Achieving Greater Inter-Local Equity in Financing Municipal Services: What We Can Learn from School Finance Litigation

By Emel Gökyigit Wadhwani*

I. Introduction

In scholarly examinations of urban deterioration and middle-class flight to the suburbs, the proposed solutions almost always incorporate a call for greater regionalization—a more even distribution of burdens and resources over the metropolitan area.[1] Much of the regionalist discussion has focused on the efficiency gains in administering services such as public transportation, water treatment and solid waste disposal over a wider area. A number of academics and practitioners also take seriously the proposition that equity concerns and redistributive principles should drive regionalization. One widely-discussed idea is pooling property taxes over a metropolitan area and redistributing the revenues according to a formula that acknowledges that some communities bear a disproportionate responsibility for providing services for the poor and needy of the region.[2] A few noted successes in financial

* Emel G. Wadhwani is currently clerking for the Honorable Norman H. Stahl of the United States Court of Appeals for the First Circuit. She holds a Juris Doctor and a Master in Public Policy from Harvard University.

1. *See generally* ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA (1994); GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999); ALAN ALTSHULER ET AL., EDS., GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AMERICA (1999) [hereinafter GOVERNANCE AND OPPORTUNITY]; LARRY LEDEBUR & WILLIAM BARNES, ALL IN IT TOGETHER: CITIES, SUBURBS, AND LOCAL ECONOMIC REGIONS (1993); DONALD N. ROTHBLATT & ANDREW SANCTON, EDS., COMMITTEE ON IMPROVING THE FUTURE OF U.S. CITIES THROUGH IMPROVED METROPOLITAN AREA GOVERNANCE, METROPOLITAN GOVERNANCE(1993) [hereinafter METROPOLITAN GOVERNANCE]; MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY (1997); REFLECTIONS ON REGIONALISM (Bruce J. Katz, ed., 2000) [hereinafter, REFLECTIONS ON REGIONALISM]; DAVID RUSK, CITIES WITHOUT SUBURBS (2d ed. 1994); ANITA A. SUMMERS, REGIONALIZATION EFFORTS BETWEEN CITIES AND SUBURBS IN THE UNITED STATES (Samuel Zell and Robert Lurie Real Estate Center, Wharton Sch., U. of Pa. Working Paper No. 246, June 1998); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996); Shelley Ross Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659 (1997).

2. *See generally* ORFIELD, *supra* note 1; CARL MCCARTHY & ANITA A. SUMMERS, STATE CONSTITUTIONAL LIMITATIONS ON REGIONAL TAX SHARING (Samuel Zell and Robert Lurie Real Estate Center, Wharton Sch., U. of Pa. Working Paper No. 296, June 1998); Saxer, *supra* note 1. *See also* Donald N. Rothblatt, "Summary and Conclusions," in METROPOLITAN GOVERNANCE, *supra* note 1, 459; Michael A. Pagano, *Metropolitan Limits: Intrametropolitan Disparities and Governance in U.S. Laboratories of Democracy*, in GOVERNANCE AND OPPORTUNITY, *supra* note 1, 274-78; DOWNS, *supra* note 1, 131-32.

regionalization—primarily the Minneapolis-St. Paul metropolitan area—are repeatedly cited to support the argument that such arrangements bring in greater equity and efficiency in the financing and administration of municipal services, benefiting inner-city and suburban communities alike.

At their core, tax-sharing proposals challenge the traditional presumption that financing local services is a local affair that is correctly delegated to and controlled by local governments. Pooling even a small portion of the property tax base regionally requires letting go of the notion that the residents of a local subdivision have the exclusive right to determine how much they will pay for the provision of municipal services and how the collected money will be spent. Because there is no constitutional requirement that municipal services be funded from local property taxation,[3] state legislatures have the authority to change how governmental services are financed. But legislatures lack the political will to make such changes because wide constituencies (mainly voters from middle-income and wealthy suburban communities) have an economic interest in keeping their taxes in their own communities. The result has been a political stalemate that has frustrated the implementation of any regional system of financing government services.[4]

In their search for ways to promote regional cooperation, public funding experts have routinely overlooked the one area of local financing where questions about the legitimacy and wisdom of local finance have received active and heated attention in the past three decades—public school financing. Beginning in the late 1960s and continuing through the present, state courts have repeatedly rejected local fiscal autonomy as a sufficient justification for allowing the quality of public education to vary by district wealth.[5] The courts have struggled with many of the same questions that now confront scholars interested in divorcing other governmental services, such as police and fire protection, sanitation, street repair, or emergency housing, from local wealth. Yet, the scholarship on regionalization has never seriously attempted to apply the

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3. *See* JOHN DILLON, MUNICIPAL CORPORATION, Vol. 1, § 237(89); MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., Vol. 1, §§ 2.07.30, 2.08.10. (1872).

4. *See, e.g.*, THE PRACTICE OF STATE AND REGIONAL PLANNING 153 (Frank S. So et al. eds., 1986). Among the three principles that should guide regional planning, the authors cite the principle that opportunities and burdens should be distributed equitably throughout the region. They write: "The equity principle would guide planning toward such goals as equal opportunity housing, meeting the needs of the area-wide job market, and sharing the metropolitan tax base. Usually this type of regional planning is the most difficult because its goals are newer and less firmly established in public attitudes. Political controversy frequently swirls around these issues."

5. *See generally* William E. Thro, *Symposium: Issues in Education Law and Policy: Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); David C. Thompson, *Commentary: School Finance and the Courts: A Reanalysis of Progress*, 59 EDUC. L. REP. 945 (1990); Betsy Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099 (1977).

reasoning of the school financing cases to support broadening the burden of paying for governmental services.

This article attempts to fill that gap. It is important to acknowledge from the start that the school financing cases are rarely entertained in the tax-sharing literature, in part because education is viewed as having a special constitutional and societal status. Many experts assert that this status makes the legal reasoning of these cases only marginally applicable to the financing of "less privileged" municipal functions.

Nevertheless, exploring how and why the school financing cases have been so successful in undermining the dogma of local control is a useful exercise that sheds light on the types of arguments and analyses likely to succeed in support of widening the tax base for other types of municipal services. In particular, two ideas emerge from these cases. First, a state purpose of providing local control over finance may not have the same level of legitimacy in the eyes of the court as a state purpose of providing local control over municipal policy. Second, while courts continue to give great deference to how legislatures have chosen to structure governmental finances, they show some willingness to view the rationality of this choice in light of the drastic new interdependencies and inequalities in our metropolitan areas.

I begin the article in section II, by way of background, by briefly discussing the current scholarship on tax-sharing. I argue that an admittedly problematic role for courts has been overlooked in this literature. In sections III and IV, I examine what this role for state courts may be by translating the school financing cases into the context of municipal services.[6] Specifically, section III looks at how education clauses in state constitutions have been used to undercut states' reliance on local property taxes and analyzes the limitations of this mode of analysis for challenging the financing of municipal services. Section IV considers equal protection challenges as they may be translated from public school finance to municipal finance. In the concluding section, I consider the usefulness of employing school financing to municipal services and the extent to which the lessons of the school financing cases may be brought to bear on current debates about divorcing municipal services from local taxes.

II. Background and Context

There are several widely-accepted justifications for spreading the fiscal and administrative burdens of local services across a metropolitan

6. A legal theory, "the duty to serve," developed by Charles Haar and Daniel Fessler for challenging disparities in the provision of municipal services within a local jurisdiction, goes unexplored in this paper. Professors Haar and Fessler's theory may arguably be extended to apply to inter-jurisdictional disparities. CHARLES M. HAAR & DANIEL W. FESSLER, FAIRNESS AND JUSTICE (Originally Published as THE WRONG SIDE OF THE TRACKS) (1987).

area.[7] The first set of justifications points out that minimizing the cost for a given amount of service creates a more efficient distribution of services within a particular area. Since arbitrarily drawn local jurisdictions rarely correspond to the optimal area for services, cooperation among political subdivisions often leads to greater efficiency in the provision of certain services.

The second set of justifications takes force from the evidence that political subdivisions within a metropolitan area are increasingly interdependent. These arguments point out, first, that central cities and inner ring suburbs carry a much larger burden of providing services for the poor. This disproportionate burden is not adequately covered by intergovernmental, i.e. federal or state, aid. Furthermore, suburbanites are impacted by the positive and negative externalities created by the central city. They should help pay for the positive externalities, and it is in their best interest to help ameliorate the negative externalities associated with poverty.

As Professor Anita Summers has argued, and as was briefly noted in the introduction, most regional cooperation that currently exists comes about because of expected efficiency gains.[8] Professor Summers' extensive study of twenty-seven large metropolitan areas reveals that the most common cooperative efforts take the form of single service districts, mainly for regional transportation, water, wastewater treatment, solid waste disposal and regional land use planning.[9] The types of services carried out lend themselves to funding through user fees or through allocation of funding from each township based on usage. Hence, there are few redistributive implications in the formation of such single-service districts. Because these districts seem to be a win-win situation for all, they face little political opposition when brought about by state or local initiative or federal mandate.

By contrast, few metropolitan areas have taken on the redistributive challenges that would ameliorate service disparities among communities, despite growing evidence that the strengths and weaknesses of local political units are now felt throughout the urban, suburban, and ex-urban areas. In various studies, social scientists have been able to demonstrate that a strong urban core leads to higher family

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7. *See* SUMMERS, *supra* note 1. For a general discussion of local revenue and expenditure variations, see Michael A. Pagano, *Metropolitan Limits: Intrametropolitan Disparities and Governance in U.S. Laboratories of Democracy in* GOVERNANCE AND OPPORTUNITY, *supra* note 1, at 254-68.

