funds had been equitably distributed, the State maintained it had fulfilled its constitutional obligation.¹²² However, the court rejected the notion that equitably distributing “available funds” resulted in equal educational opportunity.¹²³ It noted the Foundation Program had been inadequately funded, and as such, it did not even meet minimum accreditation standards—standards the court concluded did not rise to the level of “quality education.”¹²⁴ Here the court impliedly confirmed the presence of a minimum adequacy standard in conjunction with the equality standard it had already found.

The court also rejected the State’s argument that fiscal difficulties or the policy of local control alleviated its funding duty. It held statewide economic hardships did not “justify perpetuating inequities.”¹²⁵ Likewise, article X, section 8, providing for trustee supervision and control of school districts, did not allow

118. The study found that science labs were “typically larger, better stocked with more equipment and consumable supplies, with more storage, and generally more functional than those in poorer districts.” *Id.*, 236 Mont. at 50, 769 P.2d at 687-88.

119. *Id.*, 236 Mont. at 50-51, 769 P.2d at 687-88. The court also adopted the finding that “[w]ith respect to facilities, high expenditure districts reported that they have not had to defer necessary maintenance or work projects due to a lack of funds, as have low expenditure districts.” *Id.*, 236 Mont. at 51, 769 P.2d at 688.

120. *Id.*, 236 Mont. at 53, 769 P.2d at 689 (emphasis in original).

121. *Id.*

122. *Id.* The State asked the court to interpret the last sentence of article X, section 1, subsection 3—“It shall fund and distribute in an equitable manner to the school districts *the state’s share* of the cost of the basic elementary and secondary school system”—as a limitation of the guarantee in subsection 1. *Id.* The court unequivocally rejected the argument. *Id.*, 236 Mont. at 53, 769 P.2d at 689-90.

123. *Id.*, 236 Mont. at 53, 769 P.2d at 689.

124. *Id.*, 236 Mont. at 54, 769 P.2d at 690.

125. *Id.*

the legislature to close its eyes to spending disparities between districts.¹²⁶

Ultimately, the court did not clearly address the relationship between quality and equality. It used evidence of spending disparities between districts to support its conclusion that the State had “failed to provide a system of quality public education.”¹²⁷ However, it did not discuss differing costs between districts caused by greater concentration of students with special educational needs, high local costs, or other factors. The court recognized that per-student expenditure was only one object of distribution, and not the only element of a “quality education or of equal educational opportunity.”¹²⁸ Without offering any guidance on how per-student expenditure bore on the issue of quality, however, the court left the legislature with no standard but strict equality against which to measure the system and fashion a remedy.

The Fifty-First Legislature in the June 1989 Special Session responded to *Helena Elementary* with House Bill 28.¹²⁹ House Bill 28 was intended to increase the overall level of funding while bringing similarly-sized school districts onto a near-equal expenditure level.¹³⁰ The legislature’s stated intent was to “provide greater equalization of the funding available to school districts and to promote equalization of school district expenditures per student.”¹³¹

On paper, the legislature appeared to recognize the idea that funding with equal dollars would not necessarily result in equal educational opportunity. It explained the disparities allowed by minimum and maximum budget limitations as “reasonable and necessary” in order to provide “each district board of trustees the power to determine and meet the unique and individual needs of students and schools in the district.”¹³² Confusion evidently remained, however, on the issues of funding adequacy and whether the constitution required strict equality of

126. *Id.* The court further noted: “In fact, as the District Court correctly found, the present system of funding may be said to deny to poorer school districts a significant level of local control, because they have fewer options due to fewer resources.” *Id.*

127. *Id.*, 236 Mont. at 55, 769 P.2d at 690.

128. *Id.*, 236 Mont. at 55, 769 P.2d at 691.

129. 1989 Mont. Laws 11 (codified in scattered sections throughout titles 2, 7, 15, 17, 20, 23, and 90).

130. *Id.*

131. *Id.* (also noting intent to “preserve local control of the public school system”).

132. *Id.*

dollars per pupil. As is clear from its stated intent, the legislature still held to the concept that equitable distribution of *available funds* would meet its constitutional duty, and that the ultimate goal was a system that provided strict equality of per-pupil expenditures.

Perhaps in conjunction with the percentage increase in Foundation Program funding, the legislative response to *Helena Elementary* was an attempt at meeting both an adequacy and equality standard. After all, the state increased overall funding *and* made provisions designed to bring the poorer and wealthier school districts closer together in per-pupil spending. But there was still an important gap between understanding that equality of dollars would result in neither equal educational opportunity nor educational quality, and carrying that understanding into legislative action.

In fact, legislative inaction resulted in two more school funding suits tried in early 1993.¹³³ Plaintiffs' arguments in those cases focused not only on unequal expenditures between districts, but also on the foundation of per-pupil funding.¹³⁴ Specifically, the Montana Rural Education Association argued the legislature should be basing per-pupil funding amounts on costs of school district services, not on studies of past school district expenditures.¹³⁵

The two new funding suits were mooted by legislative enactment of House Bill 667, the basis for Montana's current funding system.¹³⁶ The legislature's stated intent for enacting House Bill 667 focused primarily on issues of equality.

WHEREAS, for these purposes, the Legislature determines that the foundation program funding mechanism of the past 4 decades be replaced with a public school funding system designed to yield greater equalization of both district general fund budgets per-ANB and district taxpayer efforts within a reasonable number of

133. *Mont. Rural Educ. Ass'n v. State*, No. BDV-91-2065 (Mont. 1st Jud. Dist. Ct. July 22, 1993) (Combined Order Concerning Mootness Issue) [hereinafter "Combined Order"], available at <http://www.statereporter.com>; *Helena Elementary Sch. Dist. No. 1 v. State*, No. BDV-91-1334 (Mont. 1st Jud. Dist. Ct. July 22, 1993) (Combined Order Concerning Mootness Issue) [hereinafter "Combined Order"], available at <http://www.statereporter.com>. Both were tried in front of District Court Judge Sherlock, who also adjudicated the most current funding suit in Montana.

134. See Combined Order, *supra* note 133.

135. See *id.*

136. See *id.* ("It is the contention of the State that passage of House Bill 667 has so changed the provisions of the school funding system set forth in House Bill 28 that these cases are moot. This Court agrees.")

years¹³⁷

Again, equalization of per-pupil dollars was of primary concern.

