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Stephen D. Sugarman

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TWO SCHOOL-FINANCE ROLES FOR THE FEDERAL GOVERNMENT: PROMOTING EQUITY AND CHOICE

STEPHEN D. SUGARMAN*

I. INTRODUCTION

The federal government could use its spending power to offset the inequalities in expenditure on elementary and secondary school students that arise from the unequal fiscal capacities of states to deal with the educational burdens they face. For example, states that agreed to make a specified tax effort for education might be guaranteed federal assistance that, together with the state's contribution, would fund a nationally-determined level of spending that takes into account both special student needs and the varying costs of educational services from place to place. Moreover, the national government could tie its provision of financial assistance to the willingness of states to eliminate unfair inequalities in school spending within their borders.

This scheme could eliminate the discriminatory treatment of our nation's schoolchildren that has plagued public education from the outset. Alas, the scale of the required federal role is probably too large in the present political climate.

In the meantime, however, Congress might at least assure greater fairness to poor and disabled children by guaranteeing them access to a nationally-established program of school scholarships. Where the family finds the education offered by the local public school district to be insufficient, these scholarships could be used to pay for education in other schools of the family's choice.

A. The Current Federal Role

The federal government today plays a minor role in the financing of America's public schools. Indeed, up until 1965, there was very little federal role in our public education system and virtually no federal presence on the school finance side. In that year, however, Congress enacted what immediately be-

* Agnes Roddy Robb Professor of Law, University of California, Berkeley (Boalt Hall). Erica Craven provided helpful research assistance.

came and remains the largest federal program of aid to elementary and secondary education.¹

This scheme, widely referred to as “Title I,”² enters the world of school finance in a special way—seeking to target financial assistance to poor children, or more precisely, to schools with concentrations of poor children. Underlying Title I is the assumption that children from low income homes tend to be educationally disadvantaged and in need of extra educational attention, especially when their classmates are also disadvantaged. This coming year Title I will provide approximately eight billion dollars.³

The second most important type of federal aid to elementary and secondary education is for disabled children. This funding is the result of legal and political battles that began in the 1970s, at a time when the public schools, in general, shamefully ignored the needs of disabled children—sometimes excluding them from schooling altogether, or else shunting them off into decidedly second class programs, or else admitting them to regular programs which simply ignored their special needs.⁴ The Congressional award of both procedural and substantive rights to disabled school children was the outcome.⁵

Children thought to be disabled are entitled to individualized assessment of their condition and creation and implementation of an individual educational plan (“IEP”) designed to deal with their special circumstances.⁶ In the upcoming year, federal funding of special education will amount to about four billion dollars.⁷

A civil rights mentality lies behind both of these programs. The poor child, often African-American or Hispanic, and the disabled child were seen to share two important features. First, they have special educational needs that require additional funding if they are to have a fair opportunity to be properly educated. Second, rather than special treatment, the public schools had tended to ignore their needs, or worse, provide them with inferior educational experi-

1. See Martin Orland & Stephanie Stullich, *Financing Title I: Meeting the Twin Goals of Effective Resource Targeting and Beneficial Program Interventions*, in *IMPLEMENTING SCHOOL REFORM: PRACTICE AND POLICY IMPERATIVES* (M. Wang & K. Wong eds., 1997).

2. Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 2, 79 Stat. 27 (1965).

3. Opening Statement on Federal Pre-K Through Twelve Education Programs, before the Senate Budget Committee Task Force on Education, 105th Cong., 1st Sess. (1997) (statement of Bill Frist).

4. 20 U.S.C. § 1400 (1970) (amended 1997).

5. See Individuals with Disabilities Education Act of 1970, Pub. L. No. 91-230, 85 Stat. 175 (1970) (revised by Pub. L. No. 105-17, 111 Stat. 37 (1997)).

6. Lisa Applegate & Kathy Luthe, *Montgomery Plan Based on Pupils' Rights*, *ROANOKE TIMES AND WORLD NEWS*, February 1, 1998, at A4.

7. Memorandum from Thomas Hehir, Director, Office of Special Education Programs to State Directors of Special Education (Feb. 26, 1998), available from U.S. Dept. of Ed., Ruth Ryder (202) 205-5547.

ences compared to those provided to non-disabled children of the middle class and the wealthy.

Similar (if more extreme) failings by the states were earlier viewed as special justifications for federal involvement, through the 1964 Civil Rights Act,⁸ in helping to dismantle racially segregated public school systems that remained stubbornly in place even ten years after *Brown v. Board of Education*.⁹ In the same vein, poor and disabled were two more “discrete and insular minorities” in need of federal protection—and because of their special needs, additional financial assistance as well. Schoolgirls, too, joined this list of protected groups through the Education Amendments of 1972, but as with racial minorities, they essentially obtained an equal treatment guarantee without the provision of federal money.¹⁰

Because poor and disabled children were not well treated by the states, when the federal government picked them out for special assistance, it was considered foolish merely to give the states lump sums, for instance, based on headcounts of those categories of students. The fear was that the states, at worst, would either spend the money on already advantaged children or treat it as tax relief by diminishing their state contribution to education, or, at best, would add the money to their general education budgets in support of all students more or less equally. Because of this fear, these programs contain earmarking and tracing features designed to assure that the intended beneficiaries are the true beneficiaries. For example, to insure that Title I funds generate extra spending on the target group, its rules require that districts start with at least comparable programs for Title I and non-Title I pupils, that Title I funds be used to supplement and not supplant services that would otherwise be available to Title I-eligible pupils, and that districts broadly maintain their non-federal spending.¹¹

All in all, federal financial assistance remains a very small share of total public spending for elementary and secondary education—about seven percent, all federal school aid programs considered.¹²

B. Problems with the Current Federal Role

The existing level of federal aid, when combined with existing state and local school-finance practices, leaves the federal government in a very odd position. In short, modest federal help is layered on top of a crazy quilt of other arrangements.

8. *See generally* 42 U.S.C. § 2000a (1964).

9. *Brown v. Board of Education*, 347 U.S. 483 (1954).

10. *See generally* 20 U.S.C.A. § 1681 (1972).

11. *See Orland & Stullich, supra* note 1, at 8-9.

12. Editorial: The President’s School Proposals, WASH. POST, Jan. 28, 1998, at A16.

It would be different if, for example, there were a national consensus as to what standard a good-quality education should include for the ordinary pupil and everywhere that is what the public schools provided. Against that backdrop, modest federal add-ons targeted to extraordinary students who need special assistance might be easy to understand especially when, under this hypothetical state of affairs, no schools were otherwise making special provision for such pupils. But that is not at all the real state of affairs.

Some schools, for example, receive federal money for their poor and disabled pupils even though those schools already have available to them much more than the average amount of money available to similar schools.¹³ If poor and disabled children are ill-treated in such schools, it is not a matter of too little money. Rather, it is a matter of its distribution. These pupils need a right to have school spending based on pupil needs more than they need extra cash for their schools.

Moreover, much has changed since the 1970s and in many schools there is empathy for the poor and the disabled quite apart from federal involvement. Or, there may be empathy for these classes of pupils at the state level, and that may have resulted in, say, special state compensatory aid programs for them. In either case, in at least some schools there is quite sufficient funding for the needy groups who would receive adequate special assistance in any event. Disabled and poor pupils attending those schools do not need federal involvement.

Other schools caring for these special students are generally strapped for resources. They would, in any event, voluntarily spend disproportionately on the poor and disabled among their pupils, but they can only spend relatively small sums on everyone. In these schools more money across the board is what is needed. Indeed, more money spent on the poor and disabled alone might not most benefit those groups; instead, they would be better served if the basic education provided to everyone were improved.

As I will detail below, among the schools that are generally strapped for funds, often it is because their school's district itself is just too poor and there is insufficient state aid to offset that poverty. Sometimes the district is not so poor (or it is but the state will generously match the district's effort) and yet the local voters just are not supportive of education in general. In still other communities, the real problem is an inter-state one in the sense that the community's state is relatively poor.

Of course, there is yet another category of schools that is both short on money and indifferent or hostile to the poor and disabled. Children in those schools need both more school-level funds and protection as to how they are spent. The existing federal scheme is structured in effect as though all schools

13. Paul Goodsell, *Special Needs Affect School-by-School Spending*, OMAHA WORLD-HERALD, Jan. 21, 1997, at 1.

are like this—which they are not. In sum, school-based financial problems (if any) that poor and disabled pupils face vary considerably, yet the federal strategy has been uniform.¹⁴

Moreover, this analysis has so far focused on poor and disabled students as though they are all the federal government should care about. But, as will be detailed below, there are ordinary children on whom arguably too little money is spent who might also have a legitimate claim to federal assistance.

