

MEMPHIS SINGS 'SOUL' MUSIC, RURAL DOES COUNTRY: SCHOOL FINANCE LITIGATION IN TENNESSEE

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I. INTRODUCTION

As scholar Martha Minow quips, school financing has historically followed the rule, "Green follows white."¹ Leading up to the landmark *Brown* decision,² all of the earliest challenges to the quality of public school education were lodged by African American students who attended inadequate and/or segregated educational facilities.³ Yet, with the slow pace of school desegregation orders and continuing inadequacy of many of the public schools attended by African Americans, the post-*Brown* era has hardly been heartening.⁴ School finance litigation, in fact, emerged as an alternative vehicle to press for improved educational opportunities for minority students.⁵

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1. Martha Minow, *School Finance: Does Money Matter?*, 28 HARV. J. ON LEGIS. 395, 396 (1991). By contrast, today urban-minority school districts receive, on average, more than other school districts in states. See James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 439 (1999) [hereinafter Ryan, *School Finance*] (finding that most minority-urban districts spent above the state average).

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

3. See, e.g., *Cummings v. Board of Education*, 175 U.S. 528 (1899) (challenging the provision of a high school for white students, but none for African American students); *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938) (challenging the provision of a law school for whites, but none for blacks in the state of Missouri); *Sweatt v. Painter*, 339 U.S. 629 (1950) (challenging the adequacy of a law school in Texas created exclusively for African Americans); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (challenging the requirement that African American graduate students sit in separate classrooms).

4. See James Ryan, Editorial, *Sit In For School Equality*, WASH. POST, May 19, 2003, at A19 [hereinafter Ryan, *School Equality*] ("The law in itself does not command segregation by class and by race; it merely tolerates it, along with the inequalities that inexorably follow when some schools are populated by children of families with money and power and others by children of families who possess neither."). See also Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 528 (1980) (arguing that most African Americans in the post-*Brown* era attend public schools that are "both racially isolated and inferior.")

5. See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 253 (1999) [hereinafter Ryan, *Money*] (noting that school finance litigation began in response to the "pace and progress of desegregation.").

Thus, school finance litigation, like the desegregation cases before it, frequently pitted (and continues to pit⁶) low-achieving and often poor, minority-urban school students against their well-heeled, white-suburban counterparts.⁷

In many ways, the school finance cases in Tennessee are poles apart from such historical antecedents. In Tennessee, the complainants attend mostly white, rural school districts.⁸ And, by all measures of student achievement, the student-plaintiffs are, at present, doing relatively well in school.⁹ Moreover, it is the minority-urban school systems, school districts in which students are frequently more likely to underperform, which are put on the defensive by school finance litigation.¹⁰

In fact, the school finance cases in Tennessee show that even successful litigation, while a boon to some students in a state, may have negative consequences for others. In Tennessee, the success of school finance litigation threatened to reduce the educational opportunities of urban-minority students, since virtually all African American students attend urban schools.¹¹ As seen in Table 1, which

6. *E.g.*, *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Lujan v. State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979).

7. John Dayton, *An Examination of Judicial Treatment of Rural Schools in Public School Funding Equity Litigation*, 24 J. EDUC. FINANCE 179, 202 (1998) [hereinafter *Dayton, Equity Litigation*] (noting that successful plaintiffs since *Serrano* have been able to link educational expenditures with student performance). *See also* John Dayton, *Correlating Expenditures and Educational Opportunity in School Funding Litigation: The Judicial Perceptive*, 19 J. EDUC. FINANCE 167, 177–82 (1993) [hereinafter *Dayton, Correlating Expenditures*].

8. Of course I do not mean to suggest that Tennessee is the only school finance challenge brought by a majority white school district. *See* Ryan, *School Finance*, *supra* note 1, at 452–53 (listing school finance cases in several states, including Arkansas, Idaho, Kentucky, New Hampshire, South Carolina, and West Virginia, where plaintiffs were majority-white school districts). And certainly Tennessee is not the only case of rural districts challenging a state's school finance system. *See* Dayton, *Equity Litigation*, *supra* note 7, at 179–96 (discussing several cases, including Arkansas, Alabama, North Carolina, and Texas, where mostly rural districts challenged the school finance system).

9. *See* text accompanying notes 161–71.

10. *See* text accompanying notes 172–77.

11. In this Article, I tend to conflate the terms “minority” and “urban.” My intent is not to ignore the significance of non-minority students who live in urban areas in Tennessee and attend urban schools. They make up a large, and often majority, percentage of the urban school population. Nor do I mean to suggest that there are not at least some minority students who attend schools in rural communities.

Still, it seems appropriate to use these terms somewhat interchangeably in the case of Tennessee, since the vast majority of minority children do attend schools in urban districts. In fact, three-fourths of minority students in Tennessee attend one of four school districts, the so-called “big four urban districts.” The big four include the Memphis and Shelby County

compares rural and urban school districts, nearly half of the students in urban districts are African American while virtually all students in the rural districts are white.¹² Any reform litigation by rural school districts could have potentially deleterious impact on urban school districts and African American students in those districts.¹³

Public Schools Systems (Memphis, TN), the Chattanooga/Hamilton County Public Schools System (Chattanooga, TN), the Knoxville County Schools (Knoxville, TN), and the Nashville/Davidson County Public Schools (Nashville, TN). For the racial distribution in the school districts named in the *Small School* cases, see Table 1.

12. Many of the rural districts, including plaintiffs Grundy and Pickett, do not have even one African American teacher. SOUTHERN REGIONAL EDUCATOR BOARD, *EDUCATOR SUPPLY AND DEMAND: STATISTICAL REPORT FOR THE STATE OF TENNESSEE 46* (2001), available at http://www.state.tn.us/education/fasupdemsummary_sbe.htm (last visited May 20, 2003) [hereinafter *TEACHER SUPPLY AND DEMAND IN TENNESSEE*].

13. Although nationally “minority” usually denotes a substantial number of ethnic/racial groups, in Tennessee African Americans continue to be essentially the sole minority in the state, comprising sixteen percent of the state population, yet ninety-nine percent of the minority population. See PAUL H. BERGERON, ET AL., *TENNESSEANS AND THEIR HISTORY* 318 (1999) (tracking population changes in Tennessee).

Table 1. Selected Tennessee School Districts by Race and Size.

Rural Counties	Number of Students	Percent African American	Percent White
Crockett	2,601	16.8	74.9
Grundy	2,297	0.0	99.7
Hancock	1,137	0.4	99.5
Hickman	3,728	2.0	96.7
Overton	3,052	0.3	99.5
Pickett	727	0.0	100
Trousdale	1,295	11.1	87.5
Wayne	2,634	1.0	98.4
Average	2,184	4.0	94.2
Urban Counties	Number of Students	Percent African American	Percent White
Davidson	68,016	46.1	45.3
Hamilton	40,966	33.3	63.8
Knox	52,072	13.6	83.5
Madison	13,817	53.0	45.4
Montgomery	23,933	26.6	66.8
Sevier	12,292	0.6	98
Shelby	160,760	68.5	28.1
Sullivan	22,980	2.7	96
Average	49,355	44.7	51.2

(1) In the table above, and unless otherwise noted, "Shelby" includes Memphis City Schools and Shelby County Public Schools; "Sullivan" includes Sullivan County Public Schools, Kingsport Public Schools and Bristol Public Schools; "Crockett" includes Crockett County Schools, Alamo City Schools and Bells City Schools. (2) "Number of Students" refers to the average of daily counts of students enrolled in each school system. Data compiled from Tennessee Dept. of Educ. (2000-2001 Annual Report).

As a result, the litigation actually involves the urban school districts as quasi-defendants who petition the court to reject school reform efforts. Fearing that a new funding scheme would drastically reduce funding for urban schools,¹⁴ Tennessee's urban school districts intervened in the litigation on behalf of the state. Therefore, the Tennessee litigation is a rare case where an urban, predominately

14. Telephone Interview with Martha McCampbell, Deputy Law Director, Knox County Law Department (Jan. 28, 2003).

minority, school system has intervened in a school finance litigation suit on the side of the state.¹⁵

Additionally, the case of Tennessee presents an opportunity to analyze the “politics of school finance,” how state legislatures think about responding to court-mandated school reform.¹⁶ At this writing, it will likely be some time before the legislature and governor ultimately agree as to how the court order to equalize teacher salaries will be implemented, as called for in the most recent state Supreme Court decision.¹⁷ And, no matter when they decide, how state politicians decide to observe, or ignore, its high court’s decision is ultimately as important as the decision itself.¹⁸

It should be noted that the school cases in Tennessee also expose some of the negative consequences of urbanization. Until the 1950s, most Tennesseans lived in rural areas.¹⁹ Even today, the rate of urbanization in the state is below that of the national average and there are a substantial number of Tennesseans who live in rural areas.²⁰ If not for creeping urbanization, rural counties in Tennessee would still have a substantial citizenry and, by consequence, a substantial tax base

15. The only other cases where predominately minority school districts intervened as defendants on the side of the state took place in Arkansas and Minnesota. See *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W. 2d 90 (Ark. 1983); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993). For a description of the racial composition of plaintiffs and defendants in recent school finance suits, see Ryan, *School Finance*, *supra* note 1, at 447–76. In other school finance cases by rural districts, urban schools have intervened as plaintiffs. See *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Matanuska-Susitna v. State*, 931 P.2d 391 (Alaska 1997).

16. See Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE* 136 (1999) (“Changing the [school finance] system requires a shift of power relationships, and the external stimulus from the courts is often only one of many factors that determine the success of school finance reform efforts within individual states.”).

17. Phil Bredesen, the recently elected governor of Tennessee, has set up a task force to report by November, 2003 on how best to implement equalization permanently. In the meantime, Bredesen has proposed dedicating an extra twenty six million dollars for teacher salaries in low-paying school systems.

18. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (*Brown I*) and *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (remanding racial discrimination in public school cases to district courts to effectuate implementation of appropriate remedies, and specifying the factors district courts may consider to achieve racially nondiscriminatory school systems) (*Brown II*).

19. See ED SPEER, *THE TENNESSEE HANDBOOK* 122 (2002) (noting that today more than sixty percent of Tennesseans live in urban areas, compared to ten percent at the turn of the twentieth century); BERGERON, *supra* note 13, at 317 (noting that in 1990 there were thirty-seven cities with a population of more than ten thousand, compared to twenty-four cities with the same population thirty years earlier).

20. BERGERON, *supra* note 13, at 318.

to fund their schools.²¹ Thus, the case in Tennessee throws light on the negative consequences of urban growth, the elevation of the city as the mainstay of social interaction, and the gradual displacement of farm life.²²

In large measure, this article accepts the invitation to consider carefully the plight of urban-minority students in school finance reform by examining the case of Tennessee.²³ In Part II, I describe the important details of the three school finance cases in Tennessee (*a/k/a Small Schools I-III*). In Part III, I discuss three of the most plausible legislative responses to that court-directive—taking no action, reallocating existing funds, or raising additional funds.

Next, in Part IV, I analyze the three cases' impact on the urban schools in Tennessee and their significant African American clientele. Thereafter, in Part V, I discuss why urban-minority students may be consistent losers in school finance litigation, as demonstrated by the case of Tennessee. First, I note the possibility that courts may be predisposed to rule against urban-minority students, since much of the current school finance momentum revolves around protecting non-minority interests. Second, I argue that advocates for urban-minority students have been unable to describe the qualitative differences between rural poverty and urban poverty, which tends to cripple school districts with heavy minority student populations.

21. In *San Antonio v. Rodriguez*, perhaps the most important federal school finance case, the U.S. Supreme Court made a similar argument about the shrinking tax base of Texas's rural districts. According to the Court:

Sizable differences in the value of assessable property between local school districts became increasingly evident as the state became more industrialized and as rural-to-urban population shifts became more pronounced. The location of commercial and industrial property began to play a significant role in determining the amount of tax resources available to each school district. The growing disparities in population and taxable property between districts were responsible in part for increasingly notable differences in levels of local expenditures for education.

411 U.S. 1, 7-8 (1973).

22. Tennessee is a particularly apt place to study the negative ramifications of urbanization, since Tennesseans are historically proud of their ability to bring together the good aspects of both rural and urban living. The state motto, for example, reads "Agriculture and Commerce" to pay homage to that sentiment. See SPEER, *supra* note 19, at 43.

23. See Ryan, *School Finance*, *supra* note 1, at 435 (broadly discussing the impact of race on school finance litigation and inviting other commentators to pursue a careful examination of the data).

II. THE *SMALL SCHOOLS* CASES

Tennessee has been described as three states in one: East, Middle, and West Tennessee.²⁴ If nothing else, the school finance litigation cases are monumental in that they brought many of the 138 school districts, administering more than 1600²⁵ schools across the “states,” together for the first time.²⁶ The rural schools, under an umbrella non-profit, united to bring the suit to reform the financing of the public schools, while the state fought to stave off court-ordered equalization and maintain the status quo.²⁷ And, perhaps most intriguing, the urban school districts, in which students routinely perform below state averages, joined forces with the state to avoid school finance reform.²⁸

24. The geography of the state varies widely among the regions. West Tennessee is comprised of flat, historically cotton-producing, spaces that abut the Mississippi Delta. Middle Tennessee is not only the geographical center of the state, but also the physical home of the state’s government. And East Tennessee, home to some of the highest-elevated counties in the state, straddles a series of valleys and Appalachian mountain sub-ranges. See generally JAMES W. ELY, JR., *A HISTORY OF THE TENNESSEE SUPREME COURT 89–92* (2002) (discussing the historical regionalism in Tennessee); SPEER, *supra* note 19, at 3–38, 216–18. Also, for judicial purposes, the state is divided into three so-called “grand divisions” (*i.e.*, West, East, and Middle) with no more than two justices on the state Supreme Court allowed to hail from the same division.