Committee minutes during the regular and special sessions of 1993 show legislators struggling with the issue of defining the constitutional mandate, and with the issues of adequacy raised by the two new funding suits—whether the per-pupil funding amounts were “fair” or “justified.”¹³⁸ Although the House Select School Funding Committee minutes show the Board of Public Education had recently adopted another definition of “basic quality education” in October of 1992, the definition was not recounted in detail, nor explicitly made a part of the new funding system.¹³⁹ Despite hearing from experts regarding the unjustified foundation of per-pupil funding amounts, and the need for a current cost-of-education study,¹⁴⁰ no such study was completed before the legislature redesigned the funding scheme.

One interaction in committee—when the Legislative Auditor reported to the House Education and Cultural Resources Committee on the technicalities of House Bill 667—is an example of the confusion over whether equal dollars satisfied the constitutional education article. The Auditor began by noting the bill was again based on a study of existing expenditures and had as its goal equalization of those expenditures.¹⁴¹ Representative

137. 1993 Mont. Laws 633.

138. See, e.g., *Committee Minutes of Select Committee on School Funding*, 1993 Leg., 53d Sess. 3 (Mont. Jan. 7, 1993) (Representative Peck suggesting the committee “prioritize and zero in on one issue that will make a significant contribution: analyzing the existing foundation program schedules to determine whether or not they are fair”); *id.* (Representative Fagg suggesting the two primary issues were: “(1) the foundation program and how that relates to the pending lawsuits and (2) how to address the budget crisis and still maintain a basic quality education that meets constitutional mandates”); *id.* (Representative Simpkins suggesting the major issue was one of definition: “Without a definition, how can the legislature solve the problem?”).

139. See *Committee Minutes of Select Committee on School Funding*, 1993 Leg., 53d Sess. 9 (Mont. Jan. 12, 1993). The minutes indicate that, at the request of Governor Stephens, the Board of Public Education defined “basic quality education” through a series of public hearings and written comment. *Id.* However, there is no detailed account of what that definition contained. *Id.*

140. See, e.g., *Committee Minutes of Select Committee on School Funding*, 1993 Leg., 53d Sess. 3-13 (Mont. Jan. 26, 1993) (Chip Erdman of the Montana Rural Education Association discussing need for a cost-based funding scheme including weighting per-pupil funding amounts under the Guaranteed Tax Base to reflect different costs of larger and smaller school districts).

141. *Committee Minutes of House Education & Cultural Resources Committee*, 1993 Leg., 53d Sess. 2 (Mont. Mar. 10, 1993) (“Scott Seacat [Legislative Auditor] said the concept of the new school funding plan is based on an analysis of the existing expenditures for each elementary and high school in the state.”); *id.* at 12 (Seacat identified one remaining issue: “how much the legislature will define as the cost of education.” He noted

Daily observed that “on one hand, equalization has been defined as equal dollars, but it is not certain the constitution defines it in such a way.”¹⁴² In response, the Auditor stated that its office had “not attempted to do anything other than equalize the dollars.”¹⁴³ Representative Simpkins then stated “the decision upon which the plan has been based is Judge Loble’s decision which stated ‘equal dollars per student’ in each school category.”¹⁴⁴

The confusion raised by the *Helena Elementary* decisions will only continue to perpetuate inequalities and inequities in Montana school funding unless the court clarifies the dual roles of equality and quality under the Montana Constitution.

IV. LOOKING OUTWARD FOR GUIDANCE

Certainly the conclusions of other state courts on school funding issues depend to a large extent on the state’s funding scheme, the makeup of its population, and the proof offered in each trial. The Montana courts’ factual findings and specific remedies will, thus, necessarily differ. However, the way other courts frame and analyze issues of equal educational opportunity can be particularly helpful in an area like school funding, where certain issues are largely analogous throughout the nation.

The New Jersey and Wyoming Supreme Courts have required their state legislatures to address both educational equality and educational adequacy in funding public schools after finding both standards required under their state constitution education articles.¹⁴⁵ The New Jersey Supreme Court decision in *Abbott v. Burke*,¹⁴⁶ and the Wyoming Supreme Court decision in *Campbell County School District v. State*,¹⁴⁷ and the legislative response to those decisions are instructive in how courts can clarify the relationship between equality and quality. Montana can learn both from New Jersey and Wyoming’s successes and their downfalls over the past decades.

that “available data is based on the amounts the legislature is currently allowing districts to spend on education.”).

142. *Id.* at 7.

143. *Id.*

144. *Id.*

145. See *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995).

146. 575 A.2d 359 (N.J. 1990).

147. 907 P.2d 1238 (Wyo. 1995).

A. *New Jersey*

The New Jersey Constitution mandates: “The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”¹⁴⁸ Although on its face this provision requires less of both equality and quality than the Montana Constitution, the New Jersey Supreme Court interpreted the article to require at least equality, among other objectives.¹⁴⁹ In *Abbott v. Burke*, the New Jersey Supreme Court grappled with many of the issues Montana faces today, and concluded the education article also requires the state to provide a substantive level of educational quality.¹⁵⁰

The New Jersey court concluded the state could and should address both the quality of education offered in each district, and inequality of quality between districts.¹⁵¹ The court did not require equal dollars—it recognized that such a standard could not possibly coexist with a minimum adequacy standard because the two are inherently contradictory.¹⁵² Instead, the court struck down those parts of the funding scheme that increased financial disparities between districts, *and* had no “educational or administrative justification.”¹⁵³ State aid distributed to ad-

148. N.J. CONST. art. VIII, § 4, para. 1.

149. *Abbott*, 575 A.2d at 367 (“[E]mbedded in the constitutional provision itself, at least in its construction thus far by this Court, are various objectives and permissible outcomes—equality, uniformity, diversity, and disparity—that may require . . . a continued general definition of the constitutional mandate.”). Although the court had constructed the New Jersey Constitution to include certain objectives and standards, the legislature had been the one to substantively defined the article, and the court affirmed and proceeded under that definition. See *id.* at 374 (“The substantive content of thorough and efficient has been legislatively defined and sustained by this Court.”); *id.* at 390 (“While necessarily general, the Act has fairly established the standard against which an educational opportunity can be measured to see if it conforms to the constitutional command. We found the standard constitutional in *Robinson V*, and reaffirm that conclusion now.”). This provides an important contrast to Montana, where the constitutional mandate has yet to be substantively defined.

150. See *Abbott*, 575 A.2d at 367.

151. *Id.* at 394 (“Our conclusion that the constitutional mandate has not been satisfied is based both on the absolute level of education in those districts and the comparison with education in affluent suburban districts.”).