Furthermore, federal aid to education is not financed with golden eggs. Instead, it must come from federal tax proceeds born by taxpayers in various states. Since money raised is currently sent back to schools where poor and disabled children attend, one might initially think the scheme is re-distributive among the richer and poorer states. But this is not entirely clear. After all, states like California and New York are wealthy, but they also have a disproportionate share of the nation's poor and disabled within their borders.¹⁵ Put differently, to the extent that states like that receive federal aid moneys that their own taxpayers send to Washington, the impact of the program is not one of redistribution among states but rather of attempted earmarking within states of but a small share of total school spending.¹⁶

There are additional problems with existing federal strategies. First, on the Title I side, although the plan on its face seems to call for concentrating funds in schools with the highest concentrations of poor children, that is not the case. Instead, every district receives its share of Title I basic grants based upon its number of poor children—unless fewer than 2% of its children are poor (a rare situation in all but the wealthiest areas).¹⁷ Within districts money is concentrated in schools with the poorest children.¹⁸ But the upshot of that requirement is that poor urban schools often have no Title I money for their schools enrolling relatively fewer poor children, even if the proportion of poor children in those unserved schools is much higher than the proportion of poor children enrolled in suburban schools receiving Title I funds.¹⁹ In response to this awkward situation, some effort has been made to further concentrate Title I funds by restricting them “to counties and school districts with at least 6,500 eligible children or more than 15% eligible children,” but so far Congress has been unwilling to designate very much of the Title I money in this way.²⁰

14. Deborah Anderluh, *High Turnover, Low Expectations Plague Poor Schools*, SACRAMENTO BEE, Sept. 25, 1997, at A1.

15. *Pondering Immigration*, THE PROVIDENCE JOURNAL-BULLETIN, Oct. 23, 1997, at B6.

16. Ken Foskett, *Senate Republicans Block Grants a Centerpiece in GOP Education Plan*, THE ATLANTA JOURNAL/THE ATLANTA CONSTITUTION, January 20, 1998, at A5.

17. See Orland & Stullich, *supra* note 1.

18. Mark Skertic, *Schools Bracing for Staff Cuts Federal Money to be Disbursed More Broadly*, THE CINCINNATI ENQUIRER, May 17, 1997, at B1.

19. See Orland & Stullich, *supra* note 1, at 4, 11.

20. *Id.* at 5.

Second, the unhappy fact is that studies of the effectiveness of Title I funding raise considerable doubt as to whether the money truly accomplishes anything in most places.²¹ This is not to assert that there are no exemplary programs. But overall many doubt whether poor children learn more as a result of Title I.²² To date, schools find it much easier to create pull-out programs for low income pupils because that sort of spending is easily documented, even if in their judgment the low income pupils would actually benefit more from a scheme more difficult to document to the satisfaction of federal officials.²³ Some think that the pull-out strategy is disastrous because it removes the child from the regular teacher during the school day. They would prefer using Title I for after-school or longer-school-year programs.²⁴ Cynics may suggest that Title I's primary impact is to provide jobs in public schools located in poor neighborhoods – although it is by no means clear that otherwise low income people from those communities are the main recipients of those jobs.

Third, in the special education field, the major complaint at the moment seems to be that the federal rights created on behalf of the disabled are dramatically under-funded by the federally provided funds.²⁵ In the political talk of the day, this translates into an “unfunded mandate” and leads to what is sometimes called “encroachment.”²⁶ Money that was envisioned as intended for the ordinary pupil must be siphoned off to help fund the special needs of the disabled child. Were the disabled simply the hearing-impaired, visually-impaired, and mobility-impaired, encroachment might raise few hackles today. Adding in the mentally retarded is a complicated matter: do we fear and detest them and find it wasteful to educate them (as was the conventional outlook) or do we now empathize with them and their parents and respond with a generous willingness to try to do something helpful for them even at higher than average cost?

In any event, when it comes to other major classes of the disabled, there is considerable public resentment brewing. The learning disabled comprise one group. Many wonder whether this is a true disability or rather an excuse for what they imagine are mostly white middle class parents seeking extra funding for children who are not bright or who are not effectively socialized to work hard. The other group is the emotionally disturbed. They are often thought to

21. *Id.* at 14.

22. *Id.*

23. *Id.* at 8, 19.

24. 1994 amendments to Title I are designed to encourage such programs. See Orland & Stullich, *supra* note 1, at 8; Other amendments are intended to permit some local officials to experiment with school wide improvement projects that could benefit both Title I and other pupils. See Orland & Stullich, *supra* note 1, at 20.

25. Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1137 (1997).

26. *Id.*

be children who “act out” in class (often imagined to be primarily non-white boys) and are generally thought to be trouble-makers. In short, they are seen by many to deserve disciplinary controls rather than special coddling. Whatever the truth of these surmises, it is easy to see why they contribute to a backlash against “encroachment,” i.e., less spending on “ordinary” children.

It seems a propitious time, therefore, to explore afresh possible alternative federal roles in the financing of elementary and secondary education. In order to provide the right context for re-evaluation, however, it is necessary to provide some details about the basic funding of public schools by states and localities, as well as the legal challenges to those funding arrangements mounted during the past thirty years.

II. TRADITIONAL LOCAL AND STATE SCHOOL-FINANCE ROLES AND THEIR CONSEQUENCES

The American system of public education was largely created during the second half of the 19th century, at which time local government was the basic provider of public services.²⁷ The dominant political image was that people in a local community would collectively support needed services—like public safety (police and fire), public utilities (such as water), roads, and so on. Public education was cast in this local-government tradition. Although a specialized public entity (the school district) was often employed, it was widely understood from the start that each community would create and fund its own schools, and, as with other local services, the funding mechanism would be imposition of taxes on property located in the community.²⁸

If all (or at least most) local communities could be thought of as similar—containing, say, some farmers, laborers, artisans, small merchants, successful business and professional people and so on—and so long as each school was understood as constituting a simple building and teacher for each grade, then a series of uncoordinated local actions could nonetheless cumulate to achieve a “system” of more or less “common schools” for young Americans everywhere (putting aside, of course, the widespread exclusion blacks and others from many so-called public schools!).

If it was not clear at the outset, however, it was surely clear by the later part of the 19th century that public schools were not, and simply would not be, the same from place to place.²⁹ First, some communities faced much greater

27. William E. Sparkman, *Symposium: Issues in Education Law and Policy: The Legal Foundations of Public School Finance*, 35 B.C. L. REV. 569, 578 (1994).

28. *Id.* at 579.

29. See generally Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995). “In the courts, in state legislatures, in scholarly analysis, and in the popular press, discussions of education funding over the last several decades have focused on the glaring inequalities between rich and poor school systems” *Id.* at 102.

burdens than others and could not provide the same caliber of schools others established.³⁰ For some, the burden was having a higher proportion of school age children to teach than others.³¹ For others, the burden was that the members of the community were poor and did not have a strong commercial and industrial base to tax.³² Second, some communities seemed to care about education more than others. Early on, for example, they provided high schools, or encouraged more of their local pupils to attend them, and thereby paved the way for more of their students to attend institutions of higher learning. Over time each of these differences increased.

Public schools are different from other traditionally local services, however, because education has a prominent place in state constitutions.³³ Perhaps because of these provisions, or perhaps simply because of widespread felt importance of education, state legislatures eventually began to take on some responsibility. Although until now, no state other than Hawaii has taken over public education³⁴ and made it a truly state function, from the late 1800s states were significantly involved in public school financing.

First came what may be called “basic” grants—the transfer to all school districts from the state treasury of \$X per pupil.³⁵ This amount was never really intended to be sufficient to completely pay for a child’s education; it was designed to provide encouragement to local school districts to copy the state’s example by putting up extra money needed to support local schools.³⁶

Of course, were there no strings attached to these basic grants, some districts might simply reduce their existing effort in order to offset the grant, thereby converting state aid into a property tax rebate to the local community. Still, most school districts seemed instead to welcome state aid as a way to increase spending on schools beyond what local people could afford on their own.