8. SUMMERS, *supra* note 1, at 9.

9. Examples in transportation include the Metropolitan Atlanta Rapid Transit Authority (MARTA), the San Francisco Municipal Railway (MUNI), and Dallas Area Rapid Transit (DART). An example of a water treatment special service district is the Metropolitan Water District of Southern California, and for a wastewater treatment special district see the Denver Metro Wastewater Reclamation District. Regional land use planning entities include the Delaware Valley Regional Planning Commission of the Philadelphia metropolitan area and the Regional Planning Commission in the San Francisco Bay area. *Id.* at Appendix.

incomes and higher home values in surrounding suburbs,[10] as well as greater suburban employment growth,[11] while socioeconomic problems in the center city negatively impact population growth in the suburbs.[12] The deterioration of the public and private infrastructure of a city, including cultural and sports amenities and medical and educational facilities, has social costs, some portion of which will be borne by the surrounding suburbs.[13] It is also clear that suburban communities derive significant benefit in the form of higher property values (and hence revenues) and lower service costs from the fact that central cities take on a disproportionate burden of caring for the poor and needy of the region.[14]

The bulk of the research on interdependencies within a metropolitan region has examined the relationship of the central cities to its suburbs. But interdependencies among the suburban communities are also growing. The development of a high-end shopping mall in one suburban community may lead to greater traffic congestion in the next suburb, without any of the benefits of the increased tax base. When one community within a region decides to zone exclusively for single-family homes, the remaining communities must take disproportionate shares of the burden of providing low-income housing, giving up a portion of the tax base and taking on higher service costs in the process.[15]

Despite the growing evidence that local units in metropolitan regions will benefit from overcoming balkanization and acting cooperatively to address deficiencies and problems in each community, few regions have been able to overcome the political stalemate that immobilizes such efforts. Tax-sharing[16] has been a particularly resisted

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10. Richard Voith, *City and Suburban Growth: Substitutes or Complements*, BUS. REV. (Philadelphia, PA: Federal Reserve Bank of Philadelphia, 1992); *Do Suburbs Need Cities?* BUS. REV. (Philadelphia, PA: Federal Reserve Bank of Philadelphia, 1994), as referenced in SUMMERS, *supra* note 1, at 8.

11. NANCY BROOKS AND ANITA A. SUMMERS, DOES THE ECONOMIC HEALTH OF AMERICA'S LARGEST CITIES AFFECT THE ECONOMIC HEALTH OF THEIR SUBURBS? (Samuel Zell and Robert Lurie Real Estate Center, Wharton Sch., U. of Pa. Working Paper No. 263, 1997) as referenced in SUMMERS, *supra* note 1, at 8.

12. CHARLES F. ADAMS, et. al. FLIGHT FROM BLIGHT REVISITED (Mimeo, Sch. of Pub. Policy Mgmt., Ohio State Univ., 1994), referenced in SUMMERS, *supra* note 1, at 8.

13. *See* SUMMERS, *supra* note 1, at 7. *See also* JOSEPH GYOURKO AND ANITA A. SUMMERS, PUBLIC AND PRIVATE ASSETS IN CITIES: A LOOK AT WHAT IS AT RISK FROM CONTINUED URBAN DECLINE (Samuel Zell and Robert Lurie Real Estate Center, Wharton Sch., Univ. of Pa. Working Paper No. 262, 1997); DOWNS, *supra* note 1.

14. *See* JANET PACK, POVERTY AND URBAN EXPENDITURES (Samuel Zell and Robert Lurie Real Estate Center, Wharton Sch., Univ. of Pa. Working Paper No. 197, 1995); JOSEPH GYOURKO, PLACE VS. PEOPLE-BASED AID AND THE ROLE OF AN URBAN AUDIT IN A NEW URBAN STRATEGY (Samuel Zell and Robert Lurie Real Estate Center, Wharton Sch., Univ. of Pa. Working Paper No. 245, 1997).

15. *See generally* DOWNS, *supra* note 1; ORFIELD, *supra* note 1.

16. Although tax-sharing can be defined broadly to include any special district in which participating communities contribute jointly from tax revenue to the provision of a service, those arrangements that are essentially re-distributive in intent and effect are uniquely controversial. My study uses the term tax-sharing to refer to such redistributive programs. The following definition is helpful:

proposal. Professor Summers appropriately notes that redistribution is a difficult principle to support given that

> consistent with the basic tenets of public finance, voters regard redistribution as the responsibility of higher levels of government.... Essentially, it is rational for the residents of any one suburb to vote against tax sharing on redistributive grounds—it will be trivial in its effects, and is likely to be costly.[17]

The idea that municipal services should be paid for and controlled locally is so ingrained in the American system of government that voters tend to perceive any regional redistributive efforts as a grave injustice. The privileged status that local autonomy has attained in local government literature, in legal opinions, and in our popular conscience clashes head-on with any attempt to accommodate changing metropolitan realities.[18]

Despite academic rhetoric supportive of regional tax pooling, few metropolitan areas have actually shown the political will to institute regional tax pooling plans. A number of scholars have argued that the stalemate in regionalization can be overcome by the formation of political coalitions that force cooperation through state legislation or inter-local agreements. Myron Orfield, a Minnesota state representative and author of a "how-to" plan of regional coalition building, argues that carefully studied and presented regional trends can demonstrate to legislators from less wealthy inner-ring suburbs that sharing resources and services regionally is in their best interest, prompting them to join in a political coalition with inner-city legislators.[19] The argument essentially is that there are concrete benefits to living in a strong region anchored by a strong central city, and that voters and leaders of that region, if made to see this point through public education campaigns or resourceful leaders, would support such a plan. This educated regional focus would overcome the blind faith in local financial control. An

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> [T]ax-base sharing is defined as a system that combines some portion of local tax bases into a regional or statewide pool, taxes that pool at a uniform rate, and distributes the resulting revenues based on some criteria other than contributions to the pool. Distribution criteria may involve measures of local tax capacity, tax effort, service needs, land-use decisions or other indicators. The central point is that the criteria do not simply return funds to the collection location (as with piggy-back arrangements), finance a specific service (as with multi-jurisdictional special districts), or finance a range of public services at a wider geographic scale (as with county or state taxes).

THOMAS LUCE, REGIONAL TAX BASE SHARING: THE TWIN CITIES EXPERIENCE (Samuel Zell and Robert Lurie Real Estate Center, Wharton Sch., Univ. of Pa. Working Paper No. 269, September 1997), 1-2.

17. SUMMERS, *supra* note 1, at 3, 5.

18. *See* FRUG, *supra* note 1, at 6-9 (discussing the nature of the autonomy attributed to the city and its impact on the prospects for regionalization).

19. ORFIELD, *supra* note 1.

alternative approach is suggested by Professor Gerald Frug. He proposes that new metropolitan political coalitions, instead of imposing a top-down solution, could pressure the state legislatures to simply change those aspects of current local government doctrine that provide incentives for communities to turn inward.[20] This would include the rule that localities are exclusively entitled to the tax revenues generated from property within their arbitrarily drawn boundaries. The legislatures could then step back as local governments forged new, mutually beneficial relationships that would account for their interdependencies.[21]

Indeed, Minnesota accomplished regional tax sharing through political coalition building. Under the Metropolitan Fiscal Disparities Act (MFDA)[22] of 1971, each taxing jurisdiction in a seven county area that includes Minneapolis and St. Paul contributes forty percent of the growth in value of its commercial-industrial property to a pool, at a uniformly applied tax rate. The funds are redistributed to the municipalities according to a formula that takes into account the local unit's population as well as its capacity for raising revenue from non-residential property.[23] One study has found that the program reduced the measured inequality in total tax base per capita by roughly twenty percent.[24] Despite its success, and even though it has been carefully structured to retain significant local fiscal autonomy by keeping residential property out of the pool, the Minnesota experiment is still the only one of its kind after three decades.

To say that the progress in regional tax-sharing has been sluggish is thus an understatement. Given that the new awareness of regional interdependency has peaked only in recent years, the jury is still out on the usefulness of political coalition building; yet, the prognosis is not good.

It is rarely mentioned in the debate on enabling regionalization that there may be a role for the courts in initiating metropolitan tax-sharing by discrediting the strict reliance on local property taxes for the provision

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20. Gerald Frug, Lectures on Local Government Law, Harvard Law Sch. (Spring 2000). *See* Gerald Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993) [hereinafter Frug, *Decentering Decentralization*] (describing the consequences of moving away from a residency-based understanding of local entitlements); *The Geography of Community*, 48 STAN. L. REV. 1047 (1996) (identifying some of the potential political coalitions within a region); FRUG, CITY MAKING, *supra* note 1.

21. Other scholars have been more pessimistic, pointing out that regional governance has historically encountered strong local voter resistance. In a 1993 article, John Kincaid, then the Executive Director of the U.S. Advisory Commission on Intergovernmental Relations, argued that "[a]s a general rule, it appears to be the case that the weaker the regulation and the greater the role of local government, the greater the feasibility of enacting statewide and regional growth-management legislation." John Kincaid, *Regulatory Regionalism in Metropolitan Areas: Voter Resistance and Reform Persistence*, 13 PACE L. REV. 449, 477 (Fall 1993). He points out that only top-down regulation, most importantly conditions attached to federal grants-in-aid, has prompted local governments to cooperate. *Id.*

22. MINN. STAT. § 473F (1971).

23. LUCE, *supra* note 16, at 5-6.

24. *Id.* at 11.

of municipal services.[25] Public education funding challenges have been in the courts for thirty years, many successfully bringing down the state's disproportionate reliance on local property taxes. Courts in most states have entertained these challenges, which have been litigated under several different legal theories.[26] The success of so many of the school cases[27] in challenging their state's public school financing methods suggests that the same legal arguments may be used to argue that other government services should also be freed from disproportionate reliance on local wealth. Professor Frug writes:

> To date . . . property-based tax schemes have been invalidated only in the area of school financing. But it is no more justifiable, in my view, for the quality of police protection, hospitals, or welfare programs to vary with district wealth than it is for the quality of the schools.[28]

The next two sections apply the legal arguments developed in school financing cases to the realm of other local government services. Fundamental differences exist between the constitutional treatment of education and other state and local services, which will be explored in detail below. The pervasive assumption in the literature is that these differences render the education cases inapplicable to a reconsideration of the funding of municipal services.