152. *Id.* at 368 (“Equality of expenditures per pupil could not have been constitutionally mandated when we recognized the right of districts to spend more to address students’ special needs . . .”).

153. *Id.* at 407 (“In effect, we hold that under the present funding scheme state aid that is counter-equalizing, that increases funding disparities, and that has no arguable educational or administrative justification, is unconstitutional.”).

dress the special financial needs of certain types of students was held constitutional, even though it was not equally distributed between districts.¹⁵⁴ Throughout its opinion, the court held to the operative principle that a funding system must be sensitive to students' special disadvantages.¹⁵⁵

The court declared equality of funding "one of the many factors that counts" toward meeting the state's constitutional obligation.¹⁵⁶ Per-student expenditure disparities bore on the case for three reasons. First, unless the court were to conclude that richer districts offered education at an exceptionally high level, the lower level of spending in poorer districts proved they were offering an inadequate quality of education.¹⁵⁷ Second, low district expenditures also indicated that students in poorer districts would "be unable to compete in society entered by the richer districts' students."¹⁵⁸ Finally, years of spending disparities evidenced a system that was unable to correct the problem itself.¹⁵⁹ The court continually returned to one fundamental question: if money doesn't make a difference in quality of education, why do richer school districts invariably spend so much money to obtain and implement the types of programs regarded as "indicators of quality?"¹⁶⁰

154. *Id.* at 407. Under the New Jersey funding scheme, "categorical aid" was "given by the State to districts regardless of their wealth or the total size of their budget, based on the recognition that certain essential programs cost more than others." *Id.* at 380. The court noted that because under-funded districts generally had more students with special needs, more categorical aid naturally went to those poorer districts. *Id.* at 407. Categorical aid had the potential to create funding disparities depending on the way special needs students were dispersed throughout districts. However, at the time it was contributing to equalization of the districts by supplementing poorer school districts' funding. *Id.*

155. *See, e.g., Abbott*, 575 A.2d at 363, 408 ("The level of funding must also be adequate to provide for the special educational needs of these poorer urban districts in order to redress their extreme disadvantages"); *id.* at 366 ("Poorer students need a special supportive educational effort in order to give them a chance to succeed as citizens and workers. Their educational needs are often dramatically different from those of students in affluent districts."); *and id.* at 408 (poorer urban districts' "special disadvantages must be addressed").

156. *Abbott*, 575 A.2d at 406.

157. *Id.* at 384.

158. *Id.*

159. *Id.*

160. *See, e.g., id.* at 397 ("[I]f these courses—[computer science, science lab, foreign language, music, art, physical education]—are not integral to a thorough and efficient education, why do the richer districts invariably offer them?"); *and id.* at 399 ("We return to the plaintiffs' insistent and persuasive question: if these factors—[teacher ratios, teacher experience, teacher salary, etc.]—are *not* related to the quality of education, why are the richer districts willing to spend so much for them?" (emphasis in original)).

In ordering a remedy the court concluded that the required equalization effort would only be constitutionally justified if the state “equalized up”—brought disadvantaged districts up to the level of funding found in the more advantaged districts.¹⁶¹ When the court measured school funding against both an equality standard and a quality standard, it found that for the state to meet both standards, it had to increase funding.¹⁶²

After the New Jersey Supreme Court’s 1990 decision in *Abbott v. Burke*, the legislature increased funding in poorer school districts by \$700 million dollars over four years, keeping wealthier districts at the same funding level.¹⁶³ In 1994, the supreme court again reviewed the funding scheme, noting that the increased funding was a step in the right direction, but that the state had not yet achieved compliance with the court’s 1990 order.¹⁶⁴ The court noted specific areas of non-compliance, requiring full compliance by the 1997-98 school year.¹⁶⁵ One area it found unacceptable was the formula for weighting funding levels for at-risk students.¹⁶⁶ The court highlighted the absence of legislative study of the programs and services at-risk students required, and the cost of providing those programs and services.¹⁶⁷ Without that study, the court found the funding scheme was doomed to fail.¹⁶⁸

The legislature responded with the Comprehensive Educa-

161. *Abbott*, 575 A.2d at 408 (“We find in order to provide a thorough and efficient education in these poorer urban districts, the State must assure that their educational expenditures per pupil are substantially equivalent to those of the more affluent suburban districts, and that, in addition, their special disadvantages must be addressed.”).

162. The New Jersey Supreme Court admittedly ordered a “sharp” remedy, requiring substantially equal spending per pupil between “poorer urban districts” and “property-rich districts.” *Id.* at 408-09. However, it maintained again that funding had to be sensitive to special educational needs. *Id.* The remedy, to a large extent, was dictated by the record—“a special context that brings the constitutional obligation into sharp focus as it applies to the urban poor.” *Id.* at 411.

163. *See Abbott v. Burke*, 643 A.2d 575, 576 (N.J. 1994). After the 1990 decision, funding was increased through the Quality Education Act, superseded in 1996 by the Comprehensive Education Improvement and Financing Act. *See* 1996 N.J. Laws 138.

164. *Abbott*, 643 A.2d at 576-77.

165. *Id.* at 576.

166. *Id.* at 579.

167. *Id.* (noting that although legislation was passed requiring the Commissioner to complete such a study, it was never accomplished).

168. *Id.* (“The record before us makes it clear that that success cannot be expected to be realized unless the Department and the Commissioner identify and implement the special supplemental programs and services that the children in these districts require.”).

tion Improvement and Financing Act of 1996 (“CEIF”).¹⁶⁹ One of its features was the “Report on the Cost of Providing a Thorough and Efficient Education,” a biennially required study to be completed by the State Board of Education and the Commissioner of Education.¹⁷⁰ Under the CEIF, the Commissioner of Education had to establish efficiency standards that would “define the types of programs, services, activities, and materials necessary to achieve a thorough and efficient education,” and then review those standards biennially.¹⁷¹ In addition, the commissioner is required to review local levies that are higher than the maximum budgets of the previous year to determine whether the increases are funding local educational elements that should be offered statewide.¹⁷² The resulting report gives funding level recommendations, which are adjusted for inflation in the second year to which the report applies.¹⁷³ The same section requires the State Board of Education to review and update core curriculum content standards every five years.¹⁷⁴ Under the New Jersey Administrative Code, the Commissioner of Education must convene an advisory panel of “public school educators, higher education representatives, business representatives, and other citizens” which will review the core standards and recommend any updates.¹⁷⁵

The most significant criticism of the New Jersey Supreme Court’s treatment of school funding over the past twenty years¹⁷⁶ is that its focus on the extremes—the poorest and wealthiest school districts—has resulted in funding inequity for schools

169. See 1996 N.J. Laws 138.

170. *Id.* § 4 (codified as N.J. STAT. ANN. § 18A:7F-4 (1996)).