25. See HARRY A. GREEN & CLIFF LIPPARD, *TENNESSEE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CLASSROOM TEACHER SALARY DISPARITY AMONG TENNESSEE’S SCHOOL SYSTEMS* (1999), <http://www.state.tn.us/tacir/> (last visited Feb. 25, 2003) (noting that the merger of Chattanooga and Hamilton County systems has reduced the number of systems from 139 to 138). See TENNESSEE DEPARTMENT OF EDUCATION, *ANNUAL STATISTICAL REPORT (2001–02)* [hereinafter 2002 ANNUAL REPORT].

26. As one attorney for one of the intervenors put it, the *Small Schools* cases in Tennessee is not a regional dispute, but rather “is more a function of the size of the county and whether there is a retail linkage or whether you’re in a county where tax dollars accrue to you because of your size.” Interview with McCampbell, *supra* note 14.

27. As the lead attorney for the plaintiff characterized it:

They fought like a tiger. They did everything called scorched earth. They took a whole lot of depositions. They requested a whole lot of documents. They asked for the school board meetings of the last ten years of all my school districts. Some of my school districts didn’t have any for the last year.

Telephone Interview with Lewis Donelson, Partner, Baker, Donelson, Bearman & Caldwell (Mar. 4, 2003) (transcript on file with author).

28. Interview with McCampbell, *supra* note 14. I should also mention that perhaps some of the urban school districts intervened to ensure that they would be able to participate in whatever school reform plan was enacted. As the attorney for Hamilton County put it: “We wanted to be at the bargaining table when any political deal was struck. And we felt that the only way to ensure a place at the bargaining table was to participate in the lawsuit.” Telephone interview with Mary Sutherland, Attorney, Chattanooga/Hamilton County Public School System (Feb. 6, 2003).

To be more specific, the *Small Schools* litigation has proceeded in three rounds: in 1993, 1995, and 2002.²⁹ The first case was brought by several rural school districts, superintendents, students, parents, and board of education members against the state.³⁰ Under the original funding scheme, the state and local governments co-equally funded public education, while the federal government contributed ten percent.³¹ The state share of expenditures was mainly distributed under the Tennessee Foundation Program (TFP), which was based on a weighted formula of average school attendance.³² Local funding was obtained mainly from local option sales tax revenue and property taxes.³³ In *Small Schools I*, plaintiffs claimed that the inequality between urban and rural schools violated the equal protection³⁴ and education clauses of the Tennessee Constitution.³⁵ Fearing the state would take revenue from local sales tax option and redistribute it to the rural areas if the state lost the case, the urban schools intervened.

29. *Tennessee Small Schools Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) (*Small Schools I*); *Tennessee Small Schools Sys. v. McWherter*, 894 S.W.2d 734 (Tenn. 1995) (*Small Schools II*); *Tennessee Small Schools Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002) (*Small Schools III*).

30. The named defendants in the case is a collection of the public representatives of the state, including the governor, speaker of the senate and house, state education and finance commissioners. *Small Schools I*, 851 S.W.2d at 140. The named plaintiff in the case, Tennessee Small School Systems, is an association of around eighty mostly rural school districts “set up for the sole purpose of proceeding in this lawsuit to gain benefits for the rural school districts.” Telephone Interview with Angie Davis, Attorney, Baker, Donelson, Bearman & Caldwell (Feb. 19, 2003). Rural districts are those with populations of 25,000 or less.

31. *Small Schools I*, 851 S.W.2d at 143.

32. *Id.*

33. *Id.*

34. TENN. CONST. art. I, § 8; *id.* art. XI, § 8 (“The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of the law....”).

35. TENN. CONST. art. XI, § 12 (“The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools.”).

A. Small Schools I

In *Small Schools I*, plaintiffs claimed that the funding scheme, the Tennessee Foundation Program (TFP),³⁶ resulted in gross funding disparities, depriving rural students of an education equal to that of other students in the state.³⁷ Under the TFP, counties were permitted to use locally generated revenue sources to fund schools. Plaintiffs claimed that such a funding system in Tennessee created large disparities between urban and rural school districts, since the former is able to generate relatively large amounts of revenue from local options sales taxes and property taxes. Lacking a similar fiscal capacity, the rural schools, plaintiffs argued, were severely under-funded, which limited the curriculum offered in their districts. None of the small schools, for example, offered any advanced placement courses.³⁸ A good number of the schools did not give instruction in foreign language, “which,” as the lead attorney for the plaintiff’s underscored, “is required to get [into] any college.”³⁹ The upshot was that students in these areas attended woeful facilities and their teachers were poorly-paid.⁴⁰ They argued that the education of rural students was protected by the state constitution’s education and equal protection clauses.^{41,42}

36. For a brief discussion of the origins of the program, see Theodore J. Meyers, et al., *K-12 Education Funding in Tennessee: Equity Now—Adequacy Coming*, 20 J. EDUC. FINANCE 394, 394–96 (1995).

37. See Plaintiff’s Complaint at 8–11, *Tennessee Small School Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) (No. 88–1812 II) (on file with the UNIVERSITY OF MARYLAND LAW JOURNAL OF RACE, RELIGION, GENDER & CLASS).

38. Interview with Donelson, *supra* note 27.

39. *Id.*

40. As a lawyer working for the firm that represented the small schools recalls: “There was a group of rural schools that were severely under-funded. There were closets for libraries. They didn’t have sufficient rooms for science classes. And a lot of the schools were not accredited because of those standards.” Interview with Davis, *supra* note 30.

41. *Small Schools I*, 851 S.W.2d at 141.

42. The education clause appears at TENN. CONST. art. 11, § 12, which reads, in relevant part, “The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.”

The Tennessee equal protection clause is two-pronged. See TENN. CONST. art. I, § 8, which reads, in relevant part, “That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land” and TENN. CONST. art. XI, § 8, which reads, in relevant part, “The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions other

The plaintiffs asked the court to enjoin the state from acting under the current education statutes, or TFP, and to require the legislature to establish a new method of school finance that would increase the state's financial commitment to the rural schools.⁴³

The state rebutted that the education clause only required that the state provide access to public schools, but did not impose any qualitative standard on the provision of education, which, attorneys for the state asserted, was the "exclusive business of the legislative and executive branches."⁴⁴ According to the state, the equal protection clause of the state constitution only required "nondiscriminatory performance of the duty created by the education clause."⁴⁵ Any evidence of infrastructure problems in rural schools, the state posited, was "decidedly mixed and anecdotal at best."⁴⁶ Further, they argued, any disparities were explained by rural schools' unwillingness to tax themselves.⁴⁷ In case those arguments failed, the state asserted that the spending disparities were relatively small, as compared to successful challenges to other states' systems of school finance.⁴⁸

than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested."

43. *Small Schools I*, 851 S.W.2d at 141.

44. *Id.* In a law review article with one another, the attorney general at this time was adamant that his goal in the litigation was to ensure that the court not invade a traditional legislative function:

(1) [P]ersuade the court that it should adopt a standard for assessing the constitutionality of the statutes that would avoid the result in other states in which seemingly endless litigation had impeded the education reform process; (2) achieve a result in the equal protection challenge that would maintain maximum legislative discretion and flexibility, so that the impact on other state services would be minimal; and (3) achieve a result in the education clause standard that would be consistent with the drafters' intent that the clause is not self-executing and provides no specific standard of education, so that education reform efforts by the general assembly and the executive would not be unduly constrained by the constitution.

Charles W. Burson & Jane W. Young, "*The Law of the Land*": *Tennessee Constitutional Law: School Finance Litigation: The State's Perspective*, 61 TENN. L. REV. 457, 459-60 (1994).

45. *Small Schools I*, 851 S.W.2d at 141.

46. Burson & Young, *supra* note 44, at 463.

47. Burson & Young, *supra* note 44, at 462 (noting that plaintiffs in two counties could have reached the average state expenditures by raising their property tax by \$5.20 more per month).

48. *Id.*

Interestingly, nine urban school systems, worried that the attack by the *Small Schools* would lead the state “to seize funds [of urban districts] and redistribute them to the smaller school districts with more limited sales tax bases,” intervened in the case as defendants.⁴⁹ The urban schools’ current lead attorney, for example, noted that “by far the largest portion” of redirected tax dollars, if plaintiffs were successful, would have come from Nashville-Davidson County public schools.⁵⁰ The schools argued, like the state, that school finance should be left to the General Assembly and not be subject to judicial review.⁵¹ In the alternative, the urban schools contended that funding disparities ought to take into account the higher costs of educating school children in the urban districts. Finally, the urban schools noted that the rural schools should not be granted relief, since those districts had not used all possible efforts to raise local revenue.⁵² As the lead attorney for the urban districts in *Small Schools I* and *II*, Ernest Kelly, deadpanned, “[m]any problems of the rural schools resulted from neglect or indifference by their respective county commissions.”⁵³

The Tennessee Supreme Court refused to follow the analysis of the lower court, and, for the first time in state history, overturned the state’s public education financing system.⁵⁴ The court rejected the defendants’ argument that the education clause imposes relatively little duty on the state and, instead, focused on the word “education.”⁵⁵ According to the court, education is a fundamental right and the plain meaning of “education” is an “enforceable standard for assessing the educational opportunities provided in the several districts throughout the state.”⁵⁶ More specifically, the court found that the education clause, read in combination with the equal protection clause, required

49. See Ernest Kelly, Jr., *School Finance Litigation: An Urban Perspective*, 61 TENN. L. REV. 471, 474 (1994); *Small Schools I*, 851 S.W.2d at 141.

50. Telephone Interview with James Charles, Associate Director of Law, Metropolitan Government of Nashville and Davidson County (Jan. 28, 2003) (transcript on file with author).

51. *Small Schools I*, 851 S.W.2d at 141.

52. See Interview with McCampbell, *supra* note 14 (noting that, although rural districts have relatively “low sales tax collections,” they were “not willing to raise their local property option taxes and local option sales taxes.”); see also *Small Schools I*, 851 S.W.2d at 142.

53. Kelly, *supra* note 49, at 479.

54. See *Small Schools I*, 851 S.W.2d at 156 (finding that “the disparities in educational opportunities available to public school students throughout the state ... have been caused principally by the statutory funding scheme, which, therefore, violates the constitutional guarantee of equal protection.”).

55. *Id.* at 150–51.

56. *Id.* at 151.

the state to provide “substantially equal educational opportunities to all students.”⁵⁷

The court found that there were wide disparities in educational opportunities in the public school system that the state had failed to equalize.⁵⁸ Employing a rational basis test, typical of the U.S. Supreme Court’s Fourteenth Amendment jurisprudence, the Tennessee Supreme Court could find no reasonable explanation for the disparities in the funding scheme.⁵⁹ Instead, the court found that the rural districts are less able to raise local revenue through sales taxes or property taxes because most large retail shopping centers are in urban areas.⁶⁰ Because of differing ability to raise revenue locally, per pupil funding ranged from \$1,823 to \$3,669.⁶¹ According to the court, the disparities have a tangible consequence—the under-education of rural students. The court writes:

[S]tudents in plaintiffs’ schools are not afforded substantially equal access to adequate laboratory facilities, computers, current and new textbooks, adequate buildings, advanced placement courses, varied curricula, advanced foreign language courses, music and art courses, drama and television courses. Plaintiffs’ districts also fail in their efforts to retain teachers, fund needed administrators, and provide sufficient physical education and other programs.⁶²

By comparison, the “wealthier districts” (viz, the urban schools), according to the court:

offer a wide variety of advanced placement courses; a broad curriculum with advanced science and math courses; adequate labs in both junior high and high

57. *Id.* at 140.

58. Again, at the time, the state distributed resources to schools mainly under the Tennessee Foundation Plan (TFP). Under this plan, the state distributed approximately \$60,000,000 out of \$2.5 billion dedicated for state education funding to equalize student funding. The court held that this plan did too little to provide “real equalization.” *Small Schools I*, 851 S.W.2d at 143.

59. *Id.* at 155.

60. *Id.* at 144.

61. *Id.* at 143.

62. *Id.* at 144.

schools; a choice of foreign languages; multiple computer courses; art; music, and drama courses; sufficient and current textbooks; and adequately supplied libraries. The schools are newer, cleaner, and safer.⁶³

The court went on to explicitly link the funding disparities to the quality of education received by rural students. In other words, money matters.⁶⁴ According to the court, students in rural districts, for example, are more likely to attend an unaccredited school and, as a result, are less likely to gain college acceptance.⁶⁵ Moreover, the court found that rural students are not likely to score as well on standardized tests.⁶⁶

Additionally, the decision is notable because of what the court chose *not* to say. Although the court asserts that the quality of education is associated with the expenditures of funds, it stops short of saying that dollars are causally related to the quality of education.⁶⁷ Additionally, the court declines to fashion a specific remedy, nor does it suggest the funds be equalized across the state. Instead, it orders the state to provide substantial equality of opportunity in education and remands the case to the trial court.⁶⁸ The court even acknowledges

63. *Id.* at 145.

64. The court thus wades into deep water. Compare Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. LEGIS. 423, 424 (1991) (arguing no relationship between per pupil expenditures and student achievement) and John Pincus & John E. Rolph, *How Much is Enough? Applying Regression to a School Finance Case*, in STATISTICS AND THE LAW 257 (1994) (finding no relationship between a range of resources and student achievement) with Larry V. Hedges et al., *Does Money Matter?: Meta-Analysis of Studies of the Effect of Differential School Inputs on Student Outcomes*, 23 EDUC. RESEARCHER 5 (1992) (arguing that money can be linked to student improvement) and Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991) (same). For a careful review of this literature, see Gary Burtless, *Introduction and Summary to DOES MONEY MATTER?: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS*, 1-42 (Gary Burtless ed.) (1996).