Shortly after the California Supreme Court decided *Serrano v. Priest*,[29] a landmark case in school financing, Professor Jefferson B. Fordham wrote a cautionary article on extending the logic of *Serrano* to municipal services. Professor Fordham pointed out several significant differences between education and other governmental services, including the fact that education receives "special" recognition in state constitutions. He concluded, "even if *Serrano* holds up as to education, neither sound reasoning nor wise policy bespeaks its extension to local governmental functions and services generally."[30]

The school financing cases may not be strictly applicable to the consideration of municipal services; however, this only partially diminishes their value. They still provide a unique, largely unprecedented inroad into divorcing governmental services from local revenue generating capacity. An exercise in applying the legal reasoning of the school cases to other governmental services, even if legally

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25. Kincaid briefly remarks: "[S]upporters of regionalism may need to turn more to the courts for relief from voter resistance." Kincaid, *supra* note 21, at 476.

26. *See supra* note 5.

27. In roughly half the cases brought under state constitutional theories, the courts have found that the school financing system violated the constitution. *See* Thro, *supra* note 5, at 601-04, listing successful and unsuccessful cases.

28. Frug, *Decentering Decentralization*, *supra* note 20, at 327.

29. 487 P.2d 1241 (Cal. 1971).

30. Jefferson B. Fordham, *Serrano Symposium, Part IV*, 5 URB. LAW. 110, 119 (1973).

unsupportable when carried to its logical extreme, reveals useful lessons in what types of legal and political arguments may be used to undercut the privileged status of "local autonomy." I embark on the exercise of applying the school financing cases to municipal services with this more modest goal in mind.

Two broad categories of arguments have been used in the school cases to argue that financing education through local property taxes violates constitutional norms. The first set of arguments rely on state constitutional language—a textual hook—requiring the establishment of a public school system. For reasons that are obvious, mainly the fact that such language is addressed to education specifically and not to other types of governmental services, these arguments are the hardest to apply to municipal services. Nonetheless, they illuminate a number of issues concerning local financing, which I will address in section III. The second set of arguments in school districting cases relies more generally on state Equal Protection Clauses, and finds a constitutional violation where the opportunity for education is allowed to vary by district wealth. Because these arguments are framed in more generic terms, they are more easily applied to the financing of services such as police protection or sanitation. I discuss these arguments in section IV.

III. Textual Hooks: The Constitutional Status of Education Compared to Other Municipal Services

Education Clauses

Advocates of more equitable financing of public schools have used state education clauses to argue that state legislatures have a constitutional obligation to ensure a minimum level of education for all school children.[31] The basic outline of this argument is that all children of the state are constitutionally entitled to a public education of a certain quality, and some school districts need more resources to bring the level of education offered up to this threshold level. I will refer to this line of reasoning as the "quality" argument.[32]

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31. Opinion of the Justices, 624 So. 2d 107 (Ala. 1993); Rose v. Council for Better Educ., Inc. 790 S.W.2d 186 (Ky. 1989); McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Campaign For Fiscal Equity v. State, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); Coalition for Equitable Sch. Funding v. State, 811 P.2d 116 (Or. 1991); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. V. Kirby, 777 S.W.2d 391 (Tex. 1989); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).

32. This term is borrowed from Thro, *supra* note 5.

Every state constitution, except for Mississippi's, has an education clause mandating some form of free public education.[33] Some simply require the maintenance of public schools. The New York clause states: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[34] Other state constitutions include descriptive terms, such as "efficient," to explain how the public schools are to be maintained. The Texas Constitution states: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."[35]

The most recent use of the quality argument in a legal challenge to local financing of schools was in *Campaign for Fiscal Equity v. State*,[36] decided by the Supreme Court of New York County in January 2001. The plaintiffs argued that the state had failed to ensure that New York City (hereafter NYC) children received the basic level of education guaranteed by the state's education clause. Working from a template handed down by the Court of Appeals, the New York court divided its inquiry into three sections. First, relying on a lengthy analysis of the skills required to function in a democratic society, the court decided the requirements of a basic education. Second, the court looked at both inputs (teaching and physical facilities) and outputs (graduation rates and test scores) to analyze whether NYC children were receiving the required level of basic education, concluding in the negative. Third, the court asked if there was a causal link between funding and the fact that NYC students did not receive the constitutionally required basic education. Rejecting the defendants' contention that poor performance was due to socio-economic factors and school board mismanagement, the court relied on a complex set of statistical testimony to conclude that increased educational resources could have a "significant and lasting effect on student performance."[37] The court responded to the state's argument that NYC should be putting more of its own resources toward public education by holding that the state is ultimately responsible for the city's contribution to public education.[38]

Courts in other states have followed similar lines of argument in concluding that the state is ultimately responsible for ensuring a basic level of education throughout its borders. The New Jersey Supreme

33. Thro, *supra* note 5, at n.29.

34. N.Y. CONST. art. XI, § 1.

35. TEX. CONST. art. VII, § 1.

36. 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001).

37. *Id.* at 525.

38. The court also noted that New York City's need to provide extensive and expensive municipal services in addition to funds for public education resulted in a combined income and property tax burden higher than that faced by the rest of the state, even while its contribution to public education was lower. 719 N.Y.S.2d at 539.

Court concluded in *Robinson v. Cahill*[39] that even if the state enlists local government in financing public education, it can only do so in a way that fulfills the state's obligation to provide a basic level of public education. The Texas Supreme Court similarly noted in *Edgewood v. Kirby*:

> This is not an area in which the Constitution vests exclusive discretion in the legislature; rather the language of article VII, section 1 imposes on the legislature an affirmative duty to establish and provide for the public free schools. This duty is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards.[40]

Focusing its analysis on the meaning of the term "efficient," the *Edgewood* court concluded that the education clause viewed in a historical context, was expected to yield an even distribution of the burden of the state's education resources and a uniform sharing of the tax burden of paying for them.[41]

The constitutional language receives detailed attention in "quality" cases. The Texas Supreme Court, as mentioned above, interpreted the term "efficient" in light of its dictionary meaning and historical context.[42] In *McDuffy v. Secretary of the Executive Office of Education*, the Massachusetts Supreme Court[43] had to contend with significantly vaguer constitutional language,[44] and devoted much of its opinion to determining the common as well as historical meaning of phrases such as "duty to cherish." The cases clearly assume that their arguments derive their legitimacy from a "textual hook" in the constitution rather than abstract legal reasoning. In this vein of reasoning, the courts also frequently point out that state constitutions have bestowed a special status on education not granted to other governmental services.[45]

Because of this legal textual hook, quality arguments have sometimes succeeded where equal protection arguments previously failed[46] or where concurrent equal protection arguments were

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39. 303 A.2d 273 (N.J. 1973).

40. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989).

41. The Texas court thus reached a conclusion much closer in character to the equal protection holdings of other states than the "quality" holdings of New York and New Jersey, but did so by solely invoking the education clause.

42. 777 S.W.2d at 393-96.

43. McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993).

44. "Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future period of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns . . ." MASS. CONST. c.5 § 2.

45. *See, e.g.*, Brigham v. State, 692 A.2d 384, 391 (Vt. 1997).

46. *See, e.g.*, Campaign For Fiscal Equity v. State, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001).

dismissed.[47] Additionally, recent litigation in school financing has employed quality arguments more frequently than equality arguments.[48] These observations have led some scholars to conclude that arguments developed on a constitutional textual hook have a greater probability of convincing courts that the funding of governmental services violates constitutional norms.[49]

A strict translation of the quality argument into the area of municipal services thus requires locating language within a state constitution directing the legislature to provide for police and fire protection or sanitation. The argument would then follow that the state has an obligation to ensure that this burden is met at some threshold level, and must conform its financing structure to this requirement. Given that the current system of relying entirely on a local subdivision's ability to raise revenue creates obvious disparities in service levels, the state violates its constitution until it institutes an alternate system of funding that can bring the services provided in the poorer political subdivisions to a threshold level.

The problem with this argument is that, as frequently pointed out in the school financing literature, no equivalent language exists in state constitutions for other governmental services. The absence of a textual hook for police protection or garbage collection effectively forecloses the line of argument that drafters of state constitutions intended to force legislatures to guarantee a minimum level of service in these areas. But the conclusion that these school finance cases have little epistemological value for regional financing schemes is too simplistic. In addition to the fact that state equal protection arguments may still translate into the municipal services realm, the argument that education has a unique status in state constitutions is only partially true.

Recent scholarship has shown that state constitutions contain a number of economic and social rights in addition to a right to

47. *See, e g.*, Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

48. *See generally* Opinion of the Justices, 624 So. 2d 107 (Ala. 1993); Rose v. Council for Better Educ., Inc. 790 S.W.2d 186 (Ky. 1989); McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Campaign For Fiscal Equity v. State, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); Coalition for Equitable Sch. Funding v. State, 811 P.2d 116 (Or. 1991); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. V. Kirby, 777 S.W.2d 391 (Tex. 1989); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989). An exception to this trend is *Brigham v. State*, 692 A.2d 384, 391 (Vt. 1997), where the court specifically rejects the contention that the state's purpose should be to ensure a base level of education: "From an equity standpoint, the major weakness of a foundation formula distribution system [the state's current system of supplementing local revenue] is that it equalizes capacity only to a level of a minimally adequate education program....The object of the Plan is not equality of educational opportunity generally, or even equality of local capacity to facilitate opportunity." *Id.* at 388.

49. *See* Thro, *supra* note 5, at 603-04; Thompson, *supra* note 5, at 957.

education.[50] In a case study of the New York State Constitution,[51] Professor Helen Hershkoff has located an affirmative right to welfare in the language providing that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions...."[52] Hershkoff suggests a standard of review for welfare cases "consequential in focus and allied in application to the test that is currently used by some state courts in state constitutional cases challenging the adequacy of public school systems."[53]

Professor Daan Braveman[54] has similarly argued that state courts may rely on their own constitutional language to find positive rights.[55] He points out that twenty-two state constitutions include provisions that relate to the care of the needy or the protection of public health.[56] Indeed, at least in the case of the New York Constitution, the intention of the drafters appears to have been to give some force to these clauses. During the 1938 Constitutional Convention debates in New York, one delegate argued that the social welfare provision would "remove from ... doubt" the state's responsibility to needy citizens, further adding that "no court may ever misread" the "concrete social obligation" that New York's Article XVII established.[57]

A few scholars have seen positive rights in constitutional language significantly less focused than that of the New York Constitution. John Connell posits that there is a claim of a right to emergency shelter for the homeless under the New Jersey Constitution.[58] He derives this right from language in the constitution stating that all persons have inalienable rights including "pursuing and obtaining safety" and that government is instituted for the "protection, security, and benefit of the people."[59] Might it not be possible to argue that language that broad encompasses a positive right to receive police protection or to have one's garbage

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50. *See generally* Burt Neuborne, *Foreword State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989) (discussing the differences between negative rights and positive rights and the relative advantage of state courts as opposed to federal courts in enforcing positive rights).

51. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) [hereinafter Hershkoff, *Positive Rights*]; Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403 (1999).

52. N.Y. CONST. art. XVII, § 1.

53. Hershkoff, *Positive Rights*, *supra* note 51, at 1143.

54. Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577 (1989).

55. Braveman, *supra* note 54, advocates that states need not follow *Dandridge v. Williams*, 397 U.S. 471 (1970), which held that a provision of Maryland welfare regulations effectively causing large families to receive assistance below the poverty level did not violate equal protection.

56. *See* Appendix: Selected Social Welfare Provisions in State Constitutions *in* Norma Rotunno, Note, *State Constitutional Social Welfare Provisions and the Right to Housing*, 1 HOFSTRA L. & POL'Y SYMP. 111, 145-47 (1996).

57. NEW YORK STATE CONSTITUTIONAL CONVENTION, 1938: Revised Record, vol. III, at 2126 (Aug. 4, 1938) (statement by Rep. Corsi) as quoted in Rotunno, *supra* note 56.

58. John C. Connell, *A Right to Emergency Shelter for the Homeless Under the New Jersey Constitution*, 18 RUTGERS L.J. 765 (1987).

59. N.J. CONST. art. I, ¶ 1 and 2.

removed?[60] While most practitioners would not agree that this reading (or for that matter, Connell's reading) of the New Jersey Constitution is correct,[61] such analysis indicates that, at a minimum, education is not as unique in its constitutional status as many state courts have supposed.

A convincing argument can also be made that although municipal services such as police protection and sanitation are not specifically mentioned in the state constitution, they are nevertheless state, rather than local, functions under our system of local government. These functions are admittedly placed under local administration with the blanket delegations of constitutional or statutory home rule. But at times when state legislation on a certain issue conflicts with local ordinances, courts are frequently called on to distinguish between powers that are purely local and powers that are of statewide concern. Under home rule, municipalities are only immune from state intervention in activities that are considered "purely local" in nature.[62] Furthermore, the state may preempt any activity by the municipality in a given area by "fully occupying" a certain area of regulation.[63] Thus, there is a body of case law that has struggled with identifying what functions continue to be "state affairs" despite being delegated to local government through home rule.

The boundaries between local and state powers are not clear.[64] It is possible, in fact, to argue that the distinction between local and state affairs is empty, and that no governmental function can be considered purely local because all actions have repercussions for neighboring communities. Even without going to this plausible extreme, courts have drawn the line between state and local affairs in ways that make the state category much more inclusive than the local category. Reviewing case law, Professor McQuillin states in his classic treatise on local government law that education,[65] garbage removal,[66] public health,[67] the

60. Professor Hershkoff's statement is instructive in this regard: "I believe that although a genuine difference exists between the enforcement of education and welfare rights, the difference is not one of institutional competence. It is, instead, a political difference relating to theories about equality and the limits of redistributionist aims in American society . . . . Welfare payments . . . implicate the more controversial collectivist goal of achieving equality of resources . . . . This political difference, however, makes collaboration between the court and other branches more imperative, for the difference provides no legitimate reason to underenforce values to which the state constitution is committed." Hershkoff, *Positive Rights, supra* note 51, at 1190-91.

61. *See* Robert C. Ellickson, *The Untenable Case of an Unconditional Right to Shelter,* 15 HARV. J.L. & PUB. POL'Y 17, 31-32 (1992) (distinguishing between rights to shelter and to education).

62. MCQUILLIN, MUNICIPAL CORPORATIONS, 3rd Ed., at § 4.28.

63. *Id* at § 4.80.

64. *See, e.g.,* JOHN STUART MILL, ON REPRESENTATIVE GOVERNMENT, Ch. 15; City of La Grande v. Pub. Employees Ret. Bd., 576 P.2d 1204 (Or. 1978); Johnson v. Bradley, 841 P.2d 990 (Cal. 1992), all as excerpted in GERALD E. FRUG, LOCAL GOVERNMENT LAW, 2nd Ed., (1994), 110-30, taking differing perspectives on how to separate out local and state powers.

65. MCQUILLIN, *supra* note 62, at §4.96.

66. *Id.* at § 4.98 (but there exists some conflicting law in different jurisdictions).

67. *Id.* at § 4.99.

exercise of police powers,[68] and slum clearance and housing,[69] among others, are generally considered state-wide concerns. The establishment of sewers and drains,[70] and zoning,[71] by contrast, have been viewed as municipal affairs.[72]

Most instructive for our purposes may be two guidelines offered by Professor Antieau in another classic local government treatise. Antieau suggests that, in deciding whether a power is a state affair, courts should look to the effect of the particular matter on those outside the municipality, as well as whether the function raises a need for cooperation between the municipality and the state or neighboring localities.[73] Under these considerations, Reynolds suggests that matters involving health care and protection, for example, should be state affairs.[74]

This perspective on local government law suggests that while functions such as police protection are carried out at the municipal level, the ultimate responsibility for their provision still rests with the state. This argument does not, of course, provide a full counter-answer to the fact that education is singled out for unique constitutional treatment, but it begins to narrow the gap between the legal status of education and other governmental services. This is especially true when we consider the work of scholars such as Hershkoff showing that education may not be as unique in its constitutional status as state courts have assumed. In the absence of the textual hook, we are still unable to construct a convincing legal argument that there is a constitutional requirement of a threshold level of police protection, as there is for education. At the same time, the reasoning of this set of school financing cases no longer seems irrelevant to a discussion of property taxation in the provision of other municipal services. That the state has an obligation to ensure all residents, regardless of local political subdivision, an "efficient" or "basic" level of municipal services, seems in this light to be at least a

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68. *Id.* at § 4.107.

69. *Id.* at § 4.110.

70. MCQUILLIN, MUNICIPAL CORPORATIONS, 3rd Ed., at § 4.109.

71. *Id.* at § 4.112.10.

72. Professor Osborne Reynolds writes in his *Handbook of Local Government Law* that courts often look to the need for uniformity and consistency in an area of law in deciding whether it should be considered a state affair. Another rule of thumb is to apply a governmental versus proprietary distinction when evaluating whether a function is state or local—when the function seems business-like in nature, such as the operation of the city government or of a utility, it is more likely to be considered local. Thus a city's form of government and method of enacting ordinances are considered local concerns. But the operation of police departments is a more complicated case: "Since the peace and safety of citizens is of general concern, the traditional majority view has been that the selection, hiring, firing, etc. of police officers, and the general operation of police departments are matters on which state law will prevail over home-rule city law in cases of conflict." OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW (1982), ch. 6, §§ 38-39.

73. 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 3.40 (1978) as discussed in REYNOLDS, *supra* note 72, ch. 6, § 41.

74. REYNOLDS, *supra* note 72, ch. 6, § 41.

strong supporting argument in a case challenging the exclusive reliance on local taxation for services.

I next turn to a discussion of equal protection claims in school financing cases.

IV. Equal Protection Claims and Local Control of the Financing of Governmental Services

A second set of school financing cases has struck down the reliance on property taxes in public education on the grounds that it violates equal protection under state constitutions. These cases provide a stronger model for challenging the financing of municipal services because they rely on general equal protection guarantees in the state constitution rather than the "textual hook" of the education-specific clauses.[75] The state equal protection claims were argued against the background of *San Antonio School District v. Rodriguez*,[76] the 1973 Supreme Court opinion rejecting the claim that public school financing violated *federal* equal protection law. I first examine this case and test its implications for challenges to municipal finances. I then proceed to analyze the state equal protection cases.

A. Federal Equal Protection Claims

In the late 1960s, when advocates of greater equality in school financing first started bringing challenges in court, they did so under the theory that allowing property values to determine the quality of a child's education violated the Equal Protection Clause of the Fourteenth Amendment. The theory advanced by plaintiffs was that equal protection required "fiscal neutrality," i.e., that states needed to eliminate the tie between the level of educational expenditures and taxable district property wealth.[77] The federal equal protection argument found a receptive audience in several state courts,[78] but was laid to rest by the *Rodriguez* Supreme Court decision in 1973.[79] Although the Supreme

75. But, as will be discussed, the case for "fundamentality" of a government-provided service is even stronger if the service receives special status in the constitution.

76. 411 U.S. 1 (1973).

77. Levin, *supra* note 5, at 1102-05.

78. *See, e.g.*, Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972); Rodriguez v. San Antonio Indep. Sch. Dist., 337 F.Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973); Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Hollins v. Shofstall, Civ. No. C-253652 (Ariz. Sup. Ct., June 1, 1972), *rev'd*, 515 P.2d 590 (1973); Milliken v. Green, 203 N.W. 2d 457 (Mich. 1972), *vacated*, 212 N.W.2d 711 (Mich. 1973); Robinson v. Cahill, 287 A.2d 187 (N.J. Super. 1972) *supplemented in* 289 A.2d 569 (N.J. Super. 1972), *aff'd as modified*, 303 A.2d 273 (N.J. 1973); Spano v. Bd. of Educ. of Lakeland Cent. Sch. Dis. No. 1, 328 N.Y.S.2d 229 (N.Y. Sup. Ct. 1972).

79. 411 U.S. 1.

Court holding was limited to the area of public education funding, the holding was a sign that challenges to funding for other state and local functions would also fail under equal protection arguments. *Rodriguez* thus effectively ruled out this legal theory as an approach to challenging fiscal disparities in municipal services.