171. *Id.* § 4(b).

172. *Id.*

173. *Id.* § 4(c).

174. *Id.* § 4(a). The New Jersey State Board of Education adopted the Core Curriculum Content Standards in 1996 as a definition of the constitutional mandate to provide a “thorough and efficient” education. See *New Jersey Core Curriculum Content Standards: Introduction*, available at <http://www.state.nj.us/njded/cccs/intro.htm>.

175. N.J. ADMIN. CODE tit. 6A, § 8-2.1(a)(4) (2004).

176. There have been eight *Abbott* decisions since 1985. *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985) (*Abbott I*); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (*Abbott II*); *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994) (*Abbott III*); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997) (*Abbott IV*); *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998) (*Abbott V*); *Abbott v. Burke*, 748 A.2d 82 (N.J. 2000) (*Abbott VI*); *Abbott v. Burke*, 751 A.2d 1032 (N.J. 2000) (*Abbott VII*); *Abbott v. Burke*, 790 A.2d 842 (N.J. 2002) (*Abbott VIII*).

that fall in the middle.¹⁷⁷ Since the court's orders have focused on the so-called "Abbott districts,"¹⁷⁸ the legislature has concentrated the bulk of its increased funding on those poorest urban districts to bring them up to the level of funding in the wealthiest communities.¹⁷⁹ The remedy has been a success for the Abbott districts, bringing their funding within a few hundred dollars per student of the wealthiest districts in the state.¹⁸⁰ However, empirical data now indicates that poor districts outside the definition of an "Abbott district" and middle-wealth districts are being adversely affected by the funding scheme and have actually fallen behind the Abbott districts in funding levels.¹⁸¹ The lesson to be learned from the criticism of the New Jersey litigation and legislative response is that in ordering a funding remedy, the court should require comprehensive change that addresses all school district needs.¹⁸²

B. Wyoming

The Wyoming Supreme Court also found obligations to provide both equality and quality under the Wyoming Constitution. Wyoming's constitutional declaration of rights provides: "The right of the citizens to opportunities for education should have practical recognition. The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts."¹⁸³ The Wyoming Constitution education article requires the state to provide a "complete and uniform system of public instruction,"¹⁸⁴ and a "thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state."¹⁸⁵

In *Washakie County School District No. 1 v. Herschler*, the Wyoming Supreme Court declared education a fundamental

177. See Gary W. Ritter & Sherri C. Lauer, *School Finance Reform in New Jersey: A Piecemeal Response to a Systemic Problem*, 28 J. EDUC. FIN. 575 (Spring 2003).

178. See N.J. ADMIN. CODE tit. 6A, § 10-1.2 (2004) (definition of "Abbott district" as the twenty-eight districts identified by the supreme court in *Abbott II*, 575 A.2d 359).

179. Ritter & Lauer, *supra* note 177, at 576.

180. *Id.* at 582 n.18.

181. *Id.* at 577.

182. *Id.* at 598 ("Funding inequities in New Jersey will persist until the state's lawmakers are willing to address this systemic problem with a remedy that is equally comprehensive.").

183. WYO. CONST. art. 1, § 23.

184. WYO. CONST. art. 7, § 1.

185. *Id.* § 9.

right under Wyoming Constitution article 1, section 23, and struck down the school funding scheme on equal protection grounds.¹⁸⁶ The court expressed its view that a funding scheme should reflect differing district costs of providing a quality education.¹⁸⁷ It held that the legislature must design a system of funding public schools that would reflect cost-differentials among districts, and ultimately achieve “equality of quality.”¹⁸⁸ After *Washakie*, the legislature did not accomplish that task.¹⁸⁹

Campbell County School District v. State arose in response to the post-*Washakie* legislative inaction.¹⁹⁰ The court addressed the Wyoming Constitution education article by looking at the current meaning of each word and the meaning at the time of ratification, forming a broad definition from the combined original and contemporary meanings.¹⁹¹ It concluded, however, that the ultimate definition of a “proper education” in Wyoming had to come from the legislature.¹⁹² The definition and resulting funding scheme would only be constitutionally justified if sensitive to “special needs and educational cost differentials.”¹⁹³

Portions of the funding system that had been arbitrarily set without considering “variances in individuals, groups and local condition,”¹⁹⁴ or the “actual cost of providing education for students”¹⁹⁵ were found unconstitutional. Funding components that had originally been built on the doctrine of “economies of scale” were likewise found unconstitutional because the legislature had only assumed larger schools benefited from economies

186. 606 P.2d 310 (Wyo. 1980).

187. See 907 P.2d 1238, 1246 (Wyo. 1995) (summarizing the *Washakie* decision).

188. See *id.*

189. See *id.* at 1247.

190. See generally 907 P.2d 1238.

191. *Id.* at 1259.

192. *Id.* The court stated:

the legislature, in fulfilling its constitutional duty, must define and specify what a ‘proper education’ is for a Wyoming child.” *Id.* It found the legislature’s framework for defining a “proper education” through performance and accreditation standards was not adequate because they were based on standards set up by local school districts, which according to the Court, “potentially [created] forty-nine autonomous education systems.

Id. at 1262-1263.

193. *Id.* at 1269 (“The legislature is mandated to take into consideration various balancing factors and devise a state formula which will weight the calculation to compensate for special needs and educational cost differentials.”).

194. *Id.*

195. *Id.* at 1275 (discussing the distribution of funds through the classroom unit value, which it noted was “a legislatively determined figure”).

of scale, but had never studied the actual cost of providing education in different sized schools.¹⁹⁶ Optional district mill levies were upheld as constitutional so long as the state had otherwise implemented a “cost-based, state-financed proper education” in all districts.¹⁹⁷ Noting that “the definition of a proper education is not static and necessarily will change,” the court observed that local control of school districts could lead to innovative new ideas that may change the definition of a proper education for Wyoming students.¹⁹⁸ Accordingly, if a local school district enhanced its program with an innovation that “should be available to all school districts as part of a proper education,” the state would have to provide the new component to all Wyoming students.¹⁹⁹

The court required the state to complete a “cost of education study” to “inform the creation of a new funding system.”²⁰⁰ It stated: “To fulfill the constitutional command of ‘equality of financing will achieve equality of quality,’ the legislature must state and describe what a ‘proper education’ is for a Wyoming child. The constitution requires it to be the *best* that we can do.”²⁰¹ The court provided broad guidelines of what that definition should include: (1) “small schools, small class size, low student/teacher ratios, textbooks, low student/personal computer ratios”; (2) uniform substantive curriculum; (3) sensitivity to students’ special educational needs; (4) “meaningful standards for course content and knowledge attainment intended to achieve the legislative goal of equipping all students for entry to” higher education facilities or other purposes; and (5) “timely and meaningful assessment” of all students.²⁰²

In 1996, the state performed the judicially-mandated cost of education study using a “Resource Cost Model” approach.²⁰³ In

196. *Id.* at 1277.

