VERMONT'S PUBLIC SCHOOL FINANCE SYSTEM: A CONSTITUTIONAL ANALYSIS

INTRODUCTION

The Vermont public school finance system has been the subject of intense debate. This debate will intensify during 1987 when the present statutes governing state aid to education automatically expire.[1] Underlying the debate are such issues as equal educational opportunity, equity, local control, and taxation. The Vermont Legislature must decide, before July 1, 1987, whether it will continue with the present system of allocating state funds to local public school districts or adopt an alternative method.

The current system of allocating funds to local school districts, while perhaps more equitable than past systems, does not result in equal expenditures per student.[2] The statistic of unequal expenditure is significant if per-pupil expenditures have a direct relationship to educational opportunity. Arguably, if expenditures are unequal, then educational opportunity is not equal. Unequal educational opportunity may violate constitutional provisions protecting equality and/or education. Although there is no pending constitutional challenge to the Vermont public school finance system, the system is, nonetheless, constitutionally suspect.

This note addresses the constitutionality of Vermont's public school finance system. For analytical purposes, this note focuses on Vermont's existing educational scheme. The method of analysis, however, and the constitutional issues raised apply to Vermont school finance systems in general.[3] More specifically, the note focuses on whether Vermont's existing method for distributing funds to local school districts is unconstitutional under the federal equal protection clause,[4] as well as the common benefit,[5] proportional

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1. In enacting the state-aid statutes, the Vermont Legislature provided for a prospective repeal effective July 1, 1987. *See* legislative history accompanying VT. STAT. ANN. tit. 16, § 3441 (1982).

2. *See infra* text accompanying note 68.

3. On March 26, 1987, the Vermont House of Representatives passed a bill to increase state aid dramatically, to alter the distribution system, and to finance increased state assistance through a sales tax on beer, wine, liquor, and soda. The bill also provides for state-aid financing from the state's surplus. At the time of this writing, the Vermont Senate is considering this bill. Burlington Free Press, Mar. 28, 1987, at A1, col. 5.

4. The equal protection clause of the fourteenth amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal

contribution,[6] and education[7] clauses of the Vermont Constitution.

This note is divided into three main sections. Section I sets forth the mechanics of Vermont's public school finance system. Section II examines the constitutional issues raised under the United States and Vermont Constitutions. Claims under the two constitutions are addressed separately because each constitution warrants an independent analysis.[8] After concluding that the Vermont school financing system is unconstitutional, section III discusses alternatives to the present system.

I. The Vermont Public School Finance System

The Vermont public school finance system is similar to systems in many other states in that educational funds are derived from three basic sources: (1) local property taxes; (2) state aid to education; and (3) federal grants.[9] Even though local school dis-

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protection of the laws." U.S. Const. amend. XIV, § 1.

5. Chapter I, article 7 of the Vermont Constitution provides:

> *That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community*; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

Vt. Const. ch. I, art. 7 (emphasis added).

6. Chapter I, article 9 of the Vermont Constitution provides:

> *That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion towards the expence of that protection*, and yield his personal service, when necessary, or an equivalent thereto, but no part of any person's property can be justly taken from him, or applied to public uses, without his own consent, or that of the Representative Body of the freemen, nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent; nor are the people bound by any law but such as they have in like manner assented to, for their common good; and previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the Legislature to be of more service to community than the money would be if not collected.

Vt. Const. ch. I, art. 9 (emphasis added).

7. Chapter II, section 68 of the Vermont Constitution provides in part: "a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth." Vt. Const. ch. II, § 68.

8. State v. Jewett, 146 Vt. 221, 225, 500 A.2d 233, 236 (1985) ("A state constitutional clause may confer rights not bestowed by the United States Constitution or may contain language that differs from parallel provisions in the National Charter so that the former invites interpretation on independent grounds.").

9. *See, e.g.*, Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1976); Thompson v. Engel-

tricts in Vermont rely heavily upon the proceeds from local property taxation to support public schools, the state and federal governments also provide well-needed financial support.[10] The local school districts ultimately determine how funds are spent on particular school services. The method of distributing state aid to education in Vermont has undergone a number of changes over the years.[11] This pattern is likely to continue, as Vermont's current legislation[12] on state aid distribution is scheduled to expire on July 1, 1987.