The *Rodriguez* decision followed the traditional equal protection analysis. The Court first asked whether wealth could be considered a suspect class or education a fundamental right. The Court pointed out that the poorest families do not necessarily live in the poorest school districts, and that the plaintiffs were thus asking them to view as a suspect class "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."[80] Furthermore, this class was not subject to absolute deprivation of education, but rather a relatively lower quality of education. Thus, the Court concluded, the residents in poorer school districts could not be treated as a suspect class.[81]

Moreover, the majority rejected the plaintiffs' argument that the essential connection of education to the effective exercise of fundamental rights, such as First Amendment rights and the right to vote, elevated it to the status of a fundamental right. The opinion rejected this theory on two grounds: first, the state was indeed providing the basic minimal skills needed to exercise other fundamental rights; second, this "nexus" reasoning would extend the reach of fundamental rights too far.[82] The Court stated: "Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process...."[83]

Having determined that strict scrutiny was not an appropriate test for educational funding,[84] the majority found that there was a rational relationship between Texas' system for school funding and the governmental purpose of allowing local control over the education of children. Local control, the majority argued, gave residents the ability to give their children the best education that they could afford as well as the opportunity to participate in decisions about how the funds would be spent. The fact that there was some inequality in the manner in which the state's rationale was achieved could not be grounds for striking down the system.

While *Rodriguez* was strictly about disparities in school district funding,[85] several aspects of the opinion signaled that the Court intended

80. *Id* at 28.

81. *Id.*

82. *Id.* at 37.

83. *Id.*

84. The strict scrutiny test, of course, is applied by courts when an issue is a "fundamental right."

85. Subsequent challenges to public school financing treated the federal equal protection question as closed. The California Supreme Court held in *Serrano I* (Serrano v. Priest, 487 P.2d 1241 (Cal. 1971)), brought before *Rodriguez* was decided, that the state school financing system was

to preempt similarly reasoned challenges to state and local financing of other governmental services. First, and most importantly, the Court anticipated these connections:

> [I]f local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the subdivisions in which citizens live.[86]

Second, the Court highlighted federalism concerns in its discussion of the appropriate standard of review for Texas' system for funding schools: "We are asked to condemn the state's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures."[87] The Supreme Court's concern with federalism has, if anything, grown since the 1970s. The federalism implications of passing judgment on any local taxation scheme, coupled with the clear and direct discouragement in dicta of extending federal equality questions to any local services, makes it highly unlikely that a federal equal protection challenge to property-tax based funding of municipal services will succeed.

Yet, at the same time that *Rodriguez* eliminated one theory, it pointed to an alternative method of challenging school funding and, perhaps by extension, municipal services funding.[88] By treating

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unconstitutional under the federal Equal Protection Clause. The state legislature amended its system of financing public schools and the new system was considered by the Supreme Court in *Serrano II* (Serrano v. Priest, 557 P.2d 929 (Cal. 1976)), decided after *Rodriguez*. The California Supreme Court acknowledged in this second decision that *Rodriguez* had invalidated its reasoning under the first decision (although it then found the system violated the state equal protection clause). *See also* Robinson v. Cahill, 303 A.2d 273 (N.J. 1973) (holding that a federal cause of action fails under *Rodriguez*).

86. 411 U.S. at 54.

87. *Id* at 40.

88. *Id.* at 38. *See* THOMPSON, *supra* note 5, at 951. The court arguably also left open the possibility of a minimally adequate level of education that would trigger heightened scrutiny if denied to a class of children, a claim taken up in the "quality" cases: "Whatever merit appellees' argument might have if a state's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with

federalism concerns as a primary impediment to striking down local taxation schemes, the Court effectively legitimized using the state rather than the federal constitution to attack property-tax based funding.[89] When advocates of greater equity in school funding abandoned federal equal protection causes of action in the wake of *Rodriguez*, many turned instead to state equal protection.[90]

B. State Equal Protection Claims

Equal protection under state constitutions offers a more promising strategy for challenging the funding of municipal services.[91] Although most state constitutions do not contain specific equal protection clauses, some form of equal protection guarantee has been read into every one. In some state constitutions, courts have read broad guarantees of individual rights to require equal protection. In others, provisions prohibiting special or local laws, special privileges, or discrimination on the basis of certain classifications, are understood to guarantee equal protection.[92] Professor Robert F. Williams argues that "[v]irtually all of these provisions differ significantly from the federal [equal protection] provision. They were drafted differently, adopted at different times, and aimed at different evils."[93]

State courts that interpret their equal protection jurisprudence differently from the federal equal protection law have in a number of instances been willing to hold that school financing violates this principle

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fundamental rights. Here only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimum skills necessary for the enjoyment of the rights of speech and of full participation in the political process."

89. *See* Serrano v. Priest, 557 P.2d 929, 951-52 (Cal. 1976) (arguing that the fact that the state court is not constrained by federalism concerns gives it greater leeway in applying strict scrutiny to local choices).

90. State court judges have also borrowed from Justice Marshall's dissent in *Rodriguez*, 411 U.S. at 70 (joined by Justice Douglas). Justice Marshall argued that "local control" in school funding accomplished exactly the opposite of what it implied, because by being restricted to raising funds for their schools through local property taxes, residents in fact lost the choice to pay for a high quality of education.

91. *See, e.g.*, DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 557 P.2d 929 (Cal. 1976); Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (*en banc*); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1982); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Britt v. N.C. State Bd. of Educ., 357 S.E.2d 432 (N.C. Ct. App. 1987), *aff'd mem.*, 361 S.E. 2d 71 (N.C. 1987); Bd. of Educ. of the City of Cincinnati v. Walter, 390 N.E. 2d 813 (Ohio 1979); Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135 (Okla. 1987); Olsen v. State, 554 P.2d 139 (Or. 1976); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Brigham v. State, 692 A.2d 384 (Vt. 1997); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978) (*en banc*); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980).

92. Robert F. Williams, *Symposium: The Emergence of State Constitutional Law: Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196-97 nn. 8-12 (1985).

93. *Id.* at 1197.

despite the teaching of *Rodriguez*.[94] An early California case, *Serrano v. Priest* ("*Serrano II*"),[95] followed the federal model of equal protection analysis—strict scrutiny when a suspect class or fundamental right was involved—but held that the state equal protection was "possessed of an independent vitality."[96] A state equal protection action could lead to a different legal outcome even when following the equal protection structure developed by the Supreme Court. As the Court said, "[D]ecisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law."[97] Furthermore, the court noted, a state court is not limited by the same federalism concerns that restrict the degree to which a federal court can impose constitutional law on a local body.

The state equal protection claims entertained by the California courts and courts of other states willing to take a similarly independent approach provide promising models for structuring equal protection arguments for municipal services financing. Below, I set out the basic tenets of how successful state equal protection claims were presented in school districting cases. I then consider how a challenge to property tax-based funding of other local services may look if modeled on school financing equal protection claims.

1. The Structure of the State Equal Protection Argument in School Financing Cases

State courts considering equal protection challenges to the funding of public education have, as a first step, tried to define the grievance that plaintiffs present. In doing so, they devote considerable fact-finding time to understanding exactly how the school financing system works. Although this varies from state to state, the basic structure is common. First, local school districts raise a portion of the school budget by taxing local property. The remainder of the budget comes from the state (based on a formula that tends to promote some measure of equalization) and, to

94. For further discussions of how state constitutions and the federal constitution are subject to independent interpretations, see Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Constitutions's Declaration of Rights,* and A.E. Dick Howard, *Introduction: A Frequent Recurrence To Fundamental Principles, in* RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (Bradley D. McGraw ed., 1984); Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government,* 24 RUTGERS L.J. 1057 (1993); Stanley Mosk, *The Emerging Agenda in State Constitutional Rights Law,* 496 ANNALS 54 (March 1988); David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection"* 13 VT. L. REV. 221 (1988).

95. 557 P.2d 929 (Cal. 1976).

96. 557 P.2d 929 at 950.

97. *Id.*

a lesser extent, from the federal government.[98] School financing challenges varied in what part of the funding the plaintiffs targeted as the discriminatory practice, but a common formulation of the claim was that the formula by which the state distributed state-wide funds did not sufficiently compensate for variations in local ability to raise funds.[99]

In this sense, courts reviewing equal protection claims defined the challenged state action as permitting funding for local school districts to vary by local property wealth, a theory referred to as the "fiscal neutrality" theory.[100] The *Serrano II* court found that "equality of educational opportunity requires that all school districts possess an equal ability in terms of revenue to provide students with substantially equal opportunities for learning."[101] The California system, the court concluded, failed to provide equal opportunities for learning since it gave wealthier districts substantial advantage in obtaining better staff, expanded programs, and better infrastructure and equipment. The Wyoming Supreme Court stated similarly in *Washakie County School District Number One v. Herschler* that "[it] is nothing more than an illusion to believe that the extensive disparity in financial resources does not relate directly to quality of education."[102] Some courts then argued that a states' system of funding schools constituted governmental action because they were of legislative rather than constitutional design. The Vermont Supreme Court pointed out that "neither this method [relying on local property taxes] nor any other means of financing public education, is constitutionally mandated. Public education is a constitutional obligation of the state; funding of education through locally-imposed property taxes is not."[103] The *Serrano II* court emphasized that it was the *legislative* determinations of school district boundaries, which resolved how much wealth each district would have, that were the challenged actions. Furthermore, the state constitution did

98. *See, e.g.*, discussion in *Serrano II*, 557 P.2d at 932-36. Public school funding in California, in oversimplified terms, combined local contributions based on local property wealth (over 50% of the total) with state aid that, at least in part, attempted to bring all districts up to a base level of funding. Although California tried to limit the discrepancy between wealthy and poor districts by imposing a ceiling on per pupil expenditures, this ceiling could be overridden by a vote. The court determined that significant discrepancies existed and that despite the legislature's recent efforts (in response to an earlier court challenge) these discrepancies were unlikely to diminish.

99. *See, e.g*, DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Kukor v. Grover 436 N.W.2d 568 (Wis. 1988).

100. *See* THRO, *supra* note 5. The theory was developed in JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION (1970). The majority of state courts have defined the grievance as "inequality in capacity," *i.e.*, variations in the ability to raise funds, rather than "inequality in input," *i.e.*, variation in expenditures, or "inequality in output," *i.e.*, variations in student performance. LEVIN, *supra* note 5, 1108-14 (1977).

101. *Serrano II*, 557 P.2d at 939.

102. Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 334 (Wyo. 1980). The Wyoming Constitution states: "The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade...." WYO. CONST. § 1, art. VII.