197. *Id.* at 1274.

198. *Id.*

199. *Id.*

200. *Id.* at 1279.

201. *Id.*

202. *Id.*

203. Deborah A. Verstegen, *Financing the New Adequacy: Towards New Models of State Education Finance Systems that Support Standards Based Reform*, 27 J. EDUC. FIN. 749, 773 (Winter 2002). The Resource Cost Method “identifies specific instructional components or resource ‘ingredients’ deemed necessary to provide state standards, goals and objective, and then prices and sums these components.” *Id.* at 772. Verstegen outlines other methods of studying educational costs and discusses their respective advantages and disadvantages. *Id.*

addition to meeting with local educators and educational policymakers—called the “professional judgment approach”—study leaders conducted independent research to determine necessary educational resources and the costs of providing those resources.²⁰⁴ The Foundation Program in Wyoming is now adjusted for a variety of special educational factors.²⁰⁵ Those factors include transportation, special education, “necessary small schools,”²⁰⁶ routine maintenance, “responsibility, education and experience level of administrators, the experience level of classified personnel and the seniority level of teachers in each district,” extra compensation paid to teachers, statutorily allowed isolation and maintenance payments, small-sized districts, at-risk students, vocational education students, the yearly effects of inflation, and regional cost of living differences across the state.²⁰⁷ The adjustment process and factors are reviewed at least every five years “to determine if modifications are necessary to ensure it remains cost-based in light of changing conditions and modifications to law.”²⁰⁸

V. MONTANA’S CURRENT SCHOOL FUNDING SYSTEM: INEQUALITY AND INADEQUACY

Montana’s current system of funding is essentially the same as in 1993. It still allows school districts to rely on voted and permissive tax levies to make up the difference between state provisions and the district’s costs. The current system perpetuates inequalities between wealthy and poor school districts²⁰⁹—disparities that become more pronounced as the state’s level of funding decreases. In addition, issues of overall funding ade-

204. *Id.* at 773-74. Verstegen noted that a professional judgment approach without independent research raises conflict of interest issues. *Id.*

205. *See* WYO. STAT. ANN. § 21-13-309 (2003).

206. *See id.* § 21-13-318.

207. *See id.* § 21-13-309. Each adjustment factor is specifically defined by statute.

208. *Id.* § 21-13-309(t).

209. Poorer school districts are those with lower assessed property valuations. *See* VERN BRIMLEY, JR. & RULON R. GARFIELD, FINANCING EDUCATION IN A CLIMATE OF CHANGE 69 (8th ed. 2002) (“Assessed value ranges from actual market value to a percentage of market value established by a taxing entity.”). A fixed tax rate levied on assessed value has the potential to produce vastly different outcomes in different districts across Montana because property wealth is distributed differently throughout the state. *See id.* (showing examples of the inequities that typically arise from this type of funding system). Thus, a mill (.001 per dollar) levied on the assessed value of property in one county has the potential to produce much more than a mill levied on the assessed value of property in another.

quacy are more apparent as time goes on.

School districts under the Foundation Program had the option of levying a set number of mills, rather than a set number of dollars, to make up the difference between state funds and the school's adopted budget.²¹⁰ Funding inequities followed as the Foundation funds dropped.²¹¹ Today, the same problems arise when school districts rely on local mill levies to fully fund their budgets. Under the current funding system, the state establishes a minimum and maximum range within which school districts may budget.²¹² Budget levels are based on a per-pupil calculation for each district, called the "Average Number Belonging" (ANB), calculated from the enrollment count of the previous year.²¹³ The minimum baseline for a school district budget is called the BASE Budget.²¹⁴ All schools must adopt a budget that reaches at least the minimum BASE Budget level.²¹⁵ If a school adopts a budget over the minimum amount, the excess is funded through local tax levies.²¹⁶ As such, the system still allows for disparities between districts based on local wealth.

Schools with declining enrollment are arbitrarily affected by the current funding scheme.²¹⁷ When the level of state funding

210. See *Helena Elementary Sch. Dist. No. 1 v. State*, 7 Mont. Educ. Law 14, 41 (1st Jud. Dist. Ct. Jan. 13, 1988) (called the "permissive levy").

211. See *id.*

212. OFFICE OF PUBLIC INSTRUCTION, FY 2003-04 GENERAL FUND BUDGET OVERVIEW AND WORKSHEETS, POST-LEGISLATIVE VERSION 8, available at <http://www.opi.state.mt.us/PDF/SchoolFinance/forms/GeneralFundOverview04.pdf>.

213. MONT. CODE ANN. § 20-9-306 (2003). See also OFFICE OF PUBLIC INSTRUCTION, UNDERSTANDING MONTANA SCHOOL FINANCE AND SCHOOL DISTRICT BUDGETS 11 (March 2003), available at www.opi.state.mt.us/PDF/SchoolFinance/budget/UnderstSchlFin.pdf.

214. MONT. CODE ANN. § 20-9-307 (2003).

215. See OFFICE OF PUBLIC INSTRUCTION, *supra* note 213, at 15.

216. MONT. CODE ANN. § 20-9-353 (2003). Trustees may adopt a school budget that exceeds the BASE amount allowed to the district. *Id.* However, if they do they must submit an increase in property taxes to the voters in the district for approval. *Id.* Any budget increases approved are capped by the "maximum general fund budget for the district." *Id.* § 20-9-353(1)(a). If trustees adopt a budget that exceeds this maximum, section 20-9-308(3) requires a district to incrementally reduce its budget over the course of five consecutive years to come within the maximum. *Id.* § 20-9-308(3). Under section 20-9-306, the maximum general fund budget is: (1) the basic entitlement for the district + (2) total per-student entitlement for the district + (3) special education grants. *Id.* § 20-9-306.