65. *Small Schools I*, 851 S.W.2d at 144 ("Graduates from accredited high schools have better success in college acceptances. Students in plaintiff's districts are more likely to attend unaccredited schools.").

66. *Id.* ("Children in the poorer districts suffer from poor standardized test results, and have a higher need for remedial courses at college resulting in poorer chances for higher education.").

67. *Id.* at 141 (noting that the record supports a direct correlation between funding and quality of education, but also suggesting that "many factors other than funding affect the quality of education provided.").

68. *Id.* at 140-41.

that the state may fashion a remedy that provides inequitable funding because of the differing costs.⁶⁹

Additionally, the court's finding that education is a fundamental right is unusual, especially considering the fact that most commentators have referred to the Tennessee Constitution as a "bare bones" document that provides little by way of affirmative rights.⁷⁰ Furthermore, if education is a fundamental right, any constitutional analysis of the financing scheme should utilize strict scrutiny, not rational basis review. That is, fundamental rights—like the right to privacy,⁷¹ the right to vote,⁷² and the right to travel⁷³—are reviewed by the U.S. Supreme Court under strict scrutiny, a more exacting standard of review.⁷⁴ However, the Tennessee Supreme Court, like other state courts have done,⁷⁵ dispenses with strict scrutiny analysis in its school finance cases and opts for a rational review test, the lowest level of review.⁷⁶ For instance, the court could have been taking a cue from neighboring Arkansas, where the Supreme Court had also found that education was a fundamental right, but opted to review the state plan under the lower level of scrutiny.⁷⁷ This practice is consistent and predictable in light of the court's long history of showing extreme deference to the legislature.⁷⁸ Finally, it is perplexing that, even under this highly deferential standard of review, the state would not be able

69. *Id.* at 141 (noting that the "costs of operating schools may vary significantly" and holding that "all relevant factors may be considered by the General Assembly in the design, implementation, and maintenance of a public school system that meets constitutional standards.").

70. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. LEGS. 307, 338 (1991).

71. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating a law prohibiting the distribution of contraceptives to unmarried persons); *Roe v. Wade*, 410 U.S. 113 (1973) (establishing that the right to privacy includes the right to choose whether or not to have an abortion); *Lawrence v. Texas*, 539 U.S. 558 (2003) (extending the right to privacy to include the right to engage in heterosexual and homosexual sodomy).

72. *Harman v. Forssenius*, 380 U.S. 528 (1965).

73. *Maher v. Roe*, 432 U.S. 464 (1977).

74. See Jonathan Banks, Note, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology*, 45 VAND. L. REV. 129, 134 (1992).

75. See *Kukor v. Gover*, 436 N.W.2d 568, 580 (Wis. 1989); *Shofstall v. Hollins*, 515 P.2d 590, 592-93 (Ariz. 1973).

76. See Banks, *supra* note 74, at 137-39 (explaining why state courts have avoided the U.S. Supreme Court's fundamental right analysis).

77. *Id.* at 144.

78. See Karen V. Martin, *Constitutional Law—Tennessee Small School Systems v. McWherter: Opening the Door for Education Reform*, 24 MEM. ST. U. L. REV. 393 (1994).

to convince the court that there is at least one reasonable justification for disparity in school spending.

B. Basic Education Plan (BEP)

While the plaintiffs were litigating *Small Schools I*, the state legislature approved a new funding scheme under the Education Improvement Act of 1992.⁷⁹ The new system, the Basic Education Plan, or “the funding formula . . . necessary for our schools to succeed,”⁸⁰ provided that state equalization funds, previously set at sixty million dollars,⁸¹ be increased to \$565 million.⁸² The BEP provided that equalization be phased in over several years, beginning in 1992 and ending in 1997.⁸³ Importantly, the BEP allocated funds based on the costs of forty-two “classroom components” (such as textbooks, classroom supplies, library services, and guidance, among others⁸⁴) that previous analyses had shown were linked to student outcomes.⁸⁵ Each of the classroom components receives an annual review from a special BEP committee in order to be adjusted for inflation and increased operating costs.⁸⁶ At the same time the BEP was enacted, Tennessee’s General Assembly increased the state sales tax one-half percent to raise additional revenues for the gradual equalization.⁸⁷

Under the BEP, the state pays seventy-five percent of the collective costs of classroom components or expenditures in aggregate

79. Defendant’s Brief, at 4, *Tennessee Small Schools Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002) (No. M2001–01957–SC–R3–CV) [hereinafter Defendant’s Brief] (on file with the UNIVERSITY OF MARYLAND LAW JOURNAL OF RACE, RELIGION, GENDER & CLASS).

80. TENN. CODE ANN. 49–3–302 (3) (2002).

81. See *infra* note 58.

82. *Small Schools II*, 894 S.W.2d at 735. For a more detailed review of the BEP, see Dan Goldhaber & Karen Callahan, *Impact of the Basic Education program on Educational Spending and Equity in Tennessee*, 26 J. EDUC. FINANCE 415 (2001).

83. *Small Schools II*, 894 S.W.2d at 735.

84. The components include, for example, “basic, vocational, and special education; guidance counseling; textbooks, art, music, and physical education; services of librarians, social workers, and psychologists; computer technology; supervisory and administrative staffs; transportation; and capital expenditures for physical facilities.” See *Small Schools II*, 894 S.W.2d at 736.

85. See Lora Ann Cohen-Vogel & Daniel R. Cohen-Vogel, *School Finance Reform in Tennessee: Inching Toward Adequacy*, 26 J. EDUC. FINANCE. 301 (2001).

86. *Id.*

87. Lynnissee Roehrich-Patrick & Harry A. Green, *Gains in Education Finance Equity: How Has the BEP Changed Things*, http://www.state.tn.us/tacir/PDF_FILES/Education/Gains%20in%20Education%20Spending.pdf (last visited Feb. 25, 2003).

school districts, while twenty-five percent of such expenditures are funded through local sources.⁸⁸ At the same time, localities are, collectively, responsible for half of the funding for non-classroom components and the state pays the other half of non-classroom expenditures.⁸⁹ The ultimate individual county share of school expenditures is based on the county's ability to pay, determined by a fiscal capacity index.⁹⁰ For example, districts with a fiscal capacity that slightly exceed the state average are required to pay slightly more than twenty-five percent for classroom components and slightly more than fifty percent for non-classroom components. In districts that are below the state average in terms of fiscal capacity, the requirements are correspondingly less stringent. Thus, the amount actually paid varies from district to district, with urban districts, like Davidson County in Middle Tennessee paying over forty percent, and some rural districts, like Hancock County in East Tennessee paying as little as five percent.⁹¹

Conspicuously, although earlier drafts of the BEP included teacher salaries as a component, the legislation enacted left out such salaries.⁹² Mainly for this reason, the BEP has not been satisfactory to the rural schools. Although funding for schools has gone up since 1991–92,⁹³ the rural schools remain frustrated by the fact that the BEP excludes teacher salaries, while it includes salaries of most other school employees.⁹⁴ Plaintiffs argue that teacher salaries were

88. See TENN. CODE ANN. § 49-3-356 (2002) (“The state shall provide seventy-five percent (75%) of the funds generated by the Tennessee BEP formula in the classroom components and fifty percent (50%) in the nonclassroom components as defined by the state board.”).

89. *Id.*

90. For a more detailed discussion of how the school districts' share of expenditures is determined, see Cohen-Vogel & Cohen-Vogel, *supra* note 85, at 301. Shortly, each district's share of classroom and non-classroom components turned on the district fiscal capacity, which varied widely. For instance, in 1997–1998, using the index used, local school districts were responsible for between 5.9 for the poorest district (Hancock County) and 40.8 percent of classroom components for the wealthiest district (Davidson County). *Id.*

91. *Id.*

92. *Small Schools II*, 894 S.W.2d at 738.

93. Cohen-Vogel & Cohen-Vogel, *supra* note 85, at 308–09 (estimating that school expenditures went up approximately \$849 million, adjusted for inflation).

94. Interview with Davis, *supra* note 30 (“So currently, every other employee of the school district, their salaries are all reviewed under the BEP, whether it be superintendent, or a janitor, or a secretary or a school nurse, everybody, except for teachers.”).

excluded because including them would be too cost-prohibitive, even though teachers are vital to student achievement.⁹⁵

C. *Small Schools II*

As a result, plaintiffs brought another suit, *Small Schools II*, to challenge the adequacy of the new equalization funding scheme—the BEP. They argued that the plan failed to pass constitutional muster because it did not consider inequalities in teacher salaries.⁹⁶ They also argued that the BEP’s phase-in equalization plan was too slow because equalization would take years to accomplish.⁹⁷

The defendants asserted that the court order only required that the state equalize educational opportunity, not equalize funding.⁹⁸ Under their argument, immediate funding for capital improvement and teachers’ salaries “would not equalize education[al] opportunity, which is the constitutional mandate.”⁹⁹ The state also argued that including teacher salaries in the BEP would neglect other inputs important to student performance.¹⁰⁰

After going through an explanation of the BEP,¹⁰¹ the court found that the omission of teachers’ salaries is “a significant defect in the BEP.”¹⁰² According to the court, teachers are “the most important component of any education plan” and teacher salaries are an important determinant of employment.¹⁰³ The court noted that the importance of teachers is bolstered by the fact that previous equalization schemes included teacher salaries.¹⁰⁴ Consequently, the court reasoned, teacher salaries must be included.¹⁰⁵

On whether equalization of funding and ultimately educational opportunities must be immediate, the court found gradual equalization satisfactory;¹⁰⁶ in other words, equalization would not have to occur

95. *Id.* (noting that teacher salaries were going to be “the most expensive component there was” and suggesting that the inclusion of teacher salaries would have cost the state between \$400–600 million in additional funds).

96. *Small Schools II*, 894 S.W.2d at 735.

97. *Id.* (noting that plaintiffs argue that constitutional violations must be corrected “with all deliberate speed.”).

98. *Id.* at 736.

99. *Id.*

100. *Id.* at 738.

101. *Id.* at 735–38.

102. *Small Schools II*, 894 S.W.2d at 738.

103. *Id.*

104. *Id.*

105. *Id.*

106. Interview with Charles, *supra* note 50.

immediately. Deferring to the incremental plan promulgated by the legislature,¹⁰⁷ the court held that the immediate equalization of funding would not necessarily ensure excellent public schools or equal educational opportunity.¹⁰⁸ The ruling in *Small Schools II* is the first time that a state supreme court has ordered that teacher salaries be equalized.¹⁰⁹

D. Small Schools III

In response to *Small Schools II*, the legislature passed a teacher salary equity plan.¹¹⁰ The plan, which operated outside of the BEP, attempted to equalize teachers' salaries in school districts where the average salary was below a state average compensation package when the order in *Small Schools II* was entered, or \$28,094.¹¹¹ All told, the plan provided twelve million dollars to approximately fifty counties.¹¹² However, the salary equity plan did not call for annual review of teacher salaries to adjust for inflation or higher costs, like other components of the BEP.

As a result, the plaintiffs in *Small Schools III* asked the court to require the state to "appropriate and distribute teachers' salaries in the same manner as all other BEP components."¹¹³ They argued that the defendants had failed to comply with the court order in *Small Schools II*, which required that a salary equalization plan be included in the BEP formula.¹¹⁴ Because the salary equalization plan did not include provisions for annual review or cost determination like other components of the BEP,¹¹⁵ the plaintiffs argued that the salary equity plan was not "sufficient to ensure [teacher] salaries that were similar throughout the state."¹¹⁶ They described the state-created equalization

107. *Small Schools II*, 894 S.W.2d at 738-39.

108. *Id.* at 739.

109. See Joanna Richardson, *Court Orders Tennessee to Equalize Teacher Salaries*, EDUC. WK., Mar. 1, 1995 at 6.

110. TENN. CODE ANN. § 49-3-366 (2002).

111. *Id.*

112. Defendants' Brief, *supra* note 79, at 9.

113. Plaintiff's Brief, at 1, *Tennessee Small Schools Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002) (No. M2001-01957-SC-R3-CV) [hereinafter Plaintiff's Brief] (on file with the UNIVERSITY OF MARYLAND LAW JOURNAL OF RACE, RELIGION, GENDER & CLASS).

114. *Small Schools III*, 91 S.W.3d at 238.

115. *Id.* at 237.

116. Interview with Charles, *supra* note 50.

plan as a “token gesture.”¹¹⁷ Moreover, they argued, the plan created an “artificial floor,” which only dealt “with salaries which are at the extreme low end of the pay scale.”¹¹⁸

The defendants argued that they were in compliance, since the salary equalization plan, although formally outside of the BEP, in fact uses part of the BEP formula to set minimum salaries.¹¹⁹ Further, they noted that the BEP does not preclude local governments from using local sources to supplement teacher salaries.¹²⁰ The state replied that they were in compliance with the previous court opinions, which they interpreted as leaving “the policy considerations—how to fund salaries and what salary levels should be—to the policy makers, the General Assembly.”¹²¹

The intervenors reasoned “no harm, no foul.” They argued that the performance of rural students was vastly improved since *Small Schools I*, by any measure.¹²² And, by some measures, the attorneys for urban schools found the performance of rural students even exceeds statewide averages.¹²³ For instance, students in plaintiffs’ school districts have test and graduation rates that meet or exceed statewide averages and fewer students drop out.¹²⁴ They also noted that all teachers were paid at least eighty percent of the state average teacher salary; and when cost of living was taken into account, nearly all teachers were paid at least ninety percent of the state average teacher salary.¹²⁵ Thus, the intervenors concluded that plaintiffs did not suffer a constitutional injury by the salary equity plan and that there was no evidence that plaintiffs were being denied substantially equal educational opportunities.¹²⁶

The court found that the salary equity plan does not go far enough to equalize teacher salaries, although the court “[did] not

117. Plaintiff’s Brief, *supra* note 113, at 17.

118. *See id.* at 17–18.