30. See generally ARTHUR E. WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATION OPPORTUNITY 126-133 (1968).

31. *Id.* at 129 (providing examples of disparate results in funding by comparing a district comprised mostly of industry with few pupils to another, largely residential, with many pupils).

32. WISE, *supra* note 30, at 126, quoting CHARLES S. BENSON, THE CHEERFUL PROSPECT: A STATEMENT ON THE FUTURE OF PUBLIC EDUCATION 44-45 (1965) (“[T]he power of some districts to include . . . large industrial holdings within their boundaries . . . allows those districts to provide expensive educational programs at extremely low rates.”).

33. Enrich, *supra* note 29, at 105-106 (noting that nearly all state constitutions include an equal protection clause similar to that of the Federal Constitution and an “education clause” which obligates the state to establish a public school system).

34. *Id.* at 194, n.9.

35. CHARLES S. BENSON, THE ECONOMICS OF PUBLIC EDUCATION 195 (1961) (describing the major funding approach at the turn of the century).

36. *Id.* at 196-7 (explaining that a main purpose of this funding approach was to provide incentive for districts to extend the scope of educational programs).

To be sure, basic state aid did not come from money that grew on trees; to some extent, local people were paying for this addition to the school budget in a different way. But not completely. In the first place, the state funding source tended not to be property taxes, and so it did not fall on district residents in the way the local property tax did.³⁷ More importantly, communities received an equal amount per pupil through the grant regardless of how much the state tax raised in their community.³⁸ In this way, the state aid could be considered re-distributive among communities.

By the 1920s, however, a new approach came into vogue.³⁹ Called the “foundation grant” (or the “foundation plan”),⁴⁰ it remains, in important respects, the cornerstone of public school finance today. This approach is meant to be more re-distributive (or “equalizing”).⁴¹

The idea underlying the foundation plan is that the state determines what basic public education costs (say, \$5000 per pupil) and then makes local school districts the following offer: if you tax yourselves at X rate (say, \$3 per \$100 of assessed value of the property in your community), then we will give you what is needed beyond what you raise yourselves to pay for basic education of all of your pupils.⁴² If school districts wish to spend more than the foundation level, they are free to do so by increasing their local taxes beyond the 3% rate used in this example.⁴³

It is easy to see the re-distributive (“equalizing”) nature of the foundation plan. A community with relatively less property to tax would raise relatively less from its 3% tax rate, and hence it would receive relatively more from the state through the foundation grant. So, too, a community with relatively more pupils to educate would receive a larger share of its basic education budget from the state. Where a district stands with respect to a combination of these two factors is readily captured in a single measure—its assessed value per pupil. Simply put, under the foundation plan, those with lower assessed value per pupil obtain a larger share of their basic budget from the state.

37. BENSON, *supra* note 35, at 196-97.

38. *Id.* at 199-200. Under this approach, the distribution of state aid depended on the number of teachers employed and “aggregate daily attendance.” *Id.* A reserve fund also existed for instances where distribution was inadequate to meet the needs of a particular district. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 202.

42. *Id.* at 203.

43. *Id.* at 242. One of the main criticisms of the foundation plan formulation is that it does not recognize the differing income levels between districts. While it establishes a minimum tax for achieving basic aid, it does not equalize the abilities of districts to exceed that rate. *See also* JOHN E. COONS ET AL, PRIVATE WEALTH AND PUBLIC EDUCATION 106 (1970) (stating that the foundation plan does not “eliminate wealth determinants of quality except at the participation level”).

So, for example, if a district's 3% tax raises \$1,500 per pupil (i.e., 3% on \$50,000 assessed value per pupil yields \$1,500 per pupil), its foundation grant would be \$3,500 per pupil, giving it \$5,000 per pupil in total. By contrast, if the 3% tax raises \$4,500 per pupil in a district (i.e., 3% on \$150,000 assessed value per pupil), its foundation grant would be only \$500 per pupil.

Were the foundation plan amount per pupil truly sufficient for a good education so that few districts had any real interest in spending more than that, this grant-in-aid mechanism might have led to a statewide system in which (a) nearly all districts had nearly the same amount of funds per pupil to spend (\$5,000 in this example), (b) the residents of nearly all districts made about the same local "tax effort" for education (3% of assessed value in this example), and (c) the wealth disparities among the districts (\$150,000 v. \$50,000 assessed value per pupil in this example) were largely evened out through the redistribution of statewide taxes through the foundation plan formula.

However, in practice, none of this came about. Although the foundation plan amount may have been "adequate" in some states at some times, by and large it has been well below what educators and school district officials generally have believed is needed to provide basic school services, let alone good quality services to which many communities aspired.⁴⁴ As a result, for decades districts everywhere (or nearly so) would tax and spend well beyond the foundation amount.⁴⁵

A clear pattern resulted. Communities with low wealth per pupil imposed relatively high rates of additional local taxes for public schools beyond the level required by the foundation plan, but from those high taxes raised only relatively little extra money to spend on their pupils.⁴⁶ The districts with high assessed value per pupil tended to tax relatively little beyond that required under the foundation plan, and yet raised from modest tax rates a great deal more money beyond the foundation amount.⁴⁷ For example, an additional tax of 3% on an assessed value of only \$20,000 per pupil would yield \$600 per pupil, whereas an additional tax of only 1% on an assessed value of \$200,000 per pupil would yield \$2,000 per pupil.⁴⁸

44. COONS ET AL., *supra* note 43, at 68 (under the foundation plan, "[t]he states typically did not support the unit cost of even a basic education, let alone a substantial one").

45. *Id.* at 65.

46. WISE, *supra* note 30, at 127 (discussing the inverse relationship between tax rate and yield under foundation plans).

47. *Id.*

48. Indeed, some very wealthy districts raised so much from the local tax required by foundation plan that they didn't qualify for any foundation aid at all. Many states still guaranteed even these districts the original basic aid grant—i.e., a flat grant per pupil—thereby turning the basic aid grant into something that was highly regressive since it only benefitted the wealthy communities.

There were some exceptions to this pattern. Wealthy areas (e.g., exclusive suburbs) whose residents were especially keen on public education had both high assessed value per pupil and high taxes—and in turn their schools were especially high spenders. So, too, some property poor districts, perhaps demoralized by their poverty or perhaps ranking other local services equal with, or more important than, education did not impose upon their residents substantial extra school taxes beyond those required by the foundation plan. Nonetheless, the basic pattern noted above existed within states throughout the nation.⁴⁹

This was the situation in the late 1960s when several critics began to question whether America's system of public school finance was legal. Each of the critics called for states to take on a much larger "equalizing" role.⁵⁰ Yet, critics cast their complaints in quite different ways.⁵¹

III. LEGAL CHALLENGES TO WITHIN-STATE INEQUALITIES

A first set of critics saw the problem simply as the dramatically unequal (average) spending per pupil from district to district around the state; that is, they objected to what might be called "geographic discrimination."⁵² Their solution was to insist upon roughly equal spending per pupil statewide—one dollar/one scholar, as one prominent author put it,⁵³ echoing the U.S. Supreme Court's then recently-adopted one man/one vote standard in the legislative reapportionment area.⁵⁴

A second set of critics saw the problem as dramatic differences in wealth (as measured by assessed value per pupil) from district to district.⁵⁵ Hence, they characterized the school-finance problem as one of "wealth discrimination."⁵⁶ This second group did not mind if people in one community spent more per pupil on the education of their children, so long as that difference reflected their greater commitment to education as evidenced by a greater tax effort.⁵⁷ In other words, they did not object per se to the tradition of local control; they found it unfair that most of the higher spending on public education

49. COONS ET AL., *supra* note 43, at 72.

50. Enrich, *supra* note 29, at 108-09. The equal protection and education clauses of state constitutions have given rise to arguments against state funding systems since the 1960s. *Id.* The former focuses on equality of education and the latter, adequacy. *Id.*

51. *Id.*

52. Harold W. Horowitz & Diana L. Neitring, *Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A. L. REV. 787, 788 (1968).

53. WISE, *supra* note 30, at 155-56.

54. *Baker v. Carr*, 369 U.S. 186, 207-208 (1962) (upholding justiciability of a challenge to a Tennessee appointment statute on the basis of each citizen's constitutional right to vote).