217. Linda McCulloch, Superintendent of Public Schools, in her State of Education Speech on February 14, 2003, pointed out that Montana's current funding does not reflect the costs faced by individual schools:

School budgets are stretched to the breaking point. Montana's school enroll-

decreases, schools must make budget cuts that are not necessarily reflected by lower costs.²¹⁸ This inequality is due to a “natural accident”²¹⁹—declining enrollment—and not justified by any explicitly defined or educationally relevant factor. Montana’s per-pupil funding level does not come from an understanding of the costs of providing educational resources to different sized schools, but is rather based on previous expenditure levels and the assumption that the doctrine of “economies of scale” function in the Montana school system.²²⁰ The Wyoming Supreme Court struck down those portions of the Wyoming school funding system that were based on the same assumption of economies of scale with no supporting empirical data.²²¹ Researchers subsequently studied four years of individual school enrollment and expenditure data in Wyoming and were able to determine that, with all other variables constant, for every ten percent increase in individual school size, per-student costs decreased by two percent.²²² A Montana study of the effect of school size on education costs should be based on the most recent research, some of which indicates that economies of scale only function up to a certain point, after which substantially higher enrollment will result in “diseconomies of scale” and increased per-student costs.²²³ The results of such a study would inform a decision to

ment is declining because of a decline in birth rates. State support is then reduced due to our current funding formula. . . . While the number of kids goes down, the school’s operating budget does not drop in proportion. Many classroom costs, like utilities and building maintenance are fixed and ongoing.

Superintendent Linda McCulloch, 2003 State of Education Speech (Feb. 14, 2003), available at <http://www.opi.state.mt.us/Streamer/KeyNote/speechtext.html>.

218. See 2003 State of Education Speech, *supra* note 217.

219. See RAWLS, *supra* note 2, at 65.

220. See MONT. CODE ANN. § 20-9-306 (2003). The total per-ANB entitlement for high school is \$5,262 for the first ANB, decreased by 50 cents per ANB for each additional up to 800 ANB, after which the per-ANB dollar amount stays the same. For elementary schools, the total per-ANB entitlement is \$3,949 for the first ANB, decreased by 20 cents per ANB for each additional up to 1,000 ANB, after which each gets the same dollar amount. For elementary schools with approved junior highs, the entitlement is \$3,949 for kindergarten through 6th grade, decreased as described above, and \$5,262 for grades 7-8, decreased in the same way as the high school entitlement.

221. See *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1277 (Wyo. 1995).

222. See Tyler J. Bowles & Ryan Bosworth, *Scale Economies in Public Education: Evidence from School Level Data*, 28 J. EDUC. FIN. 285 (Fall 2002).

223. See Bruce Baker & William Duncombe, *Balancing District Needs and Student Needs: The Role of Economies of Scale Adjustments and Pupil Need Weights in School Finance Formulas*, 29 J. EDUC. FIN. 195, 197 (Winter 2004). Baker and Duncombe note: “A few studies have identified that high schools above 1,000 students and elementary schools above 600 students may inhibit student performance, and that these diseconomies of scale are particularly important for at-risk children.” *Id.*

weight the per-pupil funding levels for different sized schools.

Issues of quality become more pressing as time goes on. Although there have been a few attempts to substantively define the constitutional mandate of “quality” education in Montana, no definition has ever been carried into law.²²⁴ Because Montana’s constitutional mandate has never been defined, the actual cost of providing quality educational opportunity to each student in contemporary society has not been considered in calculating the minimum and maximum allowable school district budgets and per-pupil funding levels.²²⁵ As a result, Montana school funding has never been placed on a constitutional foundation. Annual inflation-related adjustments to basic entitlements and per-student entitlements were included in the system in 2003.²²⁶ Certainly inflation adjustment to per-student funding is a necessary measure to account for predictable increases in costs. This measure, however, is based on the assumption that the current funding levels are educationally justified and adequate, and that inflation rates somehow track the rising cost of providing educational resources, an assumption unsupported by empirical data.²²⁷

As this article goes to press, Montana’s funding system is once again being litigated.²²⁸ In April 2004, District Judge Sherlock declared Montana’s current state school funding system unconstitutional in violation of article X, section 1 of the Montana

224. See *supra* notes 69-71 and accompanying text (discussing Board of Public Education study of “basic quality education”).

225. A new study calculating costs of a hypothetical system that the authors assert reflects “quality” suggests that Montana’s level of funding may not even rise to a minimum level of adequacy. See generally John Myers & Justin Silverstein, *Calculation of the Cost of a Suitable Education in Montana in 2001-2002 Using the Professional Judgment Approach* (August 2002), available at <http://www.mtsba.org/study/Final%20Report.pdf>.

226. MONT. CODE ANN. § 20-9-326 (2003) (effective July 1, 2004) (basic entitlements and per-ANB entitlements are adjusted yearly according to the consumer price index (CPI)).

227. See National Center for Education Statistics, *Measuring Inflation in Public School Costs: Working Paper No. 97-43* (U.S. Dep’t of Educ. 1997), available at <http://nces.ed.gov/pubs97/9743.pdf>. “It is important to recognize that while the CPI does play a role in the determination of the salaries of school personnel, it still represents a different set of goods and services than those purchased by school districts. The changes in the CPI do not reflect all of the other factors that affect the supply of, and demand for, individuals within the public education sector.” *Id.* at 11.

228. *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, No. BDV-2002-528 (Mont. 1st Jud. Dist. Ct.).

Constitution.²²⁹ Evidence at trial indicated multiple areas of funding inadequacy in Montana public schools, including problems with: (1) increasing numbers of schools at or above maximum budget levels; (2) meeting accreditation standards; (3) attracting and retaining teachers; (4) large numbers of school programs being cut; (5) constructing and maintaining safe and adequate buildings; (6) competition for dollars between special education and regular education; (7) declining state support for the general fund; and finally, (8) “the fact that Montana’s funding formula is not reasonably related to the costs of providing a basic system of quality public elementary and secondary schools,” nor was it “based on a study of the funding necessary to meet what the state and federal governments expect of Montana’s schools.”²³⁰ Additionally, Judge Sherlock found that the current funding scheme violates article X, section 1(2) because the State “has failed to recognize the distinct and unique cultural heritage of American Indians and has shown no commitment in its educational goals to the preservation of their cultural identity.”²³¹ Sherlock also found the funding scheme violates article X, section 1 as a whole because the state has failed to adequately fund public schools and “is not paying its share of the cost of the basic elementary and secondary school system.”²³² Once again, the court found that accreditation standards did not fully define the constitutional rights and responsibilities in Montana’s education article.²³³ Sherlock ordered: “To satisfy [the] Montana Constitution, the State’s school finance system must be based upon a determination of the needs and costs of the public school system, and the school finance system must be designed and based upon educationally-relevant factors.”²³⁴ He stayed his decision “pending resolution of this matter before the Montana Supreme Court.”²³⁵

To remedy the inequitable and inadequate funding system, the Montana Supreme Court should first acknowledge the dual state obligation under the Montana Constitution to provide both a quality education and an equal opportunity to a quality educa-

229. *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, No. BDV-2002-528, 2004 ML 813 (Mont. 1st Jud. Dist. Ct. April 2004).