103. Brigham v. State, 692 A.2d 384, 392 (Vt. 1997).

not impose any limits on the Legislature's ability to draw these boundaries.[104]

Faced with two options for reaching heightened scrutiny—defining a suspect class or recognizing a fundamental interest—many of the courts chose to view education as a fundamental interest. In doing so, some states accepted the *Rodriguez* lead in how to define a fundamental interest, looking for a right explicitly mentioned in the Constitution.[105] But using the state constitutions rather than their federal counterpart as a guide, these opinions held that the state education clauses' guarantee of a "thorough and efficient system of public schools" fulfilled this requirement.[106] In *Serrano II,* California took an independent approach and defined fundamentality as whether the right lies at the core of a free and representative form of government:[107]

> [W]e are constrained no more by inclination than by authority to gauge the importance of rights and interests affected by legislative classifications wholly through determining the extent to which they are "explicitly or implicitly guaranteed" by the terms of our compendious, comprehensive, and distinctly mutable state Constitution. In applying our state constitutional provisions guaranteeing equal protection of the laws we shall continue to apply strict and searching judicial scrutiny to legislative classifications which, because of their impact on those individual rights and liberties which lie at the core of our free and representative form of government, are properly considered "fundamental."[108]

Still another set of state courts looked to a combination of constitutional language and the role of education in a democratic society to determine that education is a fundamental interest.[109]

Having established education as a fundamental interest, only a few courts tackled the more difficult question of whether district wealth could be a suspect class, especially in light of the *Rodriguez* holding. The California trial court that heard *Serrano* concluded that district wealth was a suspect class.[110] On appeal, however, the California Supreme Court indicated in a footnote that it would not reach this question, having

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104. *Serrano II*, 557 P.2d at 955.

105. *See, e.g.*, Bd. of Educ. of Cincinnati v. Walter, No. A7662725 (Hamilton County C.P. Ct., Ohio, Nov. 28, 1977).

106. These quality clauses were discussed in greater detail in section III.

107. This view was expressed in Marshall's dissent in San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

108. *Serrano II*, 557 P.2d at 952.

109. *See, e.g.*, Washakie County Sch. Dist. No 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980); Brigham v. State, 692 A.2d 384, 394-395 (Vt. 1997); Horton v. Meskill, 376 A.2d 359 (Conn. 1977).

110. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

accepted the fundamentality of education as a right.[111] In contrast, the Supreme Court of Wyoming was alone in finding that because school "funds are distributed upon the basis of wealth or lack of it," the classification is suspect.[112]

Finally, and most importantly, applying strict scrutiny to these equal protection cases, the state courts required the showing of a compelling governmental interest to justify the existing system for financing public education.[113] A number of the courts then found that the governmental purpose of fostering local fiscal control did not survive heightened scrutiny.[114] They pointed out the distinction between local control of educational policy and local control of funding this education, arguing that the second of these was a "cruel illusion" for poor districts.[115] The courts held that poor districts did not have any real choices as to how much they could spend on education; local control of educational finances as a state purpose was therefore meaningless.

Having concluded that the existing systems violated state equal protection principles, the state courts refrained from proposing alternative funding schemes, instead deferring to state legislatures and simply directing them to come up with a system of funding public education that would not have the same constitutional flaws.[116]

2. Reaching Heightened Scrutiny for Municipal Services Funding

The equal protection arguments are more easily transferable into the area of municipal services because they are generic in the sense that they are not education-specific. Taking police protection as an example, the basic argument would be structured as follows: by delegating the financial responsibility for police protection to the local governmental units, the state has created a system whereby the quality of police protection may vary according to district wealth, leading to significant

111. *Serrano II*, 557 P.2d 929, n.45 (Cal. 1976).

112. *Herschler*, 606 P.2d at 334 (Wyo. 1980). The court's limited reasoning on this issue seems to have ignored the *Rodriguez* holding that district wealth, as opposed to the wealth of the residents, could not be a suspect class. The court did not devote any careful analysis to the issue.

113. This was true of all courts considering equal protection claims, *see supra* note 89, except the courts of Vermont (Brigham, 692 A.2d 384) and Arkansas (DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983)). These state courts reviewed the school financing systems under rational review, rather than strict scrutiny, tests, as is discussed later in the article.

114. *See, e.g.*, Bd. of Educ. of the City of Cincinnati v. Walter, 390 N.E. 2d 813, 828-29 (Ohio 1979); Horton v. Meskill, 376 A.2d 359, 372-73 (Conn. 1977); *Serrano II*, 557 P.2d at 1260.

115. *See, e.g., Serrano*, 487 P.2d at 1260 (Cal. 1971): "The poor district cannot freely tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option."

116. *See, e.g.*, Brigham v. State, 692 A.2d 384, 398 (Vt. 1997) (stating "[a]lthough the Legislature should act under the Vermont Constitution to make educational opportunity available on substantially equal terms, the specific means of discharging this broadly defined duty is properly left to its discretion").

disparities in service levels. Because protection of life and property is a fundamental right, a court should examine the state policy under heightened scrutiny. The state purpose of facilitating local control over the provision of services would not withstand this level of scrutiny, because fiscal control is a "cruel illusion" for the less wealthy local political units that have no meaningful authority over how much they can spend on police protection.

Two defenses are likely to be raised in response to this attack on municipal finance. The first, more narrow argument asserts that services such as police protection and sanitation are not fundamental rights in the same way as education. Almost all of the state courts, critics will point out, relied at least in part on constitutional language to determine whether education was a fundamental right. Those that did not, namely the California state courts, looked to the significant role education played in allowing citizens to participate in our system of democracy. Municipal services are not accorded the same status either in state constitutions or in democratic theory.

In answer to this critique, I once again point the reader to the growing scholarship by Hershkoff,[117] Braveman,[118] and others, which show that education's constitutional status is not as "special" as state courts may presume. The same arguments Hershkoff employs to posit that a consequentialist approach to judicial review is equally appropriate in welfare and school finance cases, may also be used to suggest that education is not the only positive right that should be considered a fundamental right by state courts. It is perfectly plausible to argue that police protection—because there are guarantees to life and liberty in state constitutions and because a basic sense of safety may be essential to participation in our democracy—reaches the level of a fundamental interest. But I concede that police protection may be a uniquely compelling example; the reasoning becomes weaker as we move along the continuum to services like maintenance of public right of ways or garbage collection.

The second defense to an equal protection attack on municipal financing is more intuitive and derives from a sense of the history of local governance. The intuition is as follows: the contention that financing police protection or any other municipal service through local property taxes violates state constitutions, if true, throws our whole system of local government into doubt. After all, American local government is premised on the fundamental assumption that participatory democracy requires locating the decision-making power over how local affairs should be carried out and paid for in the hands of those who live there. Local residents know best what level of service they need and are most likely to participate in the decisions if they feel

117. Hershkoff, *supra* note 51.
118. Braveman, *supra* note 54.

they have a voice in the outcome. Accordingly, under this perspective, it is not plausible that centuries of carrying out local government in this fashion has been unconstitutional. This intuition explains the dicta embedded in *Rodriguez* that cautioned against extending the logic of equal protection to other governmental services.[119] I believe that the intuition is also what has kept scholars interested in tax-sharing from seriously examining the implications of the school financing cases.

The response to this critique is more complicated and deserves more extensive exploration. It contains the most valuable lessons of the school financing cases because it directly addresses questions about the legitimacy of local autonomy. The next two subsections are devoted to its analysis, arguing that the school cases provide us with two answers to this intuitive defense. First, the principle of local autonomy embodies two distinct concepts—local control over finances and local control over policy—only the first of which is delegitimized when municipal services funding is divorced from a sole reliance on local property taxes. Control over the provision and production of services remains in the hands of the local community even when control over the financing of the services is regionalized. Second, the rationality of legislative choices for the implementation of governmental services, whether education or sanitation, must be evaluated in the context of current realities. In striking down current financing systems, the courts were not arguing that raising education funds locally had always been impermissible, for that certainly would not have been the understanding of the original drafters of the state education quality clauses. Rather, they were holding that the districts had *evolved* in ways that resulted in significant inequalities in the system. These two responses are examined in greater detail below.

C. Limited Finding: Local Control Over Finance vs. Local Control Over Policy

The first point is that the holdings of the school financing equal protection cases are not broad enough to pose a full-fledged attack on the principle of local control. The courts, often deliberately and always at least implicitly, draw a line between the control of local finances and the control of local policy. No court suggests that the legislatures' delegation of decisions about hiring, classroom size or infrastructure is unconstitutional. No court even questions that the local school district may have control over how the education funds are spent. The value of local policy-making is thus undisturbed. Instead, the school financing

119. 411 U.S. at 54. Such dicta is also found in at least one state equal protection case. The New Jersey court warned that "[w]e need hardly suggest the convulsive implications if home rule is vulnerable upon . . . the grounds to which we have referred." Robinson v. Cahill, 303 A.2d 273, 287 (N.J. 1973).

decisions focus narrowly on the *raising* of funds for education at the local level as violative of equal protection.

Note, for example, the narrow definition the California Supreme Court gives the challenged state action: "Equality of educational opportunity requires that all school districts possess an equal ability in terms of revenue to provide students with substantially equal opportunities for learning."[120] The court is careful to mention that it is not required that all school districts have equal expenditures, since the educational needs differ across school districts; rather, each school district must have the ability to raise an equal level of funds. The ability to raise funds may not vary by school district wealth.[121] The Vermont opinion is similarly instructive on this point:

> The principal rationale offered by the State in support of the current financing system is the laudable goal of local control. Individual school districts may well be in the best position to decide whom to hire, how to structure their educational offerings, and how to resolve other issues of a local nature. The State has not explained, however, why the current funding system is necessary to foster local control. Regardless of how the State finances public education, it may still leave the basic decision-making power with the local districts.[122]

Moreover, these courts suggest, local control over the financing of governmental services is a fallacy in the first place. For a school district constrained by a low property tax base and a competing municipal burden to provide expensive services for a high concentration of needy residents, there are no real choices:

> [I]nsofar as "local control" means the ability to decide that more money should be devoted to the education of children within a district, we have seen—as another court once wrote—that for poorer districts, "such fiscal freewill is a cruel illusion." ... We do not believe that the voters of Londonderry necessarily care more about education than their counterparts in Lowell simply because they spend nearly twice as much per student . . . . [P]oorer districts cannot realistically choose to spend more for educational excellence than their property wealth will allow, no matter how much sacrifice their voters are willing to make.[123]

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120. Serrano v. Priest, 557 P.2d 929, 939 (Cal. 1976).
121. *Id.* at 939.
122. Brigham v. State, 692 A.2d 384, 396 (Vt. 1997).
123. *Id.* at 396, quoting Serrano v. Priest, 487 P.2d 1241, 1260 (Cal. 1971).