55. WISE, *supra* note 30, at 129-30.

56. WISE, *supra* note 30, at 129-30.

57. COONS ET AL., *supra* note 43, at 20.

was a result simply of much more local wealth (combined indeed with, on average, a lower tax effort).⁵⁸

Their solution was a system of “fiscal neutrality” that would be achieved by making all the districts equally wealthy.⁵⁹ This might be accomplished, at least in part, either by redrawing district lines or by removing, say, commercial and industrial property from the local tax rolls and subjecting it to a statewide property tax that would be equitably distributed to the districts.⁶⁰ But a different solution was to gain the most attention—called “district power equalizing.”⁶¹ Through a new grant-in-aid formula, the state could constructively give each district effectively the same assessed value per pupil.

Simply put, the district power equalizing formula would assure every district that for every, say, 1% tax it imposed on local property, it would wind up with the same additional amount to spend per pupil as any other district. The state would, in effect, match the shortfall (whatever its amount) at any level of taxation the district would select (at least within the permitted range of local taxing). For example, assuring all districts \$1,000 in spending per pupil for every 1% tax they imposed on their property treats all districts as having an assessed value of \$100,000 per pupil. If a district actually had only \$20,000 assessed value per pupil, the state would, in effect, match every \$1 raised with \$4 in state funds. (As part of this plan, the state might well tell the local districts that they would only be permitted to tax in the range of, say, 2-5%.) Notice that if district power equalizing is to be truly equalizing in the way intended, districts that have more than the guaranteed level of assessed value per pupil (\$100,000 in this example) must not be allowed to retain all the funds raised. This provision was termed “recapture.” For example, if the district’s actual assessed valuation were \$200,000 in this example, it would have to give over to the state half of the money it raised for schools (to be used by the state in providing aid to other districts).

A third set of critics of the foundation plan centered their objection on the plan’s seeming assumption that all pupils are equal and its related assumption that an equivalent education “costs” the same everywhere in the state.⁶² Whereas the first two groups of critics described above sought spending equality and wealth equality, respectively, this group pressed for a wider notion of opportunity or outcome equality—a sort of equality that inherently implied very different spending amounts per pupil.⁶³ Whereas the existing system

58. *Id.*

59. *Id.* at 207.

60. WISE, *supra* note 30, at 127.

61. COONS ET AL., *supra* note 43, at 202.

62. WISE, *supra* note 30, at 156.

63. *See, e.g.,* *McInnis v. Shapiro*, 293 F. Supp. 327, 333 (N.D. Ill. 1968), *aff’d mem. sub nom.*, *McInnis v. Ogilvie*, 394 U.S. 322 (1969).

wound up providing extra money where the extra wealth per pupil was located, this set of critics wanted extra spending concentrated on communities (a) where education inputs (teacher salaries, maintenance and construction costs, and the like) were realistically higher and (b) where the pupils had greater educational needs.⁶⁴ In other words, they thought that higher spending per pupil was necessary for public education to have any chance of providing certain children with a realistically “equal education,” or what might more broadly be thought to be a genuinely equal educational opportunity. These critics often had poor urban students in mind—pupils suffering from the double whammy of living in places where school costs were relatively high and often having higher-than-average educational needs, given the lower socio-economic status of their families.⁶⁵

Because all three groups of critics couched their complaints in legal terms, their common strategy was to involve courts in bringing about reforms. Originally, the legal activists rested their claims on the U.S. Constitution and hoped for a nationwide victory in one stroke.⁶⁶ But despite early victories by plaintiffs relying on the “wealth discrimination” theory both in the California Supreme Court and before a federal district court panel in Texas,⁶⁷ these hopes were dashed by the U.S. Supreme Court’s decision in 1973 in *San Antonio Independent School District v. Rodriguez*,⁶⁸ in which the Court decisively rejected the plaintiff’s legal claims, albeit by a 5-4 vote.⁶⁹ That defeat did not end the legal battles, however. Instead, it generated waves of litigation under state constitutions.⁷⁰

By now, the country has seen statewide school finance litigation brought in nearly every state.⁷¹ Courts in nineteen states have held traditional school finance arrangements (and sometimes the entire education system) to be invalid under their respective state constitutions.⁷² In about half of these states, courts have adopted the wealth equalizing approach urged by the second set of critics described above.⁷³ (These are usually called the “fiscal neutrality” or “equity” cases.) Decisions in the other half have called for something ap-

64. *Id.* at 331.

65. *Id.* at 336.

66. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973).

67. *Id.* at 18, 56.

68. *Id.*

69. *Id.* at 2-6.

70. See generally Paul Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact and Future*, in NATIONAL ACADEMY OF SCIENCE, ISSUES OF EQUITY AND ADEQUACY IN EDUCATION FINANCE (forthcoming 1998).

71. *Id.*

72. *Id.*

73. *Id.*

proaching opportunity equality urged by the third set of critics.⁷⁴ (These are usually called the “adequacy” cases.) In practice, however, many of the legislative remedies adopted in response to both legal approaches tend to move the state in the direction of spending equality (the goal of the first set of critics).⁷⁵

Courts in twenty-four states have rejected legal attacks on their school finance systems.⁷⁶ These courts have largely concluded that educational inequalities with respect to resources are not suitable matters for judicial intervention.⁷⁷ In as much as the language of state constitutions in these latter states is typically similar to language found in state constitutions of the former group of states, the differing outcomes appear importantly to reflect differing attitudes toward judicial activism and judicial restraint.⁷⁸

Meanwhile, litigation continues in several states and might spread to others in others in the future.⁷⁹ Indeed, at present, a number of “adequacy” cases have been filed in states where “equity” and cases were earlier both successfully and unsuccessfully litigated.⁸⁰

School finance reformers have by no means relied upon obtaining reform through courts alone.⁸¹ They have carried their critiques directly to legislatures.⁸² However, without the courts backing, the reformers tend to run into traditional political alliances which for years protected the advantages of the wealthier districts. Indeed, the opposition of these districts to reform can become especially intense when, as illustrated above, the adoption of a wealth-neutral district power equalizing plan would force them to cough up some locally raised property taxes to be shared with relatively poor sister and brother districts.⁸³

Moreover, despite initial court victories, in several states the legislature and governor have not altered the state school finance system in a way that meets court dictates (e.g., in Alabama).⁸⁴ One indication of this foot-dragging is that the lawyers for the winning plaintiffs in several states have returned to court a number of times (e.g., in New Jersey and Texas).⁸⁵

74. *Id.* See Minorini & Sugarman, *supra* note 70.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Minorini & Sugarman, *supra* note 70.

83. *Id.*

84. *Id.*

85. *Id.*

The upshot is that, notwithstanding judicial and legislative reform efforts of the past thirty years, many believe in a large number of states significant unfair inequalities in the financing of public education remain.⁸⁶

IV. RETHINKING THE FEDERAL ROLE

A. *Inter-state Equity*

In the fight over inter-district inequalities, a wider point should not be ignored. There are enormous school finance inequalities from state to state.⁸⁷ This is obvious to anyone who looks, but is little-mentioned in a country where school finance has for so long been a local or, at best, a state and local responsibility.⁸⁸

At a simple level, there are marked average per-pupil spending differences from state to state.⁸⁹ Indeed, these inequalities in the aggregate are larger than the aggregate of the inequalities within states.⁹⁰ Some nationwide inequalities may properly reflect both cost differences from state to state as well as differences in the average needs of the pupils who happen to cluster in different states. But it is clear that these national differences also reflect both significant wealth differences among the states, as well as states' differential commitment to education.⁹¹

These inequalities have not been the target of litigation, and it is difficult to see how they might be. Nor have many policy reformers tried to attack them politically at the federal level. Yet, one problem only the federal government can attack is inter-state inequalities in fiscal capacity.

With respect to these, the three most attractive appeals individual states can make to Congress are a nation-wide replay of the within-state inequalities discussed earlier. That is, (a) some states can argue that they are too poor to provide comparably good education; (b) some can argue that they have a disproportionately large pupil load; and (c) others can argue that it is disproportionately expensive to educate the pupils they have (either because educational inputs are especially costly in their state and/or because their pupils are disproportionately needy). Of course, some states may make claims on more than one of these grounds.

86. See, e.g., UNITED STATES GENERAL ACCOUNTING OFFICE, SCHOOL FINANCE: STATE EFFORTS TO REDUCE FUNDING GAPS BETWEEN POOR AND WEALTHY DISTRICTS, HEHS 97-31 (1997).

87. William Evans et al., *Schoolhouses, Courthouses, and Statehouses after Serrano*, 16 POL'Y ANALYSIS & MGMT. 10, 17-18 (1997).