In Vermont, funds for state aid to education stem primarily from state tax revenues such as personal income, and sales and use taxes.[13] In fiscal year 1985, twenty-two percent of the state budget was expended on education.[14] In that year, Vermont relied upon local, state, and federal sources and spent an estimated $325 million on elementary and secondary education.[15] Normally, the composite makeup of total dollars spent on education consists of less than two-thirds from local property taxes, approximately one-third from state funds, and the remaining dollars from federal funds.[16]

A portion of the state funds are used to "equalize" the disparities in wealth and spending between school districts.[17] For instance, in fiscal year 1986, the Vermont Legislature appropriated approximately $78.7 million under the state equalization aid to education program.[18]

The remainder of this section focuses on the funding of education through local property taxes and state equalization aid, because only a small percentage of funds result from federal sources. The local property tax is discussed first because the value of real property is taken into consideration when the amount of equaliza-

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king, 96 Idaho 793, 537 P.2d 635 (1975); Olsen v. State of Oregon, 276 Or. 9, 554 P.2d 139 (1976).

10. *See* Bluhm, *Understanding State Aid*, 3 VT. AFFAIRS 3, 3 (1987).

11. Kaagan & Luciano, *Equity and Organization*, 3 VT. AFFAIRS 14, 14-15 (1987).

12. VT. STAT. ANN. tit. 16, §§ 3472-3476 (1982 & Supp. 1986).

13. AGENCY OF ADMIN., VT. DEP'T OF FIN. AND INFORMATION SUPPORT, VERMONT, A FISCAL SUMMARY of 1985 2 (1985) [hereinafter FISCAL SUMMARY].

14. FISCAL SUMMARY, *supra* note 13, at 3.

15. GOVERNOR'S OFFICE AND VT. DEP'T OF EDUC., STATE AID WHAT DIFFERENCE DOES IT MAKE? 2 (1985) [hereinafter STATE AID].

16. Interview with William E. Johnson, State Aid Analyst, Vermont Department of Education, in Montpelier (Oct. 14, 1986).

17. *See infra* text accompanying notes 55-67.

18. Memorandum from Vermont Commissioner of Education to Superintendents of Schools (June 6, 1986) (available from Vermont Department of Education).

tion aid is calculated.

A. The Local Property Tax

The property tax is the only tax which is locally levied and controlled. Local property taxpayers determine the rate of taxation imposed on real property within their towns. Whereas other revenue generating taxes[19] are remitted to the State Treasury, the property tax is under the direct control of those against whom it is levied.[20] As a consequence, education expenditures are closely connected with the property tax structure and control of how much is spent on education rests heavily on the local school district taxpayer. Residents of Vermont school districts vote annually to approve budgets for school services for each fiscal year.[21] These votes establish the respective local school tax rates to be levied against property owners within each Vermont town.[22]

The local property tax is by far the largest single revenue source for education in Vermont.[23] The property tax generates more income than the state's four main general fund taxes combined.[24] Real property values, the basis of the local property tax, also help form the property wealth index, a major component of the current state-aid formula.[25] As a result, the amount of state aid which a school district receives is heavily dependent upon the amount of revenue which individual towns generate through local property taxation.

In Vermont, real property tax administration is grounded on the concept of fair market value.[26] Ideally, all land within the state

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19. Examples of other revenue generating taxes include a meals and rooms tax, miscellaneous business tax, cigarette tax, motor vehicle and gasoline tax, personal income tax, sales and use tax, corporate tax, and beverage tax. FISCAL SUMMARY, *supra* note 13, at 2.

20. *See* Bluhm, *supra* note 10, at 3.

21. L. TASHMAN & M. MUNSON, RELATIONSHIPS BETWEEN SCHOOL TAXES AND TOWN TAXES IN VERMONT LOCAL GOVERNMENT 1 (Center for Research on Vermont Occasional Paper No. 8, 1984).

22. *Id.* School tax rates are part of the total town tax rates. *Id.* at 7.

23. 1986 VT. DIV. OF PROP. & REV. ANN. REP. 1 [hereinafter ANN. REP.].

24. *Id.* The state's four primary general fund taxes are: (1) personal income; (2) sales and use; (3) motor vehicle and gasoline; and (4) corporate. FISCAL SUMMARY, *supra* note 13, at 2.

25. *See infra* notes 57-67 and accompanying text.

26. ANN. REP., *supra* note 23, at 1. The Vermont Supreme Court has defined fair market value as:

> [T]he price which the property will bring in the market when offered for sale and purchased by another taking into consideration all the elements of the

is assessed at one-hundred percent of fair market value.[27] The total dollar amount of tax levied on property is based upon the fair market value of each property in a town and on the tax rate.[28]

The concept of fair market value is important to education in Vermont for two primary reasons. First, property taxes are used to generate revenues for local school districts.[29] Second, fair market values are used in calculating the amount of financial aid a school district will receive from the state.[30] Consequently, state and local funding for education is based in part upon the accuracy of the assessment of the fair market value of property within each school district.