Following this reasoning, the Supreme Courts of Arkansas and Vermont never even reached the question of whether education was a fundamental interest. Instead, they struck down the school financing schemes under rational review, arguing that local financial control could not be a legitimate governmental interest.[124]

Applied to the context of municipal services in this light, these narrow holdings seem much less threatening to the historic principle of local control than they appeared initially. What is contested is not the delegation of the responsibility to structure and administer municipal services to local governments, but the exclusive reliance on local taxation to generate the revenues for these services. The state can remedy this problem in a number of ways, including pooling property taxes over a wider region, without taking away the policy power of local political subdivisions.

D. The Development of Metropolitan Regions and the Legitimacy of Local Control

Embedded in a number of the school districting cases is also a hint that the principle of "local control," once legitimate, should no longer be considered a persuasive justification for legislative choices. Concededly, *Rodriguez* took the state purpose of local control to be a definitive response in a rational review of school financing structures,[125] and many state courts that did not reach heightened scrutiny (and even a few that did) similarly bestowed this state purpose with unquestioned legitimacy.[126] However, a number of courts questioned whether "local control" retains its historic legal and political significance in the face of drastic changes in how our metropolitan areas now function.

Examples of this reasoning are found in the opinions by the Supreme Courts of New Jersey and Vermont. The New Jersey Supreme Court stated in *Robinson*, "[i]t may well be that at one time there was a rough correlation between the needs of an area and the local resources to meet them so that there was no conspicuous unfairness in assigning State obligations to the local units of government. Surely that is not true today

124. *Brigham*, 692 A.2d at 395; *See* DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) (stating "even without deciding whether the right to a public education is fundamental, we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the district.")

125. 411 U.S. at 40-43.

126. *See, e.g.*, Robinson v. Cahill, 303 A.2d 273, 286 (N.J. 1973) ("Inherent in the concept of local government is the belief that the public interest is furthered when the residents of a locality are given some voice as to the amount of services and expenditures therefore, provided that the cost is borne locally to stimulate citizen concern for performance. Thus, it may not be 'irrational' to deal with education in those terms.")

in our State."[127] The court explained that local problems have become mobile, yet also tend to concentrate in confined areas and that there is no real correlation between the taxes that a locality can raise and the number of students to be educated, the number of the poor to be housed, or the cost of police protection.[128] The Vermont Supreme Court stated that methods of providing governmental services "that were effective in a rural society with limited development of property resources and largely local industries may become ineffective with the advent of major ski resorts and sizable industrial developments."[129] The court pointed out that the towns where the employees of these developments live bear the burden of educating their children without participating in the increased tax benefit.[130]

The interdependence of local communities has, if anything, intensified during the three decades that courts have been looking at school financing. Many scholars of the metropolitan areas now strongly advocate that the concept of "local control" should not exert the level of influence it traditionally has on our legal psyche. Traces of this model of thinking are appearing in legal opinions other than school cases. These suggestions could be harnessed into an effective argument that "local control" is no longer a compelling—or perhaps even rational—state purpose in organizing our metropolitan areas.

Professor Gerald Frug has argued that tying the rights and entitlements of a person to her place of residence no longer makes sense.[131] While local government continues to give priority to place of residence in determining where people will vote and receive governmental services, residents of metropolitan areas actually sleep, eat, work, shop, and use day care in ways that defy local boundaries. Professor Frug points out that these residents are just as affected by the closing of their shopping mall or the deterioration of the neighborhood in which their workplace is located as they are by events happening within a few blocks of their residence. "Perhaps this emphasis on residency was justifiable when, once upon a time, home, work, family, friends, market, past, present, and future, were (so we imagine) linked together in one community,"[132] but this is certainly no longer the case today. Professor Richard Briffault has written critically about the "linkage of local government to home and family" which results in a "deferential or protective attitude toward local power."[133]

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127. *Id.* at 287.

128. *Id* at 286-87 (having explained its concerns with the legitimacy of local control, the New Jersey court declined to decide the questions, invalidating the school financing structure on education clause grounds rather than equal protection grounds)

129. *Brigham*, 692 A.2d at 395.

130. *Id.* at 395.

131. *See* Frug, *Decentering Decentralization*, *supra* note 20.

132. *Id*, *supra* note 20 at 320.

133. Richard Briffault, *Localism in State Constitutional Law*, 496 ANNALS 117, 126 (1988).

Judges have not been immune to these arguments. As early as 1974, in *Village of Burnsville v. Onischuk*,[134] the Minnesota Supreme Court relied heavily on such arguments in holding that the Twin Cities Metropolitan Fiscal Disparities Act (MFDA),[135] discussed in Section II, did not violate the state constitution. This case focused on the interpretation of the Uniformity Clause of the Minnesota Constitution.[136] The trial court found that the MFDA violated the clause based on precedent stating that there must be a reasonable relationship between the distribution of benefits and the taxes levied.[137] The supreme court reversed the trial court's holding by expanding its interpretation of the term "benefit."[138] The Uniformity Clause in effect proscribed the imposition of a tax on a subdivision that was not for the payment of that subdivision's debt or obligation or for a benefit.[139] The MFDA, by requiring the collection of payments from one subdivision that was in part transferred for the use of another subdivision, seemed to violate this principle since the taxpayers of the first subdivision were not participating in the benefit received by the residents of the second subdivision.[140]

The Minnesota Supreme Court admitted that a literal reading of this precedent would make the MFDA unconstitutional but argued that it would instead "expand" the definition of "benefit" to fit it to the reality of the metropolitan area: "In essence, the issue then is whether those units of government within the metropolitan area which in a given year contribute more of their tax base to the pool than is redistributed to them are sufficiently benefited to meet the constitutional requirement of uniformity."[141]

The *Burnsville* court continued by asserting that the interdependence of the metropolitan area has indeed created benefits that cross jurisdictional boundaries. In particular, the court pointed out that the communities with commercial development (the type of development taxed under MFDA) simultaneously enjoy the benefits of having neighboring municipalities that have made alternative land use choices, such as park land, institutions, and housing development, while reaping the tax benefits of the commercially developed property within its own borders.

In interesting contrast to *Burnsville*, a Minnesota district judge held in the fall of 2000 that a similar tax-sharing arrangement, the Range Fiscal Disparities Act,[142] imposed on the largely rural community of the

134. 222 N.W.2d 523 (Minn. 1974).
135. MINN. STAT. § 473F (1971).
136. 222 N.W. 2d at 527.
137. *Id.* at 527-28.
138. *Id* at 532.
139. *Id.* at 529.
140. *Id*
141. *Id*
142. MINN. STAT. §§ 276A.01-09 (1996).

Iron Range region, stretched the definition of benefit too far.[143] The judge reasoned that "[r]esidents of the various communities on the Iron Range work, live and play within their communities or respective clusters" and do not rely on each other in the same way as urban residents.[144] This opinion seems in perfect congruence with recent scholarship on local government law as well as the *Burnsville* point of view. The court recognized the ways in which our metropolitan areas have changed from what was once the norm of the local community, even in urban areas, and continues to be the norm in some rural areas today.

The arguments developed by academics and judges concerning the relevance of local control in today's urban geography point out that the concept, while once reflecting a reality of community, may no longer have the same force today. Despite the fact that it contradicts historic understandings of how governmental services should be financed and administered, recognizing this development may help us apply the school financing holdings to a broader set of governmental services.

It is probably fair to say that drafters of the education and equal protection clauses of the state constitutions did not intend them to prohibit the delegation of financing power to local school districts. To reach this conclusion, the state courts have interpreted these clauses in light of the current reality—that school districts have evolved to contain wildly varying levels of property value. If current reality shows that the same is true of local governments, is the conclusion that equal protection demands equalization of resources for municipal services so radical?

V. CONCLUSION: LESSONS OF THE SCHOOL FINANCE CASES

A. Implications for Legal Action

Two important points have emerged from our application of the school financing cases to the financing of municipal services. Both suggest that local autonomy may be losing some of its hold on local government legal doctrine. First, and more narrowly, state courts distinguish between local control in finances and local control in policy, arguing that the first is an empty and illusory concept. The separation of these two aspects of "local autonomy" makes it more likely that a court will take the risk of striking down property tax-based financing of certain services because it lowers the risk of finding a constitutional violation. Second, the scholarship on the growing interdependency of communities

143. Walker v. Zuehlke, No. C9-98-1668 (D. Minn. filed Sept. 13, 2000).
144. *Id.* at 19.

within our metropolitan region has influenced legal reasoning and made a dent in the once uncontradicted legitimacy of local autonomy. Recognizing that the reality of our metropolitan regions has drastically departed from the law's outdated conception of the "town" and the "community," courts have shown a greater willingness to break with tradition themselves.

But the fate of a legal action may come down not to whether local control of financing is a compelling state purpose, as it is not, but to whether we believe police protection or garbage collection is as significant a governmental service as education. From a legal standpoint, at least, it is still difficult to argue that these services are equally privileged. In order for a challenge to municipal financing to succeed, it has to overcome the exalted status bestowed on the "textual hook." My attempt to discredit the notion that education has a unique status among governmental services goes part of the way toward closing the gap, but it cannot create constitutional language where there is none. Short of an unjustifiably broad reading of general terms guaranteeing life and liberty or protection of the welfare and health of the citizenry, there is no constitutional language directing state legislatures to pay special attention to police protection, sanitation, or street maintenance. Without such a textual hook, a minimal adequacy claim along the lines of the quality cases cannot be made.