88. *Id.* at 14.

89. *Id.* at 18.

90. Evans et al., *supra* note 87, at 18.

91. *Id.* at 16-18.

One measure of the first two appeals would be the assessed value of property in the state per pupil. The third appeal might then be incorporated into that preliminary measure, thereby creating a single index of state need. For example, instead of simply taking a pupil headcount, a “weighted pupil” approach could be employed. That is, pupils who cost more could be counted (or “weighted”) as more than one “average” pupil. In this way, a state’s assessed value per weighted pupil would be a measure of its fiscal capacity to deal with its actual educational burdens.

Readily imaginable federal approaches to the state-to-state differences revealed by this measure of fiscal capacity are again reflected in the history of state financial aid to districts. For example, the federal government could provide a basic aid grant to each state for every weighted pupil it has, perhaps intending thereby to fund a basic education for every pupil in the country. The latter, of course, would be fabulously expensive (although, if the federal government could employ the property tax for its purposes, the picture might look very different). Realistically, therefore, a federal basic aid grant would probably be quite small, and, as with traditional state basic aid grants, would do very little to even out state-to-state inequalities in fiscal capacity.

More could be achieved with much less federal funding if Congress created a nation-wide foundation plan. Each state would, in effect, be told that in order to participate it had to (or the state together with its districts as a group would have to) tax its property at X%. If a state complied, then the federal government would assure that when federal funds were added to the proceeds of the state/local tax, the state would wind up with at least \$Y per weighted pupil.

As with state foundation plans,⁹² this approach would leave wealthier states more readily able to spend beyond the foundation level than could poorer states. The question would then become how much federal interest there is in confronting this inequality. Were the national interest strong enough, one strategy would be to forbid additional spending. This solution would, of course, effectively nationalize the funding of public education—much as it is in a large number of nations around the world. Obviously, it would be dramatically at odds with our traditions.

A different strategy would be the analogue of district power equalizing—to be called, perhaps, state power equalizing. This sort of financial mechanism could be readily constructed if there were no independent fund-raising at the district level. Indeed, the way Medicaid is funded provides an example of sorts; under that program, the federal government matches each state’s spending on the poor at a rate that varies based on the wealth of the state.⁹³

92. *See, e.g.*, W.VA. CODE § 18-9A-12 (1997).

93. *See* 42 U.S.C. § 1396b(a) (1997).

Creating a federally funded power equalizing scheme for education becomes much more complicated if the power to make different tax efforts is to remain at the district level, not the state level. One way to deal with this complication would be to push the states out of it: for example, the federal government could take over the state role (and perhaps as well the state tax sources normally used for education, like the sales tax) and make the power equalizing offer directly to the school districts.

Several thorny problems would have to be solved before the federal government could actually attack the problem of differences in inter-state fiscal capacity. One problem concerns how comparable assessed values of property are to be obtained. At present, although all states assess property for their own purposes, they do not do it in a consistent manner. Variations include which property is included, how the assessed value compares with market value, how often the assessments are updated, and what exceptions are allowed. Even if Congress could try to specify the answers to these various issues, the states still would have an incentive to under-assess in order to make themselves look relatively poorer and hence entitled to more assistance. This, in turn, might require considerable federal monitoring.

One possible solution to this problem would be to measure the state's wealth, not in terms of its property value, but instead, say, in terms of the income of the people in the state (perhaps as reflected in census data, federal tax reports, and/or other data the federal government already collects).⁹⁴ Indeed, some analysts would prefer this approach because they object to using standardized property values as the measure of relative fiscal capacity; in turn, a state's property tax rate may not fairly measure its fiscal effort.⁹⁵ (This complaint may also be made at the state level of both district power equalizing and the foundation plan.) Hence, for some analysts, shifting to a measure of fiscal capacity based on income might be not only easier, but preferable. Under this approach, the amount of income in the state would be used as the numerator to set over a denominator comprised of the number of weighted pupils a state has. The resulting figure would be taken as the indicator of the state's fiscal capacity to carry out the education function.

A second important problem is deciding how to do the pupil weighting. Self-interest will cause different states to want to weight pupils in different ways. Experts can play a role here, although some stubborn problems will remain.

For example, on the cost adjustment side, exactly how will it be decided whether comparable educational inputs are more expensive in one state as compared with another? Suppose we observe (hypothetically) that Mississippi

94. Cf. 42 U.S.C. § 1369b (1997).

95. See Allan R. Odden & Lori Kim, *Reducing Disparities Across the States: A New Federal Role in School Finance*, in *RETHINKING SCHOOL FINANCE* 268-72 (Allan R. Odden, ed. 1992).

pays its teachers less than the national average. Is this a reflection of the fact (hypothetically) that living costs and hence wage costs are truly less there? But what if it were the case that Mississippi has been willing to make do with less qualified teachers, and that is why it pays less? Or what if it has had to make do with lower-paid teachers because it is too poor to pay more than it does? This example suggests that there would be bitter battles over determining state-to-state educational cost differences—battles sure to be complicated by the fact that there are typically substantial within-state spending differences as well, some reflecting cost variations within the state.⁹⁶

As with the problem of measuring wealth differences, perhaps the problem of cost differences could also be solved by using an indirect measure—i.e., by finding a proxy for state educational cost differences. For example, existing federal data sets such as those collected by the Bureau of Labor Statistics,⁹⁷ already meant to measure variations in consumer living costs around the country, could be relied upon instead of trying to calculate state average education cost differences directly. The federal Title I program now deals with this issue by treating higher and lower spending on education as though they measured higher and lower costs of education,⁹⁸ but this ignores variation based on effort or taste.

Even greater difficulties would probably confront the construction of that portion of the weighted pupil count that is based on pupil needs. Suppose it is even roughly conceded that certain children “need” to have more money spent on them, so that they should count as more than a 1.0 student. But how much extra weight should they be given? With disabled children, over the past 20 years the IEP methodology has been refined as school-based teams assess the special needs of disabled children and determine what special services are required to meet those needs.⁹⁹ In some cases, the IEP will call for supplementary assistance (such as speech therapy, physical therapy, a sign language assistant for the deaf, an assistant who reads to the blind or an aide who provides extra in-class or pull-out instruction).¹⁰⁰ This approach goes along with the

96. For one approach to handling cost differences that relies on a “professional model,” see James Guthrie & Richard Rothstein, *Enabling “Adequacy” to Achieve Reality*, in NATIONAL ACADEMY OF SCIENCE, *ISSUES OF EQUITY AND ADEQUACY IN EDUCATION FINANCE* (forthcoming 1998).

97. See, e.g., BUREAU OF LABOR STATISTICS (last modified Dec. 5, 1997) <<http://stats.bls.gov/>>.

98. See Orland & Stulich, *supra* note 1, at 4.

99. See, e.g., N.Y. EDUC. LAW § 4402 (Consol. 1997)(the board of education or trustees of each school district in the state of New York shall ascertain the number of handicapped students in the district and establish committees of special education to ensure timely evaluation and placement of pupils).

100. See, e.g., MONT. CODE ANN. § 10-7-411 (1997)(the trustees of a school district shall ensure that assistive technology devices and services are made available to a child with disabilities

general movement to “mainstream” disabled children with ordinary children as much as is feasible. In other cases, fully substitute programs will be desired or required (self-contained classrooms, separate schools and the like).

If we could agree upon what the proper plan elements are, then converting them to pupil weighting (e.g., 1.2 for those needing routine speech therapy, 4.0 for the deaf, etc.) is not so difficult. But the problem is deciding on the proper elements. For example, on what basis is it to be decided whether, say, the student needs speech therapy twice a week or four times a week, whether the pull-out instruction should be with four others or one-to-one, whether the special self-contained classrooms will have six students per teacher, or nine, or three?

Professional norms have been created in the special education field, but on what basis? A wide variety of standards are imaginable: what experts think is “reasonable,” what schools have felt they realistically can “afford,” what is “productive” in terms of significantly enhanced learning. This search for standards may be approached in other ways as well. Should the student receive what, on average, seems to be needed by a similar pupil to learn as much as a student without the disability? But sometimes this will not be plausible regardless of how much is spent. Should the goal, then, be to provide what is needed to make it reasonably likely that the student will achieve a minimum educational attainment? Or what about a high minimum? Or what about achieving up to that student’s potential, or at least most of the way? This is surely a quagmire.