119. *Small Schools III*, 91 S.W.3d at 8.

120. *See* Defendants’ Brief, *supra* note 79, at 12, 17 (quoting TENN. CODE. ANN. § 49–3–306(b)).

121. *Id.* at 18.

122. Intervenors’ Brief, at 9, *Tennessee Small Schools Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002) (No. M2001–01957–SC–R3–CV) [hereinafter Intervenors’ Brief] (arguing that there are eight measures of equity all of which “showed significant improvement from the time period of 1992 (the beginning of BEP phase-in) until 1998 (the achievement of BEP full funding)) (on file with the UNIVERSITY OF MARYLAND LAW JOURNAL OF RACE, RELIGION, GENDER & CLASS).

123. *Id.* at 13–14.

124. *Small Schools III*, 91 S.W.3d at 242.

125. Intervenors’ Brief, *supra* note 122, at 9.

126. *Small Schools III*, 91 S.W.3d at 242.

necessarily demand complete equalization.”¹²⁷ Although the court noted that there are several similarities between the salary equity plan and the BEP, it also found substantial differences between the two, particularly the absence of annual review and cost determination.¹²⁸ As to whether the state had provided substantially equal opportunity, the court did not hold this to be the proper legal issue. Citing teacher salary statistics, the court noted that there are still wide disparities between rural and urban and suburban districts.¹²⁹ In sum, the court held that the state “had to [equalize teacher salaries] and it didn’t do it.”¹³⁰

Although the education clause of the Tennessee Constitution imposes at best a modest duty on the legislature to provide for education, the Tennessee Supreme Court has three times interpreted that provision to require the legislature to take bold action.¹³¹ However, as in *Small Schools I* and *II*, the opinion in *Small Schools III* is devoid of any attempt to fashion a specific remedy. Instead, the court held that creating a remedy is within the exclusive purview of the legislature.¹³² The court even went so far as to say that the state is not required to eliminate disparities in teacher salaries.¹³³ A new funding plan for teacher salaries need not provide equal funding throughout the state and, notably, local districts are not barred from raising revenue to supplement teachers’ salaries in certain districts.¹³⁴

127. Interview with Sutherland, *supra* note 28.

128. *Small Schools III*, 91 S.W.3d at 239–40.

129. *Id.*

130. Interview with Charles, *supra* note 50.

131. See Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 815–16 (1985) (grouping all state educational clauses by strength of language).

132. *Small Schools III*, 91 S.W.3d at 242–43 (citing *Van Tran v. State*, 66 S.W.3d 790, 804 (Tenn. 2001) (“It is not the business of the courts to decide how salaries are funded or at what level teachers should be compensated, for it is the legislature who ‘speaks for the people on matters of public policy’ such as these.”)).

133. *Small Schools III*, 91 S.W.3d at 243.

134. *Id.* (holding that “nothing in the law prevents a local school system from supplementing teachers’ salaries from its own local non-BEP funds when such funds are in addition to its local BEP contribution” and noting that “some disparities in teachers’ salaries from school district to school district will exist.”).

III. LEGISLATIVE RESPONSES

The plaintiffs in *Small Schools III* asked the court to compel the legislature to make teacher salaries part of the BEP.¹³⁵ The court, however, declined to take on a traditionally legislative function.¹³⁶ Instead, and like in the other *Small Schools* cases, the court again deferred to the legislature. Even without a specific remedy, however, the state legislature has a limited number of options to equalize teacher salaries at an estimated cost of several hundred million dollars.¹³⁷ In fact, it has only three. By far the easiest option for the legislature is to do nothing or disregard the latest ruling. Alternatively, the legislature can raise additional revenue by raising existing taxes or creating new taxes. Last, the legislature can reallocate existing revenue such that the small schools get a bump in additional funding.¹³⁸

None of the three options is palatable politically to Tennessee legislators. The first option—to do nothing—is, quite literally, subversive. The second option—raising taxes—is anathema in Tennessee, a state that has historically imposed one of the lowest tax burdens in the country.¹³⁹ Tennesseans are virulently anti-tax and almost violently anti-tax increases. The final option—reallocating existing funds—would hurt urban school systems. If education funds are reallocated, urban schools would be hit since those districts at present raise and spend larger amounts in per pupil spending.¹⁴⁰ Thus, as an attorney for the plaintiff explains, whether Republican or Democrat, few policy-makers would be in favor of standing up and supporting the result in the *Small School* cases.¹⁴¹

135. See Plaintiff's Brief, *supra* note 113.

136. Although the court did not go so far as to require that teacher salaries must be made part of the BEP, the language in *Small Schools III* is probably the strongest language by the court in all three cases. The court says, for example, that the exclusion of teacher salaries from the BEP formula is "a significant constitutional defect in the state's funding scheme." See *Small Schools III*, 91 S.W.3d at 11.

137. See Joetta L. Sack, *Court Orders Tennessee to Level Teacher Pay*, EDUC. WK., Oct. 16, 2002, at 17, 19 (noting that estimates of equalizing teacher salaries are as high as \$450 million).

138. Incidentally, a possible fourth option would be to cap the amount that school systems can spend on teacher salaries.

139. See *Comparing the Total Tax Burden in Each State to Just the State/Local Tax Burden*, <http://www.taxfoundation.org> (last visited Feb. 25, 2003) (finding that in 2002 Tennesseans paid the lowest in taxes as a percentage of income after citizens of Alaska, New Hampshire, Oklahoma and Texas).

140. For comparative levels of spending in urban and rural school districts, see Table 2.

141. Interview with Davis, *supra* note 30.

A. Inaction

Since enforcing the opinion involves two politically unattractive choices—raise additional revenue by raising taxes or redistributing existing revenue—some legislators may understandably balk at the court’s directive to make teacher salaries a component of the Basic Education Plan. While the General Assembly is unlikely to flagrantly ignore the court’s order to act,¹⁴² it may indeed decide to do very little or make only a token gesture such that teacher salaries remain outside of the BEP’s requirements, such as annual review and increase for inflation.¹⁴³ For example, in response to *Small Schools II*, which also arguably ordered the legislature to make teacher salaries part of the BEP, the legislature enacted a salary equity plan outside of the BEP and directed only a relatively small amount to equalize teacher salaries.¹⁴⁴ In the words of the plaintiff’s lawyer, the state “pretty much ignored” the court order which found that teacher salaries “must” be a component of the BEP.¹⁴⁵ Further, since the decision in the original *Small Schools* case, the legislature has to some extent stonewalled on the issue of school reform.¹⁴⁶ For example, when the chancery court handed down the first decision in *Small Schools I*, the legislature voted down possible reform plans.¹⁴⁷ Even earlier than that, the legislature, despite several reports calling for reform, has not been inclined to reform Tennessee schools.¹⁴⁸ Even when the plaintiffs won in the lower courts, the legislature refused to

142. Although one legislature has already discussed a public disregard of the ruling. See Lana Sutton, *Fowler Wants to Put Court in its Place*, CHATTANOOGA TIMES, Jan. 4, 2001, at B1.

143. One commentator, for example, has argued that political actors frequently frustrate, impede, or delay when it comes time to implement court-ordered reform. See Carr & Fuhrman, *supra* note 16, at 137.

144. See *Small Schools II*, 894 S.W.2d at 738.

145. Interview with Donelson, *supra* note 27.

146. See Lewis R. Donelson, *School Finance Litigation: A Rural Perspective: The Magna Carta of Public Education in Tennessee*, 61 TENN. L. REV. 445, 456 (1994) (“To date, legislative resistance continues. Funding for reform has been spread over six years. Salary equalization has been expressly prohibited with state funds, seriously crippling true equalization. No funds have been provided for equalization of physical facilities. In truth, the legislature applied a Band-Aid to a hemorrhaging educational system.”).

147. See *Small Schools II*, 894 S.W.2d at 735 (noting that in the special session called in 1992 to reform education consistent with the order of the court, the legislature rejected a proposal to increase equalization funding).

148. See Banks, *supra* note 74 at 158.

grant relief.¹⁴⁹ In response to plaintiff's victory, the legislature passed a resolution for the state Attorney General to appeal.¹⁵⁰

The legislature may even feel emboldened to be non-responsive to the latest court decision, since the Tennessee Supreme Court is unlikely to ever fashion a detailed remedy on its own or compel the legislature to take specific acts and has few enforcement powers in any event. In *Small Schools III*, plaintiffs specifically asked the court to order that teacher salaries be included in the remedy, citing cases where the court finds authority to create legislation when the legislature fails to meet its constitutional obligations.¹⁵¹ Plaintiffs also specifically asked that the state provide money to make capital improvements, enforce a threshold level of support, and make an immediate infusion of several hundred million dollars.¹⁵² The court explicitly refused to take these steps, leaving the "policy considerations such as funding and level of salaries to the legislature."¹⁵³

Further, Tennessee's highest court, where justices have to stand for re-election, has a long history of judicial passivism, leaving decision-making to the legislative branches of the General Assembly and the Governor.¹⁵⁴ All lawyers closest to the case agreed that the separation of powers doctrine is particularly strong in Tennessee.¹⁵⁵ Last, as more than one attorney involved in the litigation speculated, the court may also be inclined to avoid any direct intervention to avoid public criticism of judicial interference of the sort experienced by the

149. See generally Banks, *supra* note 74 at 158.

150. See Banks, *supra* note 74, at 158.

151. Plaintiff's Brief, *supra* note 113, at 25–28 (arguing that "when the General Assembly has ignored the prior directive of the Supreme Court, the legislature is not insulated by the separation of powers doctrine").

152. See Richardson, *supra* note 109.

153. *Small Schools III*, 91 S.W.3d at 241.

154. See ELY, *supra* note 24, at x–xi (noting that "[t]he judges on Tennessee's high court early established the principle of judicial review, but rarely blocked legislative steps to address perceived social and economic problems. By and large, the members of the Court left policy determinations to the political branches of government.").

155. See Telephone Interview with Kate Eyler, Deputy Attorney General, State of Tennessee (Feb. 4, 2003) ("I don't think that's true in all states. Our separation of powers doctrine is very strong."). Even the plaintiffs expressed skepticism that the court would have authority to fashion a specific remedy. See Interview with Davis, *supra* note 30 ("We did a lot of research on that to see what would give the supreme court authority and power to not only enact a plan, but to enact a specific plan. I don't know if they are willing to take the step, because I'm not sure that they have the authority to take that step. [For instance,] we asked to make teacher salaries a component of the BEP, but they weren't willing to go that far."). Interview with Donelson, *supra* note 27 (noting that intervention by the courts "would not be possible under existing case law.").

federal bench in Tennessee, which has frequently been lampooned for “micromanaging aspects of state government.”¹⁵⁶ It appears that the legislature has little to fear from the court if it refuses to act or only makes a purely symbolic gesture.

Nevertheless, there are at least a few reasons to believe that the legislature will not ignore the court completely. For example, in *Small Schools I* and *II*, “although it took a while to find funding,” the legislature did attempt to honor the court’s decisions by enacting, first, the Basic Education Plan and, later, the salary equity plan.¹⁵⁷ Further, it is safe to assume that the legislature would think twice before disregarding the court’s opinion since such a decision would subvert the rule of law.

B. Redistribution

Another possible legislative strategy is to create a mechanism of centralization and redistribution of resources, Robin Hood-style, away from the wealthy school districts to poorer school districts. Absent centralization and redistribution, school funding would continue to flow to the school districts where the funding originated. According to the plaintiffs, this pattern was the main source of the inequality in school funding and should be abolished.¹⁵⁸ Furthermore, because rural residents also travel to urban centers, shop, and pay the local sales taxes when they make purchases, the court suggested that it makes sense that some revenue generated by local option sales taxes in urban communities be redistributed to rural areas.¹⁵⁹

However, the obvious problem with redistribution is that, while it would shift tax revenues to the smaller school districts, it would strip revenue from the urban schools.¹⁶⁰ That is, if the General Assembly, “robs Peter to pay Paul; if they say, ‘let’s take all our local option taxes and distribute them in the state,’ the urban districts are really going to take a hit.”¹⁶¹ Arguably, the BEP has already begun the

156. Interview with Sutherland, *supra* note 28.

157. Interview with Charles, *supra* note 50. The lead attorney in the most recent *Small Schools* cases goes on to posit: “The General Assembly has tried to honor the Supreme Court’s mandate. It’s not like they just said sorry we’re not going to do it.” Interview with Charles, *supra* note 50.

158. Plaintiff’s Complaint, *supra* note 37, at 9.

159. See *Small Schools I*, 851 S.W.2d at 14.

160. Defendants’ Brief, *supra* note 79, at 25.

161. Interview with McCampbell, *supra* note 14.

process of redistribution from the wealthy districts to the rural districts. That is, while funding for poor rural schools has increased under the BEP,¹⁶² state funding for some urban schools under the BEP may have actually decreased.¹⁶³ The attorney for Knox County, for instance, notes that, as a consequence of the BEP, the county has been called on to fill in budget shortfalls.¹⁶⁴ Thus, while the county can report increased funding after the BEP, the increases are the result of local, not state BEP, dollars.¹⁶⁵ In some cases, BEP school funding has technically increased, but it has not improved the fiscal condition of public schools. In Hamilton County, for example, school funding went up nominally only because the Hamilton County and Chattanooga school districts have merged.¹⁶⁶ However, if the school funding were considered separately in the county, as it had been before the BEP, the financial accounts of the district would show a funding decrease.¹⁶⁷ This is in line with national trends that show that school finance overhaul frequently leads to consolidation of school districts.¹⁶⁸ Furthermore, since *Small Schools II*, the percentage of state funding for schools in all of the big four urban districts—Chattanooga, Knoxville, Memphis, and Nashville—has decreased.¹⁶⁹ Over the same period, the cash-strapped urban districts have had to rely, even more, on local sources to fund schools.¹⁷⁰

In addition, any effort to equalize salaries with a Robin Hood-type strategy would ignore the higher costs of educating in urban

162. See generally Cohen-Vogel & Cohen-Vogel, *supra* note 85 (finding that poor schools in Tennessee received a disproportionate amount of funding under the Basic Education Plan).