230. *Id.* ¶ VIII(C)160 (Findings of Fact).

231. *Id.* ¶ 8 (Conclusions of Law and Order).

232. *Id.* ¶¶ 9-10 (Conclusions of Law and Order).

233. *Id.* ¶ 11 (Conclusions of Law and Order).

234. *Id.* ¶ 13 (Conclusions of Law and Order).

235. *Id.* ¶ 15 (Conclusions of Law and Order).

tion. As a first step to fulfilling those obligations, the court should require a legislative definition of the constitutional education article that identifies those resources necessary to provide a quality education to each student in Montana.²³⁶ In doing so, it may provide broad guidelines based on plain meaning and judicial and legislative precedent.²³⁷ The Wyoming Supreme Court synthesized the meaning of essential terms at the time of ratification and the contemporary meaning of the same terms.²³⁸ Using this approach, most of the terms in Montana's education article have not changed in definition since 1972 when the constitution was ratified.²³⁹ The definitions of Montana's constitu-

236. The legislature has recognized this need a number of times, but never enacted a definition. See, e.g., *supra* Part III discussing various legislative attempts to define the education article; see also S.B. 411, 2003 Leg., 58th Sess. (Mont. 2003) (the author's own attempt to start a contemporary debate about the definition of Montana's education article). Other authors have also noted that, unlike a number of other states, Montana has never defined its constitutional education article. For example, Wayne Buchanan and Deborah A. Verstegen in their article, *School Finance Litigation in Montana*, observed:

[*Helena Elementary*] clearly speaks to the fundamental question of a state government's role in the financing of its schools. Underlying it is the definition of a quality basic education and the adequacy of the state finance scheme to support it equitably. Montana is in the process of discovering that this question must be addressed before the responsibility of the state can be ascertained.

Wayne Buchanan & Deborah A. Verstegen, *School Finance Litigation in Montana*, 66 EDUC. LAW REP. 19, 31-32 (1991). Defining Montana's education article is a necessary first step to meeting the constitutional mandate.

237. The New Jersey Supreme Court and the Wyoming Supreme Court both supplied broad guidelines to the legislature in defining their constitutional education articles, but both required the legislature to provide the ultimate definition. See *Abbott*, 575 A.2d at 367, 374, 390; *Campbell County School District*, 907 P.2d at 1259, 1279. The Montana Supreme Court in *Helena Elementary* provided minimal guidance, but indicated that any definition must exceed the accreditation standards in place at the time of that decision. *Helena Elementary*, 236 Mont. at 54, 769 P.2d at 690.

238. *Campbell County School District*, 907 P.2d at 1259.

239. In 1972, Webster defined "quality" as "excellence; superiority." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1161 (David B. Guralnik ed., World Publ'g 2d ed. 1972) [hereinafter WEBSTER'S 1972]. It defined "opportunity" as "a combination of circumstances favorable for the purpose; fit time; a good chance or occasion, as to advance oneself." *Id.* at 998. "Education" was defined as "the process of training and developing the knowledge, skill, mind, character, etc., esp. by formal schooling, teaching, training." *Id.* at 444. In 2002, Webster defined the adjective "quality" as "of or relating to high society: aristocratic; of, relating to, or marked by good quality: excellent." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1859 (Philip Babcock Gove ed., Merriam-Webster 2002) [hereinafter WEBSTER'S 2002]. It defined "opportunity" as "a combination of circumstances, time, and place suitable or favorable for a particular activity or action." *Id.* at 1583. "Education" was defined as "the act or process of educating or of being educated: as . . . the act or process of providing with knowledge, skill, competence, or usu. desirable qualities of behavior or character or of being so provided esp. by a formal course of study, instruction, or training." *Id.* at 723.

tional terms indicate the constitutional mandate that “equality of educational opportunity is guaranteed to each person of the state,” plainly means that each Montana citizen is guaranteed an equally good chance to advance him or herself by acquiring knowledge, skill, and competence through formal training.²⁴⁰ Coupled with article X, section 1(3), the legislature must provide that formal training through public elementary and secondary schools marked by good quality, excellence, and superiority.²⁴¹ Further substantive interpretation is clearly necessary, but this plain meaning of terms could instruct the legislature in its search for a definition. The legislature should also look to historical foundations of Montana’s public school system and involve a diverse group of Montana citizens, educators, parents and legislators in framing its definition.²⁴²

The court should further specify that any definition and resulting funding scheme should be subject to periodic legislative review to reflect advancements in educational research.²⁴³ The framers of the Montana Constitution implicitly recognized the need for flexibility: “The word ‘quality’ is an instruction to the legislature to provide not simply a minimum educational system, but *one which meets contemporary needs* and produce[s] capable, well-informed citizens.”²⁴⁴ To meet contemporary needs, a legislative definition of the education article and the funding scheme based on that definition must be periodically reviewed and updated.

Funding should also be sensitive to special needs—the unique needs of students, schools, and school districts.²⁴⁵ The current system appears to address differing costs between smaller and larger schools and between elementary and high

240. See WEBSTER’S 1972, *supra* note 239; WEBSTER’S 2002, *supra* note 239.

241. See MONT. CONST. art. X, § 1(3).

242. The most significant school funding revision in Montana’s history—the 1949 Foundation Program—was the result of an informational program conducted by a “grassroots’ committee of legislators, educators, parents, and other interested persons” in 1947. See Merrill, *supra* note 43, at 4.

243. Both New Jersey and Wyoming provide for legislative review of their funding schemes at least every five years. See N.J. STAT. ANN. § 18A:7F-4 (2004); WYO. STAT. ANN. § 21-13-309(t) (2003).