Moreover, for educationally needy students who are not disabled, individualized assessment has not occurred. What extras do low achieving children from low income families need? Today’s “extras” for those children in most schools seem to be more a product of what federal Title I money turns out to be available than of an expert determination of what they really “need.” (And surely no one imagines that the funding level of Title I has been set to fully fund such needs.) One approach would be to employ multi-variate regression analysis in hopes of discovering how much extra spending would be needed to reduce the achievement gap between the low income children and “average” children.¹⁰¹ But are we talking about cutting the gap in half or eliminating it entirely? Moreover, does not basing these estimated on spending data drawn from today’s practices include wasteful, unproductive strategies that should be replaced?

In the end, if the federal government is to go down this road, it is difficult to escape the conclusion that Congress will probably have to decide on the

if required as part of the child’s special education services, related services or supplementary aids).

101. See William Duncombe et al., *Alternative Approaches to Measuring the Cost of Education*, in HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION (Helen F. Ladd ed., 1996).

weighting by making a rough guess broadly informed by a combination of expert thinking and a sense of fairness. The upshot that non-English speakers might be assigned, say, a 1.75 weight (or perhaps 1.25 for limited-English speakers and 2.50 for non-English speakers), and this might, in turn, suggest that children from homes with income below the poverty level ought to receive a 1.40 weight, that substantially mentally disabled children should have a 2.0 weight, and so on through a few more specially identified categories.

There is at least one further challenge in the search for a single measure of a state's fiscal capacity that should be addressed. It is a frontal attack on the entire goal of using federal funds to reduce or eliminate these seeming inequalities in fiscal capacity. That is, some states might argue that their own state fiscal capacity is a function of the people working hard, building up the state economy, and so on. This line of analysis implies that to bail out the poorer states with federal funds makes it seem that their lesser fiscal capacity is inevitable (say, reflecting the natural resources of the state), when that may not be the case. These contentions begin to sound like a replay of those made during the recent welfare reform.

Yet, from the viewpoint of the education of today's children, this argument is hardly persuasive. If they happen to live in a state that currently can afford to spend relatively little on education, they are innocently disadvantaged. We could tell their parents to move; many people do indeed relocate for better educational opportunities. But for many children, the prospect that their family would move out of state in order to get away from their state's present lower fiscal capacity is implausible.

On the other hand, by contrast, it does seem much less appealing for states to argue to Washington that they need money because their own citizens are relatively uninterested in supporting education (independent of financial ability). Nevertheless, it might be the case that the nation has an independent interest in overriding this indifference. Suppose, for example, it were reflected in truly inadequate schools throughout a state. A well-designed national foundation plan would assure an adequate effort in all states.

Of course, reaching agreement on how to measure the states' fiscal capacity solves only part of the problem. Congress would then have to decide upon both the size of the national foundation plan (that is, how many dollars per weighted pupil) and the required state-level tax effort. As a starting point, Congress might want to ask experts how much spending is needed for an "adequate" education – perhaps defined as the sum required for most children to achieve reasonably high educational standards.¹⁰² Some experts have devel-

102. See generally Paul Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in NATIONAL ACADEMY OF SCIENCE, ISSUES OF EQUITY AND ADEQUACY IN EDUCATION FINANCE (forthcoming 1998).

oped an approach to “adequacy” that relies upon professional norms;¹⁰³ others use a methodology that looks to spending levels in successful schools and districts.¹⁰⁴

B. Intra-state Equity

Suppose, then, that Congress were to create a nationwide foundation plan, but it would not cap education spending at the foundation level. Suppose also that the federal government would not push states aside and deal directly with districts. Leave open for the moment whether Congress would power equalize the states. In either event, it would then have to decide how to deal with intra-state inequalities.

At one extreme, the federal government might determine a state’s aggregate entitlement under a national foundation plan (or under a state power equalizing plan) and then give the money to the state to distribute however it wishes. Under this approach, there would, for example, be no necessary requirement that the state itself have a comparable foundation (or district power equalizing) plan in place for its own districts. Indeed, under the “no strings attached” approach, a poor state could (subject only to state law limits) take its share of the federal funds and give them to wealthier students living in its own richest districts. But the federal government is not likely to take such a hands off approach.

Indeed, the federal government might condition its provision of state aid designed to reduce the impact of *inter-state* inequalities on a state having taken comparable steps *within* the state. For example, a national foundation plan might realistically work like this. The federal government would agree to provide the states the difference between, say, \$5000 per weighted pupil and the amount raised if property throughout the state were taxed at, say, a 3% rate; note that \$5,000 per weighted pupil might turn out to be something like \$6,000 per pupil headcount. To receive its federal money, however, a state would be required to assure that spending in each of its districts is at least equal to the foundation level of spending per weighted pupil in each district.

The simplest thing for a state to do under such an arrangement is to mimic the federal guarantee—requiring its districts to make the local tax rate envisioned by the national foundation plan and then using the federal aid exclusively to fill in the foundation amount. At that point, any state education funds raised (as well as additional local funds) could be employed to supplement the

103. See generally, Guthrie & Rothstein, *supra* note 96.

104. JOHN AUGENBLICK, SCHOOL FUNDING TASK FORCE, OHIO DEPARTMENT OF EDUCATION, RECOMMENDATION FOR A BASE FIGURE AND PUPIL-WEIGHTED ADJUSTMENTS TO THE BASE FIGURE FOR USE IN A NEW SCHOOL FINANCE SYSTEM IN OHIO (1997).

federal guarantee.¹⁰⁵ (The federal government might also require that some or all of any extra school spending within the state were power equalized.)

Note that the weighted pupil approach has built into it the extra money thought necessary for the proper education of those pupils who get the extra weighting, such as the poor and the disabled. Although the national foundation plan as thus far described does not guarantee that money actually be spent within the district on such pupils, the federal government might also insist on that as a further condition of participation in the federal scheme.

C. Who Would Benefit From a National Weighted-Pupil Foundation Plan with Equalizing Strings Attached?

Assume that Congress adopted a national foundation plan (or a federally funded state power equalizing plan) containing conditions requiring states to eliminate the inequities of their school finance systems. Assume further for the moment that this plan substitutes for existing federal spending on the poor and the disabled.

First, which states would get more money? Under the new approach, a state would receive a disproportionate share of the federal pie to the extent that (a) its assessed value (or other wealth measure) per pupil headcount is relatively low; (b) its educational costs are relatively high; and (c) its special-needs population is relatively large. By contrast, under the current approach states receive extra money primarily based on the relative size of their special-needs population (c above) (with additional adjustments in Title I based upon school spending differences taken as a measure of school cost differences).¹⁰⁶

This means, for example, that assuming (hypothetically) a state like Minnesota scored relatively high on the first criterion (its assessed value per pupil), about average on the second criterion (its educational costs), and relatively low on the third criterion (its share of special needs pupils), it should expect to obtain even less than the limited federal funding it obtains today. Indeed, it may receive none. By contrast, assuming that Arkansas (hypothetically) has relatively low assessed value per pupil with about average costs and needs, it could anticipate increased federal funding. New York (hypothetically) might lose federal funds because of its greater-than-average wealth per pupil, but it might gain funds because of its higher-than-average costs (depending on the size of the cost adjustment in the new plan as compared with the existing Title I adjustment); exactly where it would wind up today would depend on the details of the formula.

105. The state could comply with the federal conditions in other ways too, for example, by imposing a combination of state and local taxes up to the required rate and then distributing the federal and state funds to the districts to fund the foundation plan level.

106. See 20 U.S.C. § 1419 (1997).

Second, it is important to re-emphasize that under the hypothetical plan, any state receiving funds would have to assure that, within its borders, money was fairly spent in its poorer districts (measured by low wealth and high costs) and, perhaps, on its special-needs pupils. Hence, for many states, the federal funding would be accompanied by a substantial reshuffling of state and local money. It would be incorrect simply to assume that, as compared with the present approach, the adoption of a federal, weighted-pupil foundation plan would shift funds, say, from low income children in Detroit to Oklahoma City suburbanites.

Of course, as a matter of political reality, federal legislators would want to know approximately how their constituents will fare, and they would have their staffs scrutinize alternative approaches to pupil weighting and wealth measurement to see if they made a difference.