163. Interview with McCampbell, *supra* note 14.

164. *Id.*

165. *Id.*

166. Interview with Sutherland, *supra* note 28.

167. *Id.*

168. See Andrew Grider & Deborah A. Versteegen, *Legislation, Litigation and Rural & Small Schools: A Survey of the States*, 26 J. EDUC. FINANCE 103, 113 (2000) (finding that 11 states consolidated to take advantage of supplemental funding).

169. Compare TENNESSEE DEPARTMENT OF EDUCATION, ANNUAL STATISTICAL REPORT (1996) (providing that, in 1995–1996, the percent of *state* funding for public schools in Chattanooga, Knoxville, Memphis, and Nashville were 44.0%, 42.5%, 43.2%, and 35.5% respectively) with 2002 ANNUAL REPORT, *supra* note 25 (providing that, in 2001–2002, the percent of *state* funding for public schools in Chattanooga, Knoxville, Memphis, and Nashville were 32.2%, 34.6%, 37.1%, 28.8%, respectively).

170. Compare TENNESSEE DEPARTMENT OF EDUCATION, ANNUAL STATISTICAL REPORT (1996) (providing that, in 1995–1996, the percent of *local* funding for public schools in Chattanooga, Knoxville, Memphis, and Nashville were 50.5%, 52.6%, 43.2%, 57.0%, respectively) with 2002 ANNUAL REPORT, *supra* note 25 (providing that, in 2001–2002, the percent of *local* funding for public schools in Chattanooga, Knoxville, Memphis, and Nashville were 55.7%, 59.0%, 50.8%, 62.6%, respectively).

areas.¹⁷¹ In urban areas, for instance, there are frequently more students with “exceptional educational needs,” like special education students, poor students, or students who speak English as a second language,¹⁷² for whom it takes more money to educate.¹⁷³

Finally, redistribution and centralization removes the incentives for residents in local communities to fund schools adequately.¹⁷⁴ Local control, in fact, was one of the main arguments the defendants gave against redistributing school funding in the *Small Schools* cases.¹⁷⁵ For example, an attorney for the urban school systems noted that over-centralization of school funding and education will “suffer across the board” because “the organization is going to be too big ... to respond to the needs of each district.”¹⁷⁶

C. New Taxes

A third option for responding to the court’s decision is to find new funding by raising existing taxes or finding new sources of tax revenue for state public education. Of the two, raising existing taxes would probably not be plausible, since there are few existing tax structures that can be raised.¹⁷⁷ Most state revenue in Tennessee, one of seven without a state income tax, comes principally from sales taxes. At 9.15%, Tennesseans already pay the highest average sales tax in the nation.¹⁷⁸ Thus, the latter has received the most copy. Indeed the main lawyer for the case has advocated generating new

171. See Kelly, *supra* note 49, at 471–72.

172. In Tennessee, the big four urban districts alone educate nearly sixty percent of the state’s children who speak English as a second language. See DEPARTMENT OF EDUCATION, STATE OF TENNESSEE, A SUMMARY OF TENNESSEE PUBLIC SCHOOL SYSTEMS: ANNUAL REPORT 26–27 (2001) [hereinafter 2001 ANNUAL REPORT] (author’s calculations).

173. Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm in EQUITY AND ADEQUACY IN EDUCATION FINANCE* (1999) 183–84. Also, urban areas use local option sales tax revenue to provide municipal services like fire, police, road repair, health services and other costs associated with running a large municipality.

174. See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

175. *Small Schools I*, 851 S.W.2d at 156 (rejecting defendants’ argument that location control justifies funding disparities).

176. Interview with McCampbell, *supra* note 14 (“It’s all going to be about equalization; its not going to be about education anymore.”).

177. See text accompanying notes 178–81.

178. Karin Miller, *Tennessee Now Has the Highest Average Sales Tax*, THE COMMERCIAL APPEAL, Jul. 17, 2003, at B3.

funds by raising local sales taxes or creating an income tax,¹⁷⁹ and the case may be a way to force the legislature to sign off on new taxes.¹⁸⁰

Still, funding by way of new revenue from taxes seems highly unlikely in light of recent state elections, where as one Nashville city attorney, puts it, “anyone who supported a state income tax has been thrown out of office.”¹⁸¹ The current Governor, meanwhile, has promised not to include a state income tax in his state budget, so “it’s not going to be on the table at all, yea or nay.”¹⁸² Thus, because it appears legislators and Tennesseans are virulently opposed to a state income tax, it is unlikely that this will be a source of additional money.¹⁸³

Another way to raise additional revenue is to institute a state lottery, which would direct proceeds to education in the state and would create much needed space in the state budget to equalize teacher salaries.¹⁸⁴ The legislature is already mulling over a lottery plan, after receiving the imprimatur of the public in a recent referendum.¹⁸⁵ However, under the current lottery plan revenues would go to college bound students and would not benefit the public school systems in Tennessee.¹⁸⁶ Although the excess money from the lottery will go to K–12 education, it is not clear how much that amount will be.¹⁸⁷

IV. LOSERS OF SUCCESSFUL SCHOOL FINANCE REFORM

The State of Tennessee was the named defendant in the *Small Schools* cases and naturally had much to lose by an adverse verdict. Specifically, the state would lose some of its autonomy, facing the

179. See Paula Wade, *Donelson Seeks to Equalize Teacher Pay*, THE COMMERCIAL APPEAL, Sept. 9, 1999, at B2 (reporting that Lewis Donelson has been crusading for a state income tax since the early 1970s).

180. Telephone Interview with Ernest Kelly, Partner (Feb. 25, 2003).

181. Interview with Charles, *supra* note 50.

182. Interview with Eyler, *supra* note 155.

183. See Interview with Davis, *supra* note 30.

184. See Richard Locker, *Legislature Holds Bad Hand; Lottery May Have Choice*, THE COMMERCIAL APPEAL, Jan. 7, 2001, at A1.

185. See TENN. CONST. art. XL, § 5.

186. Richard Locker, *Plan Outlines Lottery Scholarships—Low Income Achievers Would Get Extra \$1,000*, THE COMMERCIAL APPEAL, Feb. 19, 2003, at A1. In any event, lotteries are highly regressive. As one state senator posits: “It will take the poor and make them poorer, and take the marginally poor and make them poorer, and put more of them on TennCare.” Sutton, *supra* note 143, at B1.

187. See Joetta L. Sack, *Tennessee Eyes Next Step Toward Lottery*, EDUC. WK, Nov. 20, 2002, at 15, 17.

prospect of having to re-allocate funds based on a court order. But, the urban schools also had much, if not more, to lose if the state lost the case, since equalization would likely shift state dollars to the smaller schools and away from the urban districts. Perhaps it goes too far, but in some ways Tennessee is one of the few states that has actually “stepped up to the plate and provided its city students with a pretty good education.”¹⁸⁸ In each of the big four urban school districts¹⁸⁹ spending per pupil exceeds the statewide average.¹⁹⁰

Accordingly, in this Part, I attempt to put Tennessee’s school finance litigation in the perspective of urban schools. I compare the holding of the court to the actual position of the urban schools vis-à-vis the rural schools. In so doing, I examine the racial differences between the two school types. While the court does not mention race in any of the three opinions, to even the most casual observer racial undertones pervade all of the *Small Schools* cases, where most of the students in the plaintiff school districts were white.¹⁹¹

In the first section, I suggest that the court’s rulings are at odds with the needs of Tennessee schools. At least presently, rural schools are not in the kind of trouble that the court’s opinion suggests. To the extent that the court opinion supports redistribution, the urban schools, which have higher operation costs, stand to suffer. Second, possible reform efforts threaten to hurt efforts to educate students from poorer communities, specifically minority students, who tend to have greater educational needs. Students in these districts are not only more likely to come to school malnourished, but they often perform poorly on standardized tests. Finally, I argue that teachers are motivated by more than just money. In fact, at least some research has shown that teachers change school systems to get away from urban-minority students.

188. Interview with McCampbell, *supra* note 14. See also ELY, *supra* note 24, at 316.

189. For a definition of the “big four” urban districts, see *supra*, note 11.

190. See 2001 ANNUAL REPORT, *supra* note 172, at 154–55.

191. As a democratic state representative from Chattanooga finds, the *Small Schools* cases seem to have a disproportionate impact on African American children since around three-fourths of African American students live in the urban districts. See *Teacher Pay Equalization Suit Dismissed*, CHATTANOOGA TIMES, Jul. 15, 2001 (quoting State Representative Tommie Brown) at A1.

A. Schools

In the *Small Schools* cases, the court seems to go out of its way to describe the urban schools as superior districts that provide greater educational opportunities for students, as compared to rural districts.¹⁹² According to the court, urban school districts have a greater fiscal capacity to raise local revenue to fund schools.¹⁹³ In *Small Schools I*, for example, the court refers to the urban districts as the “wealthier” or “affluent districts” or the districts that “do not want the funding scheme which favors their systems disturbed.”¹⁹⁴

To a certain extent, the court gets it right—when the first *Small Schools* case was decided there were cases of wide funding disparities between urban and rural schools. Some of the rural schools, in fact, were in horrible disrepair. In one rural school district, Hancock County, temporary buildings were being used as schools because school houses were over sixty years old and “[p]ieces of the ceiling were falling out.”¹⁹⁵ As one of the principal attorneys in the first *Small Schools* case confides, off-the-record: “It’s really hard to look at pictures of inadequate buildings and deny those children equal funding access.” According to the plaintiffs’ lead attorney, textbooks were so outdated in many of the small schools that they “said that one day we’ll put a man on the moon.”¹⁹⁶

1. Condition of Tennessee Schools

But, by *Small Schools III*, it is not clear that the rural schools were in such a terrible mess. To the contrary, there is little doubt that “the BEP has enhanced the quality of education.”¹⁹⁷ The rural schools, for instance, frequently have lower teacher-student ratios than the average state school and thus smaller classes,¹⁹⁸ which most

192. *Small Schools I*, 851 S.W.2d at 143 (noting that urban schools provide far more education opportunities to students than “schools in [the] plaintiffs’ districts”).

193. The court in *Small Schools I*, for example, argues that urban districts are able to raise more money locally through a sales tax and by property tax, since the majority of big houses are in urban districts. See *Small Schools I*, 851 S.W.2d at 145.

194. *Id.* at 142.

195. Interview with Donelson, *supra* note 27.

196. Interview with Donelson, *supra* note 27.

197. Interview with Eyler, *supra* note 155.

198. For example, three of the named plaintiff districts in the case—Grundy, Pickett, and Hancock—have the some of the lowest educator-student ratios in the state—12.5, 11.4, 10.4, respectively. See TEACHER SUPPLY AND DEMAND IN TENNESSEE, *supra* note 12, at 48. See also Intervenor’s Brief, *supra* note 122, at 10.

researchers have found increases student achievement.¹⁹⁹ By comparison, school districts in some urban counties, such as Shelby County and Montgomery County, have some of the highest teacher-student ratios in the state.²⁰⁰ Further, suggesting that the urban schools are wealthier than rural schools is wishful hyperbole. In point of fact, the fiscal state of the rural schools was frequently better than that of other state schools, particularly the urban schools. At the time of the original trial, nearly forty percent of Memphis schools were between “twenty to forty years old” and most “in very bad condition.” In Memphis, “less than forty percent of its schools are fully air conditioned,” and a good portion of those schools had no air conditioning, which forced the schools to close during hot days.²⁰¹

2. *Costs of Urban Schools*

Additionally, the urban schools have greater costs related to their operation than do rural schools. By statute, half of such locally-generated revenue most go to education where the tax is collected.²⁰² As mentioned earlier, urban areas that generally have higher costs due to operating in a metropolitan environment use this additional revenue to fund a variety of operational costs that rural schools do not have.²⁰³ For instance, the attorney for urban Hamilton county notes that those funds go to several county agencies, including the county’s teaching hospital and the Air Pollution Control Bureau.²⁰⁴

199. Notably, data in the first, and perhaps most, controlled experiment of class size was collected in Tennessee, as part of its STAR (Student/Teacher Achievement Ratio) project. See Jeremy D. Finn & Charles M. Achilles, *Tennessee’s Class Size Study: Findings, Implications, Misconceptions*, 21 *EDUC. EVALUATION & POL’Y ANALYSIS* 97, 98 (1999) (noting that Tennessee study found “an array of benefits of small classes, including improved teaching conditions, improved student performance during and after the experimental years, improved student learning behaviors, fewer classroom disruptions and discipline problems, and fewer student retentions”); Barbara Nye & Larry V. Hedges, *The Long-Term Effects of Small Classes: A Five-Year Follow-Up of the Tennessee Class Size Experiment*, 21 *EDUC. EVALUATION & POL’Y ANALYSIS* 127 (1999) (finding that benefits of class size reduction persist for at least five years after children return to classes of regular size). *But see* Eric A. Hanushek, *Some Findings From an Independent Investigation of the Tennessee STAR Experiment and From Other Investigations of Class Size Effects*, 21 *EDUC. EVALUATION & POL’Y ANALYSIS* 143 (1999) (noting that design and implementation flaws of the STAR project put the findings in doubt and arguing that class reductions are expensive to undertake and do not result in appreciable gains in student performance).