244. IV CONVENTION, *supra* note 8, at 724 (emphasis added).

245. See BRIMLEY & GARFIELD, *supra* note 209, at 62 (“Equality of educational opportunity has been interpreted to mean providing the same amount of money for each pupil who is to be educated. Gradually, however, financing formulas have recognized that it costs more to educate some pupils than others.”).

schools.²⁴⁶ It also makes some provision for the exceptional costs of providing special education.²⁴⁷ However, there has been no recent legislative study of the actual unit cost of providing education in contemporary society.²⁴⁸ Likewise, there is no evidence of the legislature studying the relationship between district costs and educational opportunity. Research suggests that districts struggling with high costs, such as urban areas with higher teacher salaries, rural areas with higher transportation costs, and districts with a higher concentration of special educational needs students will have to spend more dollars per student to offer the same quality of educational opportunity that other districts offer.²⁴⁹ A district-by-district study of the cost of providing different educational resources would more clearly define what “educationally relevant factors” should be considered in setting and weighting funding amounts.²⁵⁰ Once again, these factors should be periodically reviewed to remain current and keep up with educational innovation. The framers of Montana’s constitution anticipated such innovation, and thus made flexibility a fundamental priority in drafting the education article:

246. MONT. CODE ANN. § 20-9-306 (2003).

247. See Madalyn Quinlan, *Montana*, at 11-12, in National Center for Education Statistics, *Public School Finance Programs of the U.S. and Canada: 1998-1999*, available at <http://nces.ed.gov/edfin/pdf/StFinance/Montana.pdf>. The fifty-state report is downloadable in .pdf format at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2001309>.

248. Brimley and Garfield observe in *FINANCING EDUCATION IN A CLIMATE OF CHANGE* that as society changes, so do the costs of providing educational resources. See BRIMLEY & GARFIELD, *supra* note 209, at 62-63. They note that the earliest examples of weighting per-student funding was done to reflect different costs of smaller and larger sized school districts, the conventional wisdom being that smaller rural school districts had higher costs. *Id.* at 62. However, those costs have evolved in some states to reflect higher costs in urban districts. *Id.* at 62-63. Whether this same shift has taken place in Montana, where extreme effects of urbanization are not felt, could only be determined by studying the unit cost of education in this state. Although there is no recent legislative study of unit costs of education, one such study was prepared for plaintiffs in the current school funding litigation in Montana. See generally Myers & Silverstein, *supra* note 225; see also *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, No. BDV-2002-528, 2004 ML 813, ¶¶ 147-160 (Mont. 1st Jud. Dist. Ct. April 2004) (discussing the professional judgment study conducted by plaintiffs). The study used a combination of input and output measures defined by Montana educators and experts to determine a per-pupil amount it suggests would be “adequate” for different districts. *Id.*

249. See LUKEMEYER, *supra* note 10, at 14-15 (citing William Duncombe & John Yinger, *School Finance Reform: Aid Formulas and Equity Objectives: Metropolitan Studies Program Occasional Paper No. 175* (Syracuse Univ. Ctr. for Policy Research 1996); Helen F. Ladd & John Yinger, *The Case for Equalizing Aid*, 47 NAT’L TAX J. 211 (1994)).

250. See *Helena Elementary Sch. Dist. No. 1 v. State*, 7 Mont. Educ. Law 14, 86 (1st Jud. Dist. Ct. Jan. 13, 1988).

“Fundamental to the committee’s considerations were the twin goals of protecting the integrity of a quality educational system and allowing for flexibility to meet changes as yet unknown but which will certainly occur in the future developments in the field of learning.”²⁵¹

Once the legislature identifies the resources essential to provide quality education, it can fulfill the constitutional guarantee of equal educational opportunity by designing a system to distribute those resources on an educationally relevant basis—one which acknowledges unique student and district needs. Although some inequality is inevitable, the Montana Constitution mandates an even playing field when it comes to educational opportunity. Inequality in the sense of how much certain communities will value education, how much they will demand from their children, how much they will demand from their teachers and schools, is simply inescapable as a natural result of locale. However, the Montana Constitution does not allow educational opportunity to vary with locale—it requires equal educational opportunity for every child.²⁵² This requirement is essential to minimizing the disparities between the affluent and poor in Montana’s communities. Deborah Verstegen, author of *Financing the New Adequacy*, notes: “All too frequently, inequalities penalize poor children and youths, compounding adverse social and economic circumstances by hobbling them in securing a viable passport out of poverty—a quality education.”²⁵³ John Rawls observes that wealth is “necessary for the framing and the execution of a rational plan of life.”²⁵⁴ If wealth flows from and is dependent on education, then by depriving children of an equal opportunity to education, the state deprives them of an equal opportunity to make life plans and pursue them.²⁵⁵ To prevent this tragedy, the court should at least require essential resources to be equalized in order to create the even quality mandated by the Montana Constitution.

CONCLUSION

Montana’s current funding scheme is based on the erroneous assumption that equal dollars per student or per district will

251. VI CONVENTION, *supra* note 8, at 1948 (statement of Delegate Champoux).

252. MONT. CONST. art. X, § 1(1).

253. Verstegen, *supra* note 203, at 758.

254. RAWLS, *supra* note 2, at 433.

255. *Id.*

produce equal resources, services, and curricula, and result in the equal educational opportunity envisioned by the Montana Constitution. But one size does not fit all in the public school system. The Montana Constitution requires not only *equal* educational opportunity, but also *quality* educational opportunity.

The legislature needs to definitively address how quality education should be measured in Montana, how the state can provide students with an equal opportunity to receive a quality education, and how the amount of funding put into educational programs correlates to the level of quality as defined. The court can and should offer guidance on these issues by clarifying the relationship between equality and quality, and recognizing that blind fiscal equality will not meet the state's constitutional obligations. A judicial remedy should specifically require the state to first define the education article by studying the resources necessary to provide a quality education to all students in Montana, then study the costs of providing those resources and design a funding scheme that reflects its findings. The final funding system should be sensitive to students', schools' and school districts' unique needs.

The Montana public school system must be reformed to reflect the essential theory of justice upon which it was founded—it must fulfill the guarantee of equal educational opportunity. Should the issue be presented to the Montana Supreme Court again, the underlying philosophy of equal opportunity should inform the court's decision. The guarantee of equal educational opportunity envisions a system that is sensitive to individual student and school needs and funds accordingly. Instead of decreasing overall quality in the name of equality, the system should increase the overall level of quality. By recognizing these foundational principles, and clarifying the dual obligations to provide quality and equality under the Montana Constitution education article, the court can help breathe life into Montana citizens' constitutional right to equal educational opportunity.