Finding a fundamental right in support of strict scrutiny equal protection review may be more promising, but only if state courts are willing to look beyond strict constitutional language to define fundamentality. If plaintiffs can push the courts to recognize a fundamental right in at least some municipal services, they can use my findings about the decreasing legitimacy of local financial control to suggest that no *compelling* state purpose dictates the current finance system. Additionally, a few brave courts may go even further to find no *rational* relationship between local property tax-based financing and the state purpose of local autonomy, and hence not even require the presence of a fundamental interest to strike down the reliance on local wealth in the delivery of municipal services. As this article has pointed out, a few state courts have indeed said that the state purpose of local control fails rational review. I agree with those courts that there is nothing rational about making communities exclusively fiscally responsible for municipal services, given that it is an empty and illusory responsibility. But it would be unrealistic to expect, in light of the school finance precedents, that more than a small minority of state courts will accept either the argument that municipal services are fundamental rights or the alternative argument that the means of financing them may be struck down—even in the absence of fundamentality—by rational review.

B. Implications for Political Action

At this point, the potential for implementation of successful tax sharing programs is uncertain. My analysis suggests that legal action is unlikely to produce decisive results. Nevertheless, the arguments developed in our exercise of applying the school-finance court cases to municipal services are useful tools even when brought outside of the legal context. At a minimum, these arguments provide any burgeoning, regionally-focused, political coalition with a powerful answer to the "local autonomy" defense. Those who oppose regionalization because it goes against long-held traditions of community control over community spending now stand on less certain ground. In this final section, I want to present some ideas on how to use this fundamental lesson of the school financing cases to strengthen current political efforts to promote tax-sharing.

As I discussed in the introductory section of this paper, despite strong support in academic literature,[145] tax-base sharing, in the sense that I have defined it,[146] has been frustratingly absent in our metropolitan regions. I have suggested that tax-base sharing has failed to win political support largely because it is perceived as running head-on into one of the most revered principles of American democracy: local autonomy. Scholars supportive of regionalization in general, and tax-sharing in particular, recognize this dilemma. Bruce Katz states that "[t]he fundamental premise of regionalism is that places have relationships and connections to other places that should not be ignored" and blames local preference for "fierce competition or splendid isolation" for the fact that these connections are not recognized.[147] A study by the Committee on Improving the Future of U.S. Cities Through Improved Metropolitan Area Governance states:

> [T]here may be a trade-off between the values associated with equity (in particular, the reduction of unequal opportunity) and values that have undergirded the traditional American system of local government, such as efficiency, choice, and local autonomy. Certainly such a trade-off is

145. *See supra* note 2.

146. *See supra* note 16.

147. Bruce Katz, *Editor's Overview*, *in* REFLECTIONS ON REGIONALISM, *supra* note 1, at 3. In a partial attempt to explain why Canadian metropolitan areas have been more willing to implement a regionalist agenda, including the redistribution of taxes, Professor Donald N. Rothblatt points to the culture of competitive individualism in the United States. Donald N. Rothblatt, *Summary and Conclusions*, *in* METROPOLITAN GOVERNANCE, *supra* note 1, at 449. Andres Duany et al., argue in their seminal text on new urbanism that the "social inequity that results from separating new development from old deterioration [including 'loss of population, jobs, and tax income'] can be addressed only by governments working in concert. Since governments prefer absolute political autonomy, there is little motivation for them to do so." ANDRES DUANY ET AL., SUBURBAN NATION 142 (2000).

> perceived by many of the opponents of various proposals for metropolitan reform.[148]

Professor John Mikesell similarly points out that as long as "city identity and autonomy of choice" are viewed as critical elements, "it is no surprise that regional base-sharing has not spread beyond its few implementation."[149]

Interestingly, the scholarship, having put forth the ideology of local autonomy as a barrier to tax-sharing, almost never challenges this pervasive assumption that tax-sharing is a fierce blow to local control. Instead, scholars and practitioners alike put their faith in the fact that a high enough proportion of metropolitan communities are hurt by local isolationism to drive a coalition of regionalists to overcome their preference for local control. This is the argument made by Myron Orfield when he points out that city dwellers and inner-ring suburbs, both hurt by the choices made by wealthier, outer-ring suburbs, can overcome their isolationism to pursue a common agenda of planned growth and revenue sharing.[150]

Political coalition building is no doubt essential to passing any regionalist legislation.[151] Legislators are most likely to be convinced by strong demonstrations from constituencies that a regionalist agenda is in their best interest. However, if the school financing cases are any indication of what types of arguments are persuasive to governmental actors considering greater revenue equality, the coalitions for tax-sharing should also be armed with an interpretation of local autonomy that stands up to their proposals. As one study has pointed out, even Representative Orfield's account of successful coalition building in Minnesota points to "how difficult it is to overcome ideological opposition . . . even when

148. GOVERNANCE AND OPPORTUNITY, *supra* note 1, at 105.

149. JOHN MIKESELL, CITY FINANCES, CITY FUTURES (Ohio Municipal League Educational and Research Fund) (1993), as quoted in Michael A. Pagano, *Metropolitan Limits: Intrametropolitan Disparities and Governance in U.S. Laboratories of Democracy in* GOVERNANCE AND OPPORTUNITY, *supra* note 1, at 277.

150. ORFIELD, *supra* note 1. For another discussion of how to galvanize political support for regionalism through such coalition building, see *Politics of Choosing among Visions* in Downs, *supra* note 1, at 183-205. Downs suggests that to "generate near-future political support for such a change, it will be necessary to appeal to particular groups likely to benefit sooner and more directly from it. Analyzing these potential sources of support requires identifying potential benefits, defining groups that might gain from them, and estimating the importance of each benefit for each group." Downs, *supra* note 1, at 185.

151. *See* Margaret Weir, *Coalition Building for Regionalism, in* REFLECTIONS ON REGIONALISM (Bruce J. Katz, ed., 2000) for an account of how coalition building ensured the success of regionalist policies in Minneapolis/St. Paul and Portland while the failure of coalition building defeated such initiatives in California and Illinois. For an interesting view on how greater awareness of a regionalist agenda may be fostered, see Thomas Bender, *The New Metropolitanism and the Pluralized Public*, HARVARD DESIGN MAG., Winter/Spring 2001, at 70 (arguing that to make existing special service districts and taxing districts more democratic will begin to engage the public in regionalist thinking).

measures of objective interests would seem to point to easy victory."[152] If tax-sharing can be presented in a light that seems less threatening to the gripping ideology of local control than it is popularly understood to be, the possibility of its acceptance will increase dramatically. This is precisely what the arguments borrowed from the school financing cases allow us to do.

Again, the school financing cases tell us two things. First, control over local finance is not determinant of local autonomy; control over local policy is what matters.[153] Second, our understanding of what is local, at least in the context of a metropolitan area, has to change in light of the fact that communities are now highly interdependent. This second argument is implicit in all discussions of regional tax-sharing but could be brought out more starkly. It is appealing to governmental decision-makers in part because it suggests that passing regional legislation is not an admission of what they and their predecessors have believed for decades—local government functions best if it can control its own revenues—was misguided, but rather simply a natural and inevitable response to a changing metropolitan reality. Although regionalists already refer to these historic and geographic trends when advocating their ideas, they may want to play up these arguments even more than they currently do, because it helps legislators see their agenda as less radical.

On the other hand, the argument about the distinction between local financial control and local policy control is conspicuously absent in the tax-sharing literature. In my review of the scholarship, I found only one instance of such reasoning. In a chapter reviewing forms of metropolitan organization, the Advisory Commission on Intergovernmental Relations pointed out that distributional equity can be achieved by expanding the jurisdiction of a local government to encompass a greater economically diverse area, creating a broader tax base.[154] However, the Commission suggested, for the reason that localities want to control the provision and production of their services, the better alternative is to retain local jurisdictions but create an overlying taxing jurisdiction: "Public economies can be organized, however, so that overlying jurisdictions can raise revenues for purposes of redistribution without depriving distressed communities of their autonomy as provision units."[155] The logical maneuver made here by the

152. *Strategies for Reducing Disparities* in GOVERNANCE AND OPPORTUNITY, *supra* note 1, at 100.

153. For perspectives on why retaining local policy control matters, *see* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, METROPOLITAN ORGANIZATION: THE ALLEGHENY COUNTY CASE 2 (1992) (summarizing scholarship suggesting that a more fragmented and hence complex metropolitan area shows greater efficiency in the delivery of services) and GOVERNANCE AND OPPORTUNITY, *supra* note 1, at 105 (summarizing public choice theories on delivery of services).

154. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 153.

155. *Id.* at 3. Not pointed out by the authors, but perhaps even more important, is that this also does not deprive the wealthy communities of their autonomy as provision units.

Commission is strikingly similar to the local control over finance versus local control over policy distinction made by the courts in the school financing cases.

This type of argument should be brought to the forefront of the tax-sharing debate as a counter to the ideological position of local autonomy. Even the strongest political coalitions favoring tax-sharing will be attacked for proposing a system that is viewed as somehow un-American and undemocratic. If these coalitions are able to incorporate the logic of the school financing cases into their general arguments, they will chip away at resistance to tax-sharing on at least this ideological front. Instead of declaring defeat in the face of the ideology of local autonomy, advocates of tax-sharing could point out how little their proposals actually take away from local policy control.[156] They could employ the history of school finance litigation to show that the regime they propose is in fact the regime that at least one aspect of local government, education, already functions under a system in which local financial control is not viewed as a legitimate governmental purpose.

Although this is a modest proposed addition to the tax-sharing dialogue, it is nonetheless significant in that it counters perhaps the most ingrained and instinctive source of opposition to regional cooperation. The potential for legal victory in the area of tax sharing may be modest; however, the school financing cases, even if not clearly extendable to the realm of municipal services, should be integrated into the regionalist scholarship and debate because of their contribution to a deeper understanding of how we may address concerns about the loss of local autonomy.

156. No doubt this line of reasoning is absent in debates about tax-sharing in large part because tax-sharing initiatives are usually discussed in the context of a greater regionalist agenda, some components of which indeed require giving up control over local policy-making (regional growth planning is one example). This suggests some caution in when and how the argument is employed.