200. *TEACHER SUPPLY AND DEMAND IN TENNESSEE*, *supra* note 12, at 48.

201. Burson & Young, *supra* note 44, at 463.

202. *TENN. CODE ANN.* § 67–6–712 (2003).

203. See Minorini & Sugarman, *supra* note 173, at 184.

204. Interview with Sutherland, *supra* note 28.

The sheer size of the urban districts requires extra money to be spent on transportation costs, security costs, and other expenses associated with operating a mega-enterprise.²⁰⁵ For instance, the prototypical rural school district has six schools and educates little more than 2,200 students on a daily basis.²⁰⁶ By contrast, the prototypical urban school district operates eighty schools and educates, on average, nearly fifty thousand students every school day. Together, the two largest school districts in the state, Memphis City Schools and Nashville-Davidson County Public Schools, operate more than 200 schools, averaging around 200,000 students daily.²⁰⁷ In fact, the nine intervening districts together comprise more than one third of the schools and educate nearly half of all students in the state on a daily basis.²⁰⁸ The condition of the rural schools may rightly warrant intervention by the Tennessee high court in the not-so-distant future. However, the three holdings seem to not recognize the needs of Tennessee urban schools. Operating these large, urban juggernauts is extremely expensive.

Also, the court may have exaggerated spending levels in the so-called wealthy districts. In fact, spending levels in urban schools is not far and away much higher than in rural districts. In some of the rural schools, per pupil spending, as seen in Table 2 below, exceeds that in the urban areas. Further, in at least one urban school district, which has had to look elsewhere for funds, including private foundation grants, the above-average spending levels may not be the result of a wealthy tax base.²⁰⁹ In still other places, such as Nashville, increased spending levels may be linked to desegregation orders, which require the locality to expend resources to integrate historically segregated schools.²¹⁰

205. The data for this paragraph come from the annual reports published by the Tennessee Department of Education. See 2002 ANNUAL REPORT, *supra* note 25; see also Table 1.

206. 2002 ANNUAL REPORT, *supra* note 25.

207. *See id.*

208. *See id.*

209. Interview with Sutherland, *supra* note 28.

210. *See Metropolitan County Board v. Kelley*, 453 U.S. 1306 (1981); see also generally Caroline Hendrie, *In Indianapolis, Nashville, a New Era Dawns*, EDUC. WK., Jul. 8, 1998 at 8.

Table 2. Per Pupil Spending in Selected Tennessee School Districts in 2001–2002 School Year.

Rural Schools	Per Pupil Spending Levels	Urban Schools	Per Pupil Spending
Crockett	\$5,371	Davidson	\$7,630
Grundy	\$6,528	Hamilton	\$7,034
Hancock	\$6,512	Knox	\$6,324
Hickman	\$5,359	Madison	\$6,682
Overton	\$5,653	Montgomery	\$5,500
Pickett	\$6,521	Sevier	\$6,183
Trousdale	\$5,311	Shelby	\$6,696
Wayne	\$5,918	Sullivan	\$7,414
Average	\$5,897	Average	\$6,683

All values rounded to nearest dollar. Data compiled from Tennessee Dept. of Educ. (2002 Annual Report).

B. Students

Secondly, school finance reform is often about the underperformance of students. The rural schools have a high turnover rate of teachers, difficulty filling positions, particularly in math, science, foreign language, and special education and, ultimately, are compelled to employ many unqualified, inexperienced, or part-time teachers.²¹¹ So long as teacher salaries are not equalized, stable student achievement in rural districts is put in jeopardy.²¹² This is reflected in the poor performance of students in rural schools. For example, one-quarter of students from Grundy County, perhaps the worst-performing district, did not make it through high school.²¹³ The court, however, avoids the issue of comparative measures of success. It concludes, according to a Tennessee Deputy Attorney General, that the “children in rural schools were not performing as well.”²¹⁴ But, here again the condition of the urban schools seems to be overlooked.

211. *Id.* at 22–24 (“Parents of students in the poorer districts can no longer expect that their children will be taught by a qualified teacher who knows the basic tenants of teaching or even has the training in the discipline in which he or she teaches.”)

212. Interview with Davis, *supra* note 30 (“Certainly the facilities have improved. But, because teacher salaries haven’t improved, there hasn’t been a great improvement in student achievement.”).

213. 2001 ANNUAL REPORT, *supra* note 172, at 45.

214. Interview with Eyster, *supra* note 155.

1. Rural Schools

As a result of increased state funding after *Small Schools I*, “test scores in rural schools have soared,” the lead attorney for the rural schools acknowledges.²¹⁵ Students in rural districts routinely post numbers that exceed statewide averages and far exceed the achievements of urban schools.²¹⁶ As the lead intervening attorney in *Small Schools III*, Jim Charles of Nashville, found that “while one of four of the rural poor don’t make it through high school, one out of three of the kids [in urban districts] don’t make it through high school.”²¹⁷ Memphis city schools, the largest urban school district in the state, has displaced Grundy County, a rural district, as having the highest dropout rate in the state.²¹⁸ Many of the named plaintiffs’ students surpass the state average ACT scores, while some of the city schools, such as those in Memphis City,²¹⁹ are struggling. At the same time, students in rural districts are more likely to graduate high school, less likely to drop out and more likely to pass a basic competency test (the Tennessee Competency Test), than students in other school districts and significantly more likely than students in urban districts.²²⁰ In short, any redistribution away from urban schools stands to “exacerbate the problem” of urban students’ achievement.²²¹

2. Urban Schools

Secondly, the court fails to factor in the poverty of urban-minority students. To be sure (although often unrecognized by the popular press and the public) rural poverty is frequently as debilitating as any other.²²² Also troubling, rural districts with shrinking tax bases cannot expect to provide as extensive a curriculum as other more metropolitan school districts.²²³ Despite nominally wealthy tax bases, the students in the urban school districts frequently are the products of impoverished homes, another characteristic of urban students

215. Interview with Donelson, *supra* note 27.

216. This lends credence, albeit anecdotal, to the view that expenditures bare no systematic relationship to student performance. See Hanushek, *supra* note 64, at 454 (“Research has demonstrated conclusively that, within the current organization and operation of schools, there is no consistent relationship between resources and student performance.”).

217. Interview with Charles, *supra* note 50.

218. 2001 ANNUAL REPORT, *supra* note 172, at 46.

219. 2001 ANNUAL REPORT, *supra* note 172, at 93.

220. Intervenors’ Brief, *supra* note 122, at 13.

221. Interview with Charles, *supra* note 50.

222. See Dayton, *Equity Litigation*, *supra* note 7.

223. See Dayton, *Equity Litigation*, *supra* note 7.

conspicuously overlooked by the court.²²⁴ According to several attorneys for the urban districts, these schools have higher percentages of economically challenged populations.²²⁵ The intervenors' brief in *Small Schools III* suggests that a little less than half of all Tennessee public school children (and almost exactly half of the students in the big four urban districts)²²⁶ received free or reduced price meals, compared to eighteen percent of the students in plaintiff's school systems.²²⁷ The big four urban districts accounted for nearly eighty-four percent of all school children eligible for reduced lunch.²²⁸ As the superintendent of Hamilton County Schools said, "you will find a higher concentration of poorer people in the urban areas."²²⁹ For example, in the Memphis city schools, a system of virtually all African American students, over sixty percent of students have been identified as "at risk" under state standards and thus eligible to receive Title I funds, the federal program aimed at the country's most poverty-stricken schools.²³⁰ Thus, it comes as no surprise that the urban school districts in Tennessee spend more per pupil than the rural districts.

C. Teachers

Finally, according to the court, because "there is a less and less [monetary] incentive for teachers to be in rural districts," the rural districts are unable to recruit and/or retain teachers.²³¹ For instance, the superintendent of one rural school district, Sequatchie County Schools, laments how teachers leave for one of the big four urban districts where they are paid more: "We can't compete with larger districts. . . . We train them (teachers), and then they go to Hamilton

224. As one of the attorneys for the intervenors puts it: "You have inner city schools that have more things in common with Detroit than they do with [rural schools in] West Tennessee." Interview with Sutherland, *supra* note 28. See also Ryan, *Money*, *supra* note 5, at 285-86.

225. See, e.g., Interview with McCampbell, *supra* note 14; Interview with Charles, *supra* note 50 (The poor rural students are not as poor as the "urban poor" who "need the most help.").

226. 2001 ANNUAL REPORT, *supra* note 172, at 4-5.

227. Intervenors' Brief, *supra* note 122, at 1.

228. 2001 ANNUAL REPORT, *supra* note 172, at 19 (author's calculations).

229. *Judge Dismisses Teacher-Pay Lawsuit*, THE COMMERCIAL APPEAL, July 14, 2001, at A4 (quoting Jessie Register).

230. See 2001 ANNUAL REPORT, *supra* note 172, at 5, 9, 13 (providing that approximately eighty-six percent of Memphis City School students are African American).

231. Interview with Davis, *supra* note 30.

County.”²³² Plaintiffs, in their brief in the most recent *Small Schools* case, argued that the wealthy, urban districts could “out-compete the poorer districts in teacher compensation.”²³³ As a result, with the incentive of higher pay, beginning teachers would gravitate toward urban districts.²³⁴ Meanwhile, experienced, rural teachers would leave for “wealthier districts where they can earn higher salaries,” thus “leaving students in the poorer districts to be taught by inexperienced teachers.”²³⁵ In this light, making teacher salaries a component of the BEP would put all school districts on an equal playing field.²³⁶ Small school advocates also complained that teachers would leave rural districts for neighboring states and higher salaries.²³⁷ The superintendent of another small school district, Overton County, has complained that he has seen dozens of teachers move to Kentucky to take advantage of higher salaries.²³⁸

In Tennessee, which borders more states than any other, the threat of teacher moves is real. In 2000, for instance, Tennessee paid its teachers, on average, nearly \$5,000 less than Georgia, the highest paying state in the region.²³⁹ In fact, at an average \$36,328, the state was well-behind average salaries in Georgia, North Carolina and Virginia, not to mention slightly behind average salaries in Alabama.²⁴⁰ The state trailed the same group in starting teacher salaries as well.²⁴¹ The differences in teacher salaries between the urban and rural districts are even starker. As shown by the table below, teachers in urban districts, on average, receive more than \$8,000 more than what is earned in rural districts.

232. Beverly A. Carroll, *Tennessee Underfunds Schools, Officials Say*, CHATTANOOGA TIMES, Apr. 29, 2002 at A1.

233. Plaintiff’s Brief, *supra* note 113, at 21.

234. Interview with Davis, *supra* note 30 (“[T]eachers who are coming out of college aren’t going to work in rural district because they can get paid a lot more money working in an urban school district.”)

235. Plaintiff’s Brief, *supra* note 113, at 20.

236. Interview with Davis, *supra* note 30.

237. See Interview with Donelson, *supra* note 27 (“Tennessee is a state where neighboring states have a big impact on us. Chattanooga is right on the border. Memphis is right on the border. Clarksville is right on the border. Every one of those is competing with other states. So, it makes a difference what you’re doing.”)

238. See Sack, *supra* note 137.

239. See AMERICAN FEDERATION OF TEACHERS, SURVEY ANALYSIS OF TEACHER SALARY TRENDS (2000) <http://www.aft.org/research/survey00/salarysurvey00.pdf> (last visited May 20, 2003) [hereinafter SURVEY ANALYSIS OF TEACHER SALARY TRENDS].

240. See SURVEY ANALYSIS OF TEACHER SALARY TRENDS, *supra* note 239.

241. *Id.*

Table 3. Average Teacher Salaries in Selected Districts.

Rural County School Districts	Average Classroom Teacher Salaries	Urban County School Districts	Average Classroom Teacher Salaries
Crockett	\$31,841	Davidson	\$42,784
Grundy	\$31,533	Hamilton	\$40,179
Hancock	\$33,254	Knox	\$38,589
Hickman	\$31,464	Madison	\$41,175
Overton	\$33,452	Montgomery	\$36,917
Pickett	\$33,608	Sevier	\$37,543
Trousdale	\$33,077	Shelby	\$44,002
Wayne	\$33,439	Sullivan	\$41,615
Average	\$32,709	Average	\$40,350

All values rounded to nearest dollar. Data compiled from Tennessee Dept. of Educ. (Annual Report, 2001–2002).

1. Disparities in Teacher Salaries, Generally

Still, according to one lawyer, plaintiffs offered no substantive evidence that substantially equal pay for teachers was requisite for substantially equal education.²⁴² On this point, at least one recent study published by the Rand Institute suggests the contrary: teacher salaries have little impact on achievement.²⁴³

In addition, teacher salaries in Tennessee are not far afield from teacher salaries in *all* of its neighboring states. Tennessee salaries, for example, are, on average, on par with those of neighboring Kentucky.²⁴⁴ And while salaries in Tennessee trail four of its eight neighbors, the average salaries exceed the average in the three others—namely, Arkansas, Mississippi, and Kentucky.²⁴⁵ Meanwhile state teacher salaries have increased in proportion to the national average.²⁴⁶

As for intra-state moves, the court makes too strong a link between salaries and teacher relocations. As an attorney in East

242. Interview with McCampbell, *supra* note 14.

243. See, e.g., DAVID W. GRISSMER, ET AL., IMPROVING STUDENT ACHIEVEMENT: WHAT STATE NAEP TEST SCORES TELL US xxvi–xxvii (2000), at <http://www.rand.org/publications/MR/MR924> (finding no relationship between higher teacher salaries or higher proportions with advanced degrees and student achievement).