Plainly, a national foundation plan could carry vastly differing price tags depending upon the combination of (a) the dollar level of the per-weighted-pupil guarantee and (b) the required state-local tax rate. Put differently, for the same amount of federal funding, the foundation level could be pushed higher or lower depending upon the participating tax rate. Although the attractiveness of a higher (truly "adequate") foundation guarantee may, in turn, lead to pressure for a higher participating tax rate, it is also easy to see that changes in this direction tend to make more and more states able to raise the full amount of the foundation guarantee from their participating tax rate and hence cease to qualify for federal assistance. This tweaking of the plan may be attractive to many because it more clearly targets federal aid on the states with the least fiscal capacity to deal with their educational burdens. Yet, as states become "no aid" states, this also may sharply undercut the ability of the federal government to press for the elimination of intra-state inequalities in those states, to say nothing of altogether losing political support for the plan from the "no aid" states. Realistically, then, a national foundation plan that would have a significant impact would almost surely be far more costly than the sum of existing federal efforts (and would make the calculation of winners and losers more complicated).

D. Federal Efforts to Date

To date, federal efforts to promote inter-state and intra-state equity have been far more limited than the proposal under discussion here. In 1994, Congress authorized a revision in Title I that would reward with extra funds those states that have done more within-state equalization, but this provision has yet to be funded.¹⁰⁷ At that time some argued that Title I's "comparability" requirement should be applied to all schools in the state, not merely those within

107. See Orland & Stullich, *supra* note 1, at 4 (noting that the Education Finance Incentive Program, created in the 1994 reauthorization of Title I, has not been appropriated funding).

the school district, thereby making intra-state equalization a condition of receiving Title I funds.¹⁰⁸ But this was rejected.¹⁰⁹ If nothing else, the limited size of Title I may make this seem like the tail wagging the dog. Neither of these reforms attack inter-state inequalities.

Major political problems which have stood in the way of a stronger federal role in promoting equity are, on one hand, the perceived lack of money at the federal level that might be used to help achieve both within-state and between-state equalization and, on the other hand, the strong resistance to unfunded mandates, which is what federal commands to achieve intra-state equity are seen to be when they are not backed up with cash.¹¹⁰ More generally, state representatives in Congress have simply been unwilling to use federal power to try to “solve” the intra-state inequality problem, and the representatives from states with greater fiscal capacity have been unwilling to support measures broadly aimed at “solving” the inter-state inequality problem.

President Clinton’s latest proposal for an enhanced federal role contains the same flaw as existing federal programs. The President wants to increase the amount of federal aid to education by giving schools money to lower their class size.¹¹¹ Assuming that sharply reduced class size yields higher achievement, re-ordering spending patterns in this way is not an idea that the Administration dreamed up. Some states have already adopted programs to do just what the President proposes.¹¹² They don’t need federal funding to bring about this reform. Other states are moving in this direction on their own, or certainly could do so if they wished. Money per se is not their problem; for them it is a matter of deciding upon their spending priorities, something that has long been left to states and localities. For some states, however, it is simply financially too burdensome to lower class size a lot. A generous national

108. See, e.g., 140 CONG. REC. S14155, S14169 (1994) (statement of Senator Mitchell).

109. Interview with Jack Jennings, former General Counsel to House Education and Labor Committee in Washington, D.C. (Nov. 11, 1997).

110. In view of recent United States Supreme Court cases, it is by no means clear that Congress could simply order states to make their school finance systems more equitable. See *U.S. v. Lopez*, 514 U.S. 549 (1994); see also *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997); *Swanner v. Anchorage Equal Rights Comm’n*, 513 U.S. 979 (1994). Indeed, unless the thinking behind those cases is to be rendered irrelevant, the Court will have to apply some federalism limits to the spending power as well, thereby creating some limits on what the Congress can impose on states as conditions on receiving federal funds. Nonetheless, does not seem to me likely that there would be anything legally objectionable about requiring states to enact a comparable state foundation plan as a condition of participating in a national foundation plan.

111. See Anemona Hartocollis, *Educators Say Clinton’s Plan On Class Size Faces Problems*, N.Y. TIMES, Jan. 29, 1998, at A1.

112. See, e.g., Nanette Asimov, *State Figures Reveal Early Success of Plan To Reduce Class Size*, SAN FRANCISCO CHRONICLE, Feb. 6, 1998, at A19; Jennifer Peebles, *Schools Get Brief Relief in Meeting State Guidelines*, THE TENNESSEAN, March 5, 1997, available in 1997 WL 7399157 (noting Tennessee law mandating low pupil-teacher ratios).

foundation plan of the sort proposed here would more efficiently direct federal funds towards this need.

Republicans have been pushing to allow state and local educational authorities to take their federal funds as block grants.¹¹³ This would give schools and districts great leeway to spend the funds as they wish. Yet, it is by no means clear that it makes sense from a policy perspective to use, say, the Title I funding formula to distribute what amounts to general federal aid to education. Perhaps this approach, which is unlikely to become federal law, should be viewed as a preliminary step towards the embrace of a federal school finance role of the sort described here.

E. School Choice

Suppose that no significant amount of new federal funding is to be made available to the states. Does this leave any room for an innovative school-finance role for the federal government?

As indicated earlier, if the state and the local district together provide what a family considers to be too few resources in the school to which its children are assigned, the family might consider moving to another district or to another state (or if it is wealthy enough, it might withdraw its children from public school and pay for their education in private schools). Of course, moving can be very costly, especially if the parents work nearby and the family friends and relations live nearby, but schools with the sort of spending the family wants for its children are not. Moreover, poor families might find it financially implausible to move into a community that has the spending level it desired.

So, instead of forcing families who are dissatisfied with their local public schools to move, families might instead be enabled to stay but send their children to other schools. By severing the existing tight connection between place of residence and the child's school, at least some of the school-finance inequalities earlier discussed might be eliminated.

If we start out imagining that a large share of families would, if given the chance, choose other than their local public schools, then it might no longer make sense to continue today's basic school funding arrangements. A local school district could still run schools (i.e., make them available to anyone who wished to attend), but the idea underlying conventional school finance—that

113. On April 23, 1998, Senate Republicans successfully added the block grant scheme as an amendment to H.R. 2646, a House-passed bill that would give parents federal tax breaks for educational spending. The "educational savings account" feature alone dooms this bill to a presidential veto. See, Lizette Alvarez, "Senators Endorse Tax Breaks for Education Savings Accounts," *NEW YORK TIMES*, April 24, 1998, Sec. A, page 1, col. 1. For background on the federal block grant approach, see Wayne Riddle, Educational and Public Welfare Division, Congressional Research Service, "Education Block Grants: Option, Issues, and Current Legislation" (updated May 29, 1996).

the families in the community are getting together to fund those schools—would be highly inapt. Thinking big like this suggests that, instead of the conventional arrangements described earlier, perhaps the state would provide every child with a scholarship to be used to pay for schooling wherever the child enrolled.

Under this state scholarship approach, it might be best to think of all public schools as “charter schools.” This label that has been adopted by the growing “charter school movement” that has taken hold in a large number of states.¹¹⁴ Put simply, charter schools are independent public schools that are organized and operated at the school level under a charter that has been awarded by either the local school district or some other public body.¹¹⁵ Charter schools do not generally base their enrollment on where pupils live; indeed, most accept students on a first-come first-served basis.¹¹⁶ And, charter schools are generally funded, analogously to the scholarship idea, on a per-student basis; i.e., so many dollars for every pupil they enroll.¹¹⁷

Non-public schools could also participate in a similar scholarship plan. Let us assume they would be allowed to do so. This is not, however, the place to go into all the difficult policy and legal issues surrounding their inclusion (especially religious schools). It is perhaps enough merely to point by analogy to the ability of Americans to use publicly funded scholarships to attend institutions of higher education and to make use of public subsidies in support of privately run pre-schools—to say nothing of the wider analogy of spending public funds through Medicaid and Medicare to pay for private medical care or of similar programs that help people obtain private housing.

If we think of the state scholarship plan as analogous to the national foundation plan described above, the ordinary child would obtain a scholarship set at the foundation level amount, adjusted for living costs in the region in which the family lives. In addition, adjustments that would go into the need side of the weighted-pupil approach could also be carried over to be applied to the scholarship amount. For example, a limited-English-speaking child’s scholarship (other things equal) might be worth 125% of the basic amount in the area in which she lives, a deaf child’s 400%, and so on.¹¹⁸

114. *See, e.g.*, N.J. REV. STAT. § 18A:36A-4 (1997); MINN. STAT. § 120.064 (1997); ARIZ. REV. STAT. § 15-183 (1997).