244. Goldhaber & Callahahn, *supra* note 82, at 423.

245. SURVEY ANALYSIS OF TEACHER SALARY TRENDS, *supra* note 239.

246. Goldhaber & Callahahn, *supra* note 82, at 422–23.

Tennessee notes, since most of the rural districts are in West and Middle Tennessee, it is not likely that teachers will move across state simply because salaries are equalized.²⁴⁷ While the urban schools frequently pay higher teacher salaries,²⁴⁸ it does not mean they are in a better position to attract qualified teachers to urban districts. In fact, more than three-quarters of the teachers in urban schools are unlicensed, compared to approximately half of the teachers in rural schools, although the former pay higher salaries.²⁴⁹

Additionally, urban districts have trouble recruiting teachers. Many urban districts have to offer higher pay in order to recruit and retain teachers.²⁵⁰ In fact, excluding supplements, “not a major county in Tennessee can hire people on the state salary schedule.”²⁵¹ This is true not only for teachers, but of many public officials as well, including members of the judiciary, like the county district attorney and local judges.²⁵² The problem with equalization of teacher salaries, therefore, is that the “suburbs and rural areas tend to have both lower cost of living and a lot of schools have lower stress level for the teachers.”²⁵³

A noticeably large number of teachers in urban school districts are unlicensed. To be sure, huge proportions of teachers in both urban districts and rural districts are unlicensed and teaching under waivers. However, while many rural school districts operate without a single waiver, virtually all of the urban school districts have some unlicensed teachers working under waivers.²⁵⁴ In fact, just two urban districts, Memphis City Schools and Davidson County represent more than half of the waivers issued to non-licensed teachers in the state.²⁵⁵

247. Interview with McCampbell, *supra* note 14.

248. Further, although there were indeed disparities in teacher salaries in at least some rural schools, as shown in Table 3, teacher salaries in a few rural school districts actually eclipse teacher pay in urban areas. Moreover, the Table 3 does not begin to capture the average salary in other rural schools districts. As an attorney in the last court case divulges: “My kids go to a school where the district is the highest paid district in the state, yet technically that is a small school, yet technically they are plaintiffs.” Interview with McCampbell, *supra* note 14.

249. See Intervenors’ Brief, *supra* note 122, at 11.

250. See Ryan, *Money*, *supra* note 5, at 294 (arguing that it is difficult for urban schools to attract teachers because “[t]hey are often located in unsafe neighborhoods and experience levels of violence that exceed those of their suburban counterparts”).

251. Interview with Sutherland, *supra* note 28.

252. *Id.*

253. Interview with Kelly, *supra* note 180.

254. TEACHER SUPPLY AND DEMAND IN TENNESSEE, *supra* note 12, at 135.

255. *Id.*

2. Recruiting Teachers to Urban Districts

Moreover, in none of the cases did the court consider the differences in teacher salaries in urban versus rural schools. In other words, as the state attempted to emphasize, although the court seems to concentrate on local supplements, there are several factors that explained discrepancies in teacher salaries.²⁵⁶ The most obvious is the difference in cost-of-living between the rural and non-rural districts.²⁵⁷ Under the BEP, wage rates rightly took into account regional cost differentials.²⁵⁸ To date, however, the salary equity plan for teachers does not completely account for such differences. As mentioned, it required that all teacher salaries be equalized above a base of around \$28,000, even though it may be appropriate in some regions, given the relative cost of living, to pay even less than that base amount or “equalize below the base.”²⁵⁹ Further, urban schools are arguably entitled to higher expenditures to pay for additional staffing and security costs that rural schools do not have to meet.²⁶⁰

Finally, the threat of *en masse* teacher migration to so-called “wealthy,” urban districts may be overblown. The evidence suggests that year-to-year the vast majority of teachers remain in the same school.²⁶¹ In Tennessee, the percentage of teachers remaining in the same school had reached a decade high at ninety-six percent.²⁶² Further, while salary may be a motivating factor for teacher moves to suburban areas, it is not the sole motivation for teachers who are contemplating a move to urban areas.²⁶³ In other words, the so-called

256. Interview with Eyler, *supra* note 155.

257. See Kelly, *supra* note 49, at 474 (“Higher costs of ordinary programs are partially generated by salary scales, which must reflect the cost of living in urban communities.”). In fact, according to the TACIR, a state agency, the disparity in teacher salaries is greatly reduced when salaries are adjusted for cost of living differences using the Tennessee Teacher Cost Index (TTCI). See also Green & Lippard, *supra* note 25 (finding that “[t]he use of the TTCI reduced the range between the highest and lowest system median salaries from \$19,443 to \$16,416”).

258. For an example of how the BEP calculated the Cost Differential Factor or CDF, see Goldhaber & Callahahn, *supra* note 82, at 419.

259. Interview with Sutherland, *supra* note 28.

260. See Kelly, *supra* note 49, at 475.

261. See Eric A. Hanushek, John F. Kain, & Steven G. Rivkin, Why Public Schools Lose Teachers, National Bureau of Economic Research Working Papers 3 (2002), (unpublished manuscript available at <http://econpapers.hhs.se/paper/nbrnberwo/8599.htm>) (noting Department of Education statistics that find that eighty-six percent of teachers remain in the same school).

262. TEACHER SUPPLY AND DEMAND IN TENNESSEE, *supra* note 12, at 32.

263. See TENNESSEE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, TEACHER MOBILITY AMONG TENNESSEE SCHOOL DISTRICTS: A SURVEY OF CAUSES,

wealthy urban districts are not competing with the rural districts in any meaningful sense. And, while teachers who are willing may move to rural areas for higher pay, they will also move to rural areas for reasons completely unrelated to pay, such as lifestyle.

In his study of teacher relocation, Eric Hanushek found that most rural teachers move to other rural schools rather than urban districts.²⁶⁴ The same study found that urban and suburban teachers are more likely to move to rural districts than rural teachers are to move into urban districts.²⁶⁵ As one commentator on the Tennessee cases notes, many teachers are attracted to the environs of non-urban districts or “God’s country,” like farm life, and access to hunting and fishing.²⁶⁶ According to a Chattanooga official, urban “teachers are leaving in droves” for non-urban areas.²⁶⁷ In fact, the same official notes that experienced teachers in her districts are retiring early to collect their pensions, while moving to non-urban districts in neighboring Georgia.²⁶⁸ According to the study, the major motivator of teacher moves out of urban districts is that the students in urban districts are largely minorities.²⁶⁹ The same study showed that teachers switch districts in order to teach to students with high standardized test scores and who come from relatively wealthy families.²⁷⁰ For all these reasons, when it comes to recruiting teachers

www.state.tn.us/tacir/PDF_FILES/Education/Migration.pdf (2000) (surveying Tennessee teachers who move to different school districts in Tennessee and finding that “salary is a major influence on migration decisions (even among teachers who indicated some other factor as being the most influential), but that no one factor can be said to command the attention of researchers at the expense of all others”).

264. Hanushek, *supra* note 261, at 13.

265. *Id.*

266. Interview with Sutherland, *supra* note 28.

267. *Id.*

268. As she puts it:

[M]ost of our good teachers and most of our principals are able to retire under the Tennessee consolidated retirement system, draw a full pension and go down to Georgia and teach. So, you are having people, for the first time in their lives making \$110–120,000. People who have never made that kind of money before. They are pleased. They are leaving in droves.

Interview with Sutherland, *supra* note 28.

269. Hanushek, *supra* note 261, at 3. Interestingly, this study finds that female teachers are the most motivated by the racial characteristics of students, and thus most likely to move out of schools with large minority populations. *Id.* At the other end of the spectrum, minority teachers, according to the study, are likely to move in to areas that are more heavily minority. *Id.* at 16.

270. Hanushek, *supra* note 261, at 15. Interestingly, the study also concludes that districts serving a high proportion of minority students with relatively poor academic scores, may have to pay an additional 20–50 percent more in salary than schools that serve “a predominately white or Asian, academically well-prepared student body.” Hanushek, *supra* note 261, at 23.

the rural areas in the *Small Schools* cases—which are virtually uniformly white and have high test scores—have a decisive advantage over urban areas—which are frequently almost all-minority, have poor scores, and more likely to come from lower-income backgrounds, regardless of pay schedule.

V. REFORMING SCHOOL FINANCE REFORM

So far, I have noted that it is initially striking that a conservative court in a fairly conservative state²⁷¹ (the so-called “buckle of the Bible Belt”) with a constitution that provides only the “bare minimum” protection for education²⁷² would find the state financial system of education unconstitutional. In this Part, I suggest that the case of Tennessee shows how a court can come to the wrong conclusions in school finance cases when urban-minority interests are in the balance.

First, when school finance cases pit rural and urban districts against one another, a state high court can come to the wrong conclusions because it misses the unquantifiable or qualitative differences between rural and urban school districts. These differences are almost impossible to measure. For instance, as the attorney for the Memphis City Schools suggests “rural poverty [] doesn’t affect people in terms of their educational performance as badly as the inner city-urban poverty [does].”²⁷³ The chancellor recognized this qualitative difference, when he suggested that urban teachers deserve “combat pay.”²⁷⁴ Second, the case of Tennessee may be evidence of how majority-minority school districts can expect to fare when their

271. See Banks, *supra* note 74, at 155 (arguing that liberal courts, not conservative ones, are more inclined to interfere with state financing schemes).

272. See McUsic, *supra* note 70, at 338 (arguing that the language of Tennessee’s education clause provides the least protection for education).

273. In the interview, he goes on to describe it:

In the rural schools, there are people who are growing in a community that is fairly stable with fairly stable family as things go, as opposed to growing up in an inner city drug culture with shattered families. So, I don’t think it’s the poverty in terms of how many dollars you have in your 1040 form or how many bucks in the wallet that affects the performance Part of the problem goes back to the fact that the urban areas suffer from several things that anybody who has looked at the problem realizes exists, but no one can really quantify.

Interview with Kelly, *supra* note 180.

274. *Id.*

interests are wholly distinct and perhaps separable from the needs of other, non-minority public school children.

A. Qualitative Differences

1. Student Population

First, the student composition of urban schools is markedly different than that in non-urban schools. How the composition of the urban schools affects (or infects) urban schools is likely impossible to measure in terms of quality of education, and even more difficult to translate into legal remedy. In other words, the connection between the quality of education and the composition of the student population are not intuitive, like in the case of low student-teacher ratios or access to the Internet, and, thus, more likely to be missed by jurists. On this point, the words of one attorney on the case are particularly jarring:

The fact that I'm dealing with crack babies. The fact that I now have children who are autistic; they [are who] I have to educate. The fact that I have now got other mandates on top of it. The fact that I deal with kids that come to school with an empty stomach who go home to [be] beaten or abused. This never registers with a lot of people. When they think of problems with school [they think of] when they were in school. That's what I mean by a bias or prejudice. They think things are bad, but things are not that bad. And that's what I mean by a bias. Everyone feels that they understand the situation. So, if you try to present them with statistical information or statistical facts, they think that's an anomaly. Things really aren't that bad.²⁷⁵

It is easy, for instance, to overlook the fact that a significant portion of the well-to-do urban students go to private schools, leaving the public schools for the “really poor, the middle-class, and the super-bright who are in magnet schools.”²⁷⁶ According to the same attorney, one-third of the students in Hamilton County attend private schools.²⁷⁷ According to the latest census figures, more than one in seven students in the intervening urban school districts (or 14.6%) are enrolled in

275. Interview with Sutherland, *supra* note 28.

276. *Id.*

277. *Id.*

private school.²⁷⁸ By comparison, less than four percent of students in plaintiff-rural districts (3.7%) are likewise enrolled in private schools.²⁷⁹ In the big four districts, on average, more than one in six (18.4%) of the student population is enrolled in private school.²⁸⁰

2. *Student Trouble-Makers*

Secondly, urban schools, more so than other school districts, are left with trouble-makers who make learning difficult, although their impact is hardly quantifiable. Urban students frequently, no doubt, cower in hallways of their schools due to increased incidence of violent crime in urban (and increasingly suburban) schools, as compared to rural schools.²⁸¹ Furthermore, bad students in urban schools are probably more disruptive in class, since students in urban schools in Tennessee are more frequently expelled and/or suspended from school.²⁸² In Nashville, Knoxville, and Chattanooga around ten percent of the student population is suspended each year.²⁸³ Lastly, negative pressure from peer groups is likely more pervasive in urban schools. Urban students, for instance, more frequently drop out of high school.²⁸⁴ Although many of the rural schools have high drop out rates,²⁸⁵ rural students are still more likely to finish high school than urban students.²⁸⁶ In the Memphis City School System, which has the highest dropout rate in the state, thirty percent of students did not make it through high school.²⁸⁷

3. *Racial Isolation*

Thirdly, racial isolation may produce disparity in the quality of public school education received by those minority students. In Tennessee, for instance, the dropout rate and expulsion rates for

278. See DEIRDRE A. GAQUIN & KATHERINE A. DEBRANDT, 2002 COUNTY AND CITY EXTRA: ANNUAL METRO, CITY, AND COUNTY DATA BOOK 649-668 (11th ed, 2002) [hereinafter COUNTY AND CITY EXTRA].

279. COUNTY AND CITY EXTRA, *supra* note 278.

280. *Id.*

281. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 142 (2002) [hereinafter 2002 STATISTICAL ABSTRACT] (providing that urban (and suburban) students are more likely to be victims of theft and violent crime).

282. See generally 2001 ANNUAL REPORT, *supra* note 172, at 51-53, 55-58.

283. See *Id.* at 55-58.

284. *Id.* at 44-46.

285. In Grundy County, for example, twenty-seven percent of students drop out of school. See *Id.* at 44.

286. *Id.* at 44-46.

287. *Id.* at 46.

African American students are nearly double that of white students.²⁸⁸ As a general matter, all African American children, as compared to white children, are infrequently read to at home,²⁸⁹ less likely to have internet access at home and, of course, become much less likely to have 'surfed' the Internet.²⁹⁰

In Tennessee, like no doubt in most states, most of its minority students attend urban schools.²⁹¹ As mentioned, this means that minority students are frequently isolated and the public schools, particularly in the South, are increasingly segregated.²⁹² The numbers across school districts may even belie the amount of racial isolation of minority students within particular schools, since the biggest urban school districts have merged. Nashville and its surrounding county merged over two decades ago.²⁹³ Knoxville and the surrounding county consolidated their school districts in 1987.²⁹⁴ Eight years later, Chattanooga voted to abolish the city school system and merge with the county.²⁹⁵ The school districts in two of the big four metropolitan areas, Memphis and Nashville, abandoned their desegregation orders.²⁹⁶ Thus, minority-urban students, like in other places, are racially isolated. The promise of *Brown* and its progeny²⁹⁷ were never completely fulfilled.

288: *Id.* at 42, 53.

289. 2002 STATISTICAL ABSTRACT, *supra* note 281, at 143. Very young African American children are also, the data show, less likely to be able to write their names than white children (49% compared to 54%), or be able to read a story book (79% compared to 66%). *See Id.* at 145.

290. More than three fourths (77.3 %) of non-Hispanic white children have computer access at home, compared to fewer than half of African American children (42.5%). *Id.* at 157.

291. Ryan, *Money*, *supra* note 5, at 272 (noting that two-thirds of African American students attend public schools in central cities and that urban public schools are populated mostly by minority students); *see also* GARY ORFIELD, ET AL., DEEPENING SEGREGATION IN AMERICAN PUBLIC SCHOOLS (1997).

292. *See* Alan Richard, *School Segregation Rising in South*, EDUC. WK., Sep. 11, 2002, at 5.

293. *See* Ann Bradley, *Tennessee Waltz*, TEACHER MAGAZINE, Oct. 1, 1995.

294. *Id.*

295. *Id.*

296. *See* Ryan, *Money*, *supra* note 5, at 265.

297. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *See also* *U.S. v. Fordice*, 505 U.S. 717 (1992) (holding that Mississippi's policy of de jure segregation in its public university system violated *Brown* because the policy had segregative effects without sound educational justification and can be practicably eliminated); *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963) (finding that Tennessee's transfer provision permitting a student, upon request, to transfer from a school to which he was assigned by rezoning where he is a minority back to his former school where he was in the racial majority, to violate *Brown* because the school selection was based solely on the student's race and did not permit a student to transfer to a school where he would be in the racial minority); *Taylor v. Bd. of Educ.*, 294 F. 2d 36 (2d Cir.

To summarize, perhaps the decisions in Tennessee are more about the inability of minority-urban students to convincingly prove the qualitative differences in needs between these two camps. After all, this is the quintessential equity case. Plaintiffs, above all else, want equalization of resources.²⁹⁸ It is quite predictable that the Tennessee Supreme Court missed the important qualitative differences, when hard numbers have become the mainstay of equity-type lawsuits. As a result, urban-minority students in school finance litigation cases may always, as compared to white students in similar suits, have a tougher row to hoe.

B. Urban Bias

Additionally, the court may have come to the wrong conclusions based on what one attorney close to the case called an "urban bias." Urban bias may work to the disadvantage of urban-minority school systems in two related ways: (1) the court, like many courts, may have come to the wrong conclusions because of favoritism toward white, rural areas; or (2) more slippery still, bias against minority-urban areas.

1. Influence of Other State Court Decisions

To begin with, courts may be predisposed to favor the interests of majority-white rural districts, like the plaintiff districts in Tennessee. One commentator has found that such decisions are usually successful when the plaintiffs are non-minority and non-urban.²⁹⁹ As one attorney close to the case commented, the state high court may have even taken the case with the view of granting some relief to rural schools,³⁰⁰ since the court may have been upset over repeated legislative inaction. Further, the urban bias may be the

1961) (New York school district ordered to allow students to transfer to another elementary school in the city where they were previously required to register in a racially segregated elementary school).

298. For example, the head plaintiff's lawyer points out: "As a result of [the school finance litigation], the test scores in the rural schools have soared. They're even higher than the urban schools now. ... They have come up. But, as I point out, and as the Supreme Court pointed out, we're talking about equalization. We're not talking about results." Interview with Donelson, *supra* note 27.

299. Ryan, *School Finance*, *supra* note 1, at 452-55 (finding that the majority of successful challenges were brought by suburban or rural white school districts, while majority-minority districts have had significantly more losses).

300. Interview with Kelly, *supra* note 180.

upshot of other school finance decisions, which tend to reward majority-white school systems.³⁰¹ In Tennessee, the actions of several neighboring states, in other words, may have influenced the swelled momentum that favors rural schools. The influence of school finance decisions in neighboring states, including Alabama, Georgia, Kentucky, and Arkansas, may have had the court primed to order a new financing scheme in Tennessee.³⁰² At about the same time the Tennessee Supreme Court was mulling over *Small Schools I*, the Alabama Supreme Court was preparing to issue a detailed advisory opinion that ordered the state legislature to comply with the ruling of a lower court order, holding that Alabama's school funding formula is inequitable to students in rural areas because it fails to reflect the costs related to low population density to the detriment of the affected students."³⁰³ Meanwhile, in Kentucky, the state Supreme Court had overturned their school financing scheme just four years before *Small Schools I* was decided.³⁰⁴ In probably the most sensational school finance decision in the region, and perhaps one of the most memorable in the nation, the state high court, in lofty language admonishes the state legislature:

Common schools make patriots and men who are willing to stand upon a common land. The boys of the humble mountain home stand equally high with those from the mansions of the city. There are no distinctions in the common schools, but all stand upon one level.³⁰⁵

In Arkansas, the state Supreme Court also affirmed the decision of a lower court that found the school finance system unconstitutional.³⁰⁶ To the southeast, in Georgia, a dozen years before the first Tennessee case reached the state's highest court, the Georgia Supreme Court's invalidation of school finance systems invariably left rural districts "with the least valuable part of the property from which to derive revenue."³⁰⁷ Indeed, all of these cases, where majority white,

301. Ryan, *School Finance*, *supra* note 1, at 452–55.

302. For an excellent survey of the decisions in these states, see Dayton, *Equity Litigation*, *supra* note 7, at 179–96.

303. 624 So. 2d 107 (1993).

304. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 185 (Ky. 1989)

305. *Id.* at 206.

306. *DuPree v. Alma School District*, 279 Ark. 340 (1983).

307. 285 S.E.2d 156, 172 (Ga., 1981).

rural districts sued the state, are conspicuously similar to the Tennessee case.³⁰⁸

2. "Interest Divergence"

Additionally, there may be bias against urban-minority school systems. As others have observed, minority students frequently are only favored when they are able to "tie" their interest to the majority group.³⁰⁹ Derrick Bell has given this concept life with his theory of "interest convergence."³¹⁰ According to Bell: "The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."³¹¹ Judges will only grant racial remedies when such remedies do not harm or advance "societal interests deemed important by . . . whites."³¹² Put differently, African American interests will be served only when they are linked to non-minority interests.³¹³

Thus, advocates for minority interests in school finance cases may have an unduly hard time convincing courts of the merits of their cases when the interests of the minority students are not ostensibly tied to a majority group's interests. Eerily prescient, Bell's principal claim is that African Americans will not receive racial justice in the areas of school litigation (at the time of his writing, *Brown* desegregation cases) unless they are able to tie their interests to the interests of whites or, put differently, avoid obvious interest divergence.³¹⁴ Further commentator James Ryan has argued that the outcome in school finance litigation cases can be directly attributable to the race of the plaintiff class.³¹⁵ In sum, Ryan argues that white students are more likely to win than the African American students.³¹⁶

308. See Ryan, *School Finance*, *supra* note 1, at 452.

309. See Ryan, *Money*, *supra* note 5, at 271; see also Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 6, 53-54 (1969).

310. Bell, *supra* note 4, at 518.

311. *Id.* at 523.

312. *Id.*

313. *Id.* ("[O]n a positivistic level—how the world is—it is clear that racial equality is not deemed legitimate by large segments of the American people, at least to the extent it threatens to impair the societal status of whites.").

314. *Id.* at 528 ("Further progress to fulfill the mandate of *Brown* is possible to the extent that the divergence of racial interests can be avoided or minimized.").

315. Ryan, *School Finance*, *supra* note 1.

316. *Id.* at 434 ("[I]t appears that minority school districts—particularly urban minority districts—do not fare as well as white districts in school finance litigation. More precisely, minority districts do not win school finance cases nearly as often as white districts do, and in the few states where minority districts have successfully challenged school finance schemes,

In Tennessee, although a significant number of white students attended public schools in urban centers, the interest of minority students was hardly ostensibly tied to any of these groups. It is highly significant that the lead attorney for the urban centers in all the *Small Schools* cases was from the largest metropolises, Nashville and Memphis, which both have heavy concentrations of African American students. The lead attorney in *Small Schools I* was the attorney for the Memphis City Schools System, arguably one of the most segregated school systems in the nation.³¹⁷ Even more striking, the urban schools chose not to intervene on the side of the plaintiffs, which would have at least nominally tied their fate to the fate of the white, rural schools. Instead, they intervened on the side of the state, which made the interests of the urban schools appear distinct and unwed. Thus, in Tennessee, the fact that the concerns of minority students were clearly unitary and separable may explain the outcome.

In the end, the case of school finance litigation in Tennessee is a case where minority-urban students lost, even though the superficial outcome of the case was perhaps a positive one for some students. The outcome can only be understood by how unquantifiable some urban problems are and a predisposition to rule against urban schools. The question in school finance cases, therefore, turns on how to describe, advocate, and win educational opportunities for a class of students whose needs are hard-to-quantify, amorphous, and discrete.

VI. CONCLUSION

Impact litigation, generally, is bottom up; it is the last ditch effort of the weak to challenge the strong. School finance litigation is normally no different. It is a useful vehicle to advocate for changes in schools on behalf of the neediest students, both the “economically and educationally disadvantaged students.”³¹⁸ And, honestly, school finance litigation is frequently the chosen saber of minority students.³¹⁹

they have encountered legislative recalcitrance that exceeds, in both intensity and duration, the legislative resistance that successful white districts have faced.”).

317. See generally GARY ORFIELD, ET AL., *A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM* 54 (2003), available at http://www.civilrightsproject.harvard.edu/research/reseg03/reseg03_full.php (last visited May 17, 2003).

318. Hanushek, *supra* note 64, at 424.

319. Ryan, *Money*, *supra* note 5, at 254 (noting that the goal of school finance litigation is to improve “the educational opportunities and achievement of poor minority students”).

Tennessee, however, may be a case of school finance litigation gone cockeyed. In the case of Tennessee, urban school districts, with an under-performing and largely minority student population, were on the defensive, while relatively high-achieving rural schools of mostly white students hurled shots across the bow.

Certainly there is room to expand expenditures on education in Tennessee, a state ranked at the bottom in per pupil expenditures.³²⁰ Only four years after the BEP, in fact, the state slipped, from 46th to 47th, in per pupil spending in the nation.³²¹ However, the result in Tennessee's school finance cases seems to contemplate peculiar consequences. Urban school districts that are not performing stand to win nothing if state funding were increased to equalize teacher salaries in the rural schools. At the same time, additional funding to white rural schools without a significant infusion to urban, minority schools would have a disparate impact on minority students. Perhaps more bizarre, urban students (or their parents) may actually subsidize increased funding to rural schools. In other words, increased funding, as it is currently constituted, contemplates an increased tax burden without any direct benefit to urban areas. Last, if education funds are redistributed, the "wealthy" urban schools will almost certainly take a hit. Thus, sometimes school finance litigation overshoots the needs of school-age children or, in the case of Tennessee, even hurts the urban poor.

In the end, Tennesseans are famous for many things, not least of which is their contributions to music. The state capital, Nashville, is well-known as the home of country music. Perhaps the popularity of the genre even prompted the legislature to immortalize the square dance as the state's only official dance.³²² But, the state can also boast substantial contributions to the music of "soul," a distinctive style of rhythm and blues shaped by African American musicians in Memphis during the civil rights era of the Sixties.³²³ Famed African American

320. See 2002 STATISTICAL ABSTRACT, *supra* note 281, at 154 (ranking the state 43rd in per pupil expenditures); see also KENDRA A. HOVEY & HAROLD A. HOVEY, CQ'S STATE FACT FINDER 2004: RANKINGS ACROSS AMERICA 206 (2004) (ranking the state 49th in per pupil expenditures for fiscal year 2000).

321. Goldhaber & Callahahn, *supra* note 82 at 420.

322. See SPEER, *supra* note 19, at 43.

323. See BERGERON, *supra* note 13, at 317. I should give some credit to Detroit, popularly regarded as the northern soul music capital. See Bill Ellis, *In hot 'n' funky Ashford time*, THE COMMERCIAL APPEAL, Feb. 23, 2003 (reporting on Memphis artists who influenced the music of Detroit's Motown).

performers like singer Isaac Hayes and organist Booker T. emerged from this tradition.³²⁴ Thus, at least in terms of music, the state can boast having a hand in two seemingly incompatible traditions: one emerging largely from the rural areas (perhaps largely white Tennesseans) and the other emerging largely in urban areas and carried by African American residents. In other words, at issue in school finance litigation, in Tennessee and elsewhere, is how to harmonize the country of the rural areas with the rhythm and blues of the urban ones.

324. See BERGERON, *supra* note 13, at 317.