115. *See* U.S. DEPARTMENT OF EDUCATION, A STUDY OF CHARTER SCHOOLS: FIRST YEAR REPORT (1997) (available on-line at <http://www.ed.gov/pubs/charter/index.html>).

116. *See, e.g.*, MINN. STAT. § 120.064 (1997); ALASKA STAT. § 14.03.265 (1997).

117. At present, many charter schools get their funding from the local school district where they are located and this works tolerably well so long as most of the children come from the same district. But as this changes, complicated patchwork arrangements are needed that ultimately will undermine the suitability of local-based funding.

118. Under this regime it might well not be necessary for government to insist that any school in which such a pupil enrolled actually spent the weighted amount extra on that pupil. Instead,

Suppose, however, a family wanted more spent on its child than the foundation level scholarship provided; i.e., to enroll its child in a school whose tuition charges were in excess of the basic scholarship amount. One response, analogous to the implicit response of the foundation plan, would be to tell families to add on to the scholarship out of their own income. This, of course, would make it easy for the wealthier families to outspend the poorer ones, perhaps thereby gaining exclusive access to the priciest schools that, among other things, bid away many of the best teachers. This, of course, is exactly what well-to-do families in most states are already able to do by banding together in high cost suburbs and sending their children to high spending public schools.

If this is thought unfair, one response would be to forbid the use of the scholarships at schools that seek tuition payments beyond the scholarship amount. Indeed this has been the general practice with charter schools.¹¹⁹ But that is not the only solution.

Government could alternatively adopt a power equalizing strategy, here called "family power equalizing."¹²⁰ Simply put, based upon its income, a family would have to contribute a share of the extra tuition charged at the school it selected. But through the grant-in-aid formula, all families would be made roughly equally able to "afford" the more expensive schools if that was what they wanted (and were willing partially to pay for).

In sum, if a state funded basic scholarships for everyone, adjusted their value based upon the weighted-pupil factors, and subsidized supplemental scholarships in a power equalizing manner, then concerns about within-state school finance inequalities discussed above would be eliminated.

The main problem remaining would be the states' differential fiscal ability to fund their programs. Hence, as discussed above, reducing those inequalities could be an important federal function even in a choice scheme.

To deal with this problem, the federal government could itself simply take over full funding of the scholarships. But this is so far from our traditions and would be so expensive as to make it highly implausible for the foreseeable future. Indeed, at the present time, even a sweeping statewide scholarship program of the sort discussed above also seems politically implausible (although perhaps a bit less so).

A less sweeping version is at least imaginable. So, assume now, contrary to what was assumed before, that the scholarship program would be limited,

perhaps we could simply rely upon the parents choice to assure that their child received its fair share of the chosen school's resources.

119. Debra Banks & Eric Hirsch, National Institute on Educational Governance, Office of Educational Research and Improvement, U.S. Dept. of Education, *The Charter School Roadmap* 3 (1997).

120. See, e.g., Stephen D. Sugarman & John E. Coons, *Federal Scholarships for Private Elementary and Secondary Education* in *PRIVATE SCHOOLS AND THAT PUBLIC GOOD: POLICY ALTERNATIVES FOR THE EIGHTIES* 115 (Edward M. Gaffney, Jr. ed., 1981).

and that most families would stay put, keeping their children in the local public schools of the district in which they wind up living. This assumption permits keeping school districts in place as both revenue raisers and operators of schools (and, alas, as continued sources of school-finance inequalities). The focus instead would be on a relatively modest percentage of families who would exercise their choice to enroll their children elsewhere.

The government's financial role would be to assure that those families received the fair amount of economic backing in support of their exercise of choice. Pupils attending in high cost areas would appeal for extra support, as would those whose children have special needs. Indeed, if the family wished its children attend a more expensive school, it too might appeal for extra assistance based upon its limited wealth (and hence its own inability to fund that extra spending).

F. School Choice for the Objects of Federal Assistance

In fact, the easiest way to imagine a choice scheme functioning on a modest scale is to assume that it would be restricted exclusively to those families whose children count as more than 1.0 weighted-pupil in the regimes discussed above. In the main, these would be poor and disabled children. Moreover, thinking about it in this way allows us to re-conceive what is an appropriate federal role.

Suppose the federal government undertakes to assure that the family of every disabled and poor child who is dissatisfied with what the local public schools offer under today's regime can obtain a suitable scholarship that would enable the child to attend elsewhere.¹²¹ The scholarship here would be based on a Congressional determination of a reasonable national foundation plan amount, adjusted both for educational cost variations from place to place and the special needs of the poor and disabled.¹²²

For the disabled, this approach is not difficult to play out because it is but a variation on what is currently provided. Today, the IEP is supposed to identify what services are needed for these children, and the district has an obligation to provide them.¹²³ However, under the current scheme, the public schools generally offer to provide those services in-kind through programs—that is, the schools actually provide what the IEP calls for. If the parents do

121. This would put some pressure on the schools to do better by these pupils by adopting more effective programs. Otherwise, they would lose those pupils and the funding they represent. Admittedly, some schools would not be sorry to see some of these pupils go, but schools that feel this way are not likely to be especially good places for these children anyway.

122. It might also possibly be power equalized for families seeking to spend more than the base level provided.

123. See, e.g., 20 U.S.C. § 1412 (1997); N.Y. EDUC. LAW § 4402 (Consol. 1997); MONTANA CODE ANN. § 20-7-411 (1997).

not like the IEP proposal, they can contest its appropriateness in a hearing and, if successful, they may gain either additional services or the right to send their child to a different school (typically a private school) whose tuition the school district must pay.¹²⁴

Put simply, under the scholarship plan parents would not need to ask for a hearing and then win in order to obtain something they prefer for their child. They would simply be entitled to the value of their child's IEP on demand, and they could take that sum in the form of a scholarship to be used anywhere else that satisfies them.¹²⁵

For the children of the poor, a larger change would be required. But its outlines too are easily understood. If low income families with Title I-eligible children were not satisfied with the program their local school provided, they too would have a right to a scholarship elsewhere.

One way to think about this is that the school district would receive its federal Title I money as it does now, but if the family wants out, it would get a scholarship equal to a cost-and-need-adjusted national foundation level amount. The federal government need not fully fund these scholarships. Rather, it could simply insist that, as a condition of accepting federal money for the poor, states must to guarantee scholarships of the sort described. However, for poor children living in states with low fiscal capacity, the federal government might want to provide additional funds to bridge the difference between, say, the Congressionally determined national foundation level and the amount the state would raise per pupil were it to make a tax effort at the national average. Such an approach would assure that poor and disabled children who accept the scholarships would receive financial support that reflects their own extra needs.

In sum, I have endeavored to show that there is a potential role for the federal government to promote school choice in the name of school finance equity.¹²⁶ Recent proposals to involve the federal government in school choice plans have been somewhat differently conceived. A few years ago, for example, Senator Hatch suggested a federally-funded national experiment with choice.¹²⁷ Then presidential candidate Bob Dole proposed a modest school

124. *See, e.g.*, N.Y. EDUC. LAW § 4402 (Consol. 1997); *see generally* 20 U.S.C. § 1412 (1997).

125. I do not mean that this scholarship right would necessarily substitute for the IEP hearing process if, say the parents want more from their local district; at a minimum, the scholarship would be an alternative to the hearing process.

126. Because the politically powerful teacher's unions have had a veto power over in most states over efforts to introduce choice-based school reforms, some would see that as an additional justification for the federal government taking action on this front.

127. *See, e.g.*, S. 1141, 102nd Cong. §§ 501, 511-13, 521-26, 532-36 (1991).

voucher scheme.¹²⁸ Most recently, Republican leaders pushed to give school vouchers to low income families in the District of Columbia.¹²⁹ Still, these proposals draw on the same general sentiment expressed above. All too often, children from poor families and disabled children are served least well by today's public schools. By allowing them to escape on fair terms from the schools offered them by today's school finance system, we may provide them the most promising route to a better future.

128. See, e.g., Adam Nagourney, *Dole Backs School Choice Through Vouchers*, N.Y. TIMES, July 19, 1996, at A4.

129. See Janelle Carter, *Voucher Debate Renewed for D.C.*, THE ASSOCIATED PRESS POLITICAL SERVICE, March 12, 1998, available in 1998 WL 7394699.