Even if accurate measurements are made, problems remain regarding inconsistent measurement techniques and the inherent disparity of fair market values of properties in the respective towns.[31] Thus, inequalities result between towns and, therefore, school districts, because a consistent measurement of fair market value is not used when determining the tax base in respective towns. State aid for education, which relies on fair market values, is also impacted by the disparate calculations. Even with state aid to "equalize" funding levels between school districts, disparate methods of calculation and unequal aggregate fair market values will continue to result in unequal education expenditures.

In an effort to remedy inequitable assessments,[32] there exists a penalty potential[33] in the present state-aid formula to provide in-

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> availability of the property, its use both potential and prospective, any functional deficiencies, and all other elements such as age and condition which combine to give property a market value. There is no one or controlling factor.

Bookstaver v. Town of Westminster, 131 Vt. 133, 136-37, 300 A.2d 891, 893 (1973).

27. Telephone interview with Deborah Brighton, Land Tax Specialist, Vermont Division of Property Valuation and Review (Oct. 8, 1986). Land in Vermont is typically reappraised every four years so that listed or appraised values may at times be less than one-hundred percent of fair market value, even if only inflation is taken into account. ANN. REP., *supra* note 23, at 2. In addition, Vermont's current use program allows certain agricultural and forest land to be assessed on the basis of its productive or "use" value as opposed to its fair market value. VT. NAT. RESOURCES COUNCIL, CURRENT USE: A QUIET SUCCESS 1 (Undated).

28. *See* B. HUFFMAN, PROPERTY, EDUCATION AND TAXES IN VERMONT 36 (1977).

29. *See* Bluhm, *supra* note 10, at 3.

30. *See infra* notes 57-67 and accompanying text.

31. B. HUFFMAN, *supra* note 28, at 36-39.

32. A further inequality results from the fact that not all towns conduct reappraisals of land during the same year. Telephone interview, *supra* note 27.

33. ANN. REP., *supra* note 23, at 4. VT. STAT. ANN. tit. 16, § 3475 (1982).

centives to towns to conduct regular reappraisals of land.[34] As a result, the common denominator of Vermont's school districts, referred to as equalized grand lists,[35] now represent appraisals closer to fair market value than at any time in Vermont's history.[36] "The most immediate result of reappraisal at fair market value is the potential for increased equity in the distribution of the property tax burden" within the state.[37] When property tax equity[38] is achieved, school districts are more likely to reflect their true real property wealth for purposes of state-aid calculations.

B. State Aid to Local School Districts

Vermont's financial aid to local school districts is distributed in two primary ways. The first is a categorical grant program which assists local school districts in financing such items as the cost of school construction, vocational-technical education, and special education.[39] The second type of grant is the general assistance grant. In contrast to the categorical grant, the general assistance grant is designed to "equalize" (or neutralize) certain factors about the relative fiscal abilities of school districts.[40] Vermont adopted the equalization method of allocating its general assistance grants in 1964.[41]

In Vermont, a little over one-third of all elementary and secondary school expenditures are supported by the state.[42] Nationally, state support averages approximately fifty percent of all educational expenditures.[43] As such, Vermont relies more upon local property tax efforts to support education than other states.[44] This means that the respective school districts are primarily dependent upon revenues generated by local property taxation. The heavy re-

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34. ANN. REP., *supra* note 23, at 4.

35. "Equalized Grand List of a school district in any school year means one percent of the aggregate fair market value of all taxable property in that school district, as certified during that school year by the director of property valuation and review. . . ." VT. STAT. ANN. tit. 16, § 3441(10).

36. ANN. REP., *supra* note 23, at 1.

37. *Id.*

38. In this context, property tax equity refers to the relative tax burden between real property taxpayers.

39. B. HUFFMAN, STATE AID TO EDUCATION AND VERMONT LEGISLATIVE POLITICS 5 (1979).

40. Bluhm, *supra* note 10, at 3.

41. Kaagan & Luciano, *supra* note 11, at 14.

42. STATE AID, *supra* note 15, at 2.

43. *Id.*

44. *Id.*

liance upon local property tax reinforces the disparity between the amounts spent per pupil because of the wide gap in real property wealth between certain towns.[45] With state aid, the inequalities in per-pupil spending between relatively poor and relatively rich school districts are lessened, but not eliminated. This disparity is particularly significant assuming there is a correlation between expenditures and educational quality. Although there are no Vermont statistics to substantiate this correlation, several other state studies have identified such a correlation.[46]

Financial support for public school education in Vermont has increased significantly during the past five years, but as of 1984, state aid, measured in per-pupil expenditures, was still the second lowest among the New England states.[47] Local school district expenses are increasing at a rate which exceeds the rate of general state aid; thus, local school districts must bear an increasingly heavy burden.[48] As state aid declines in relation to total education costs, local wealth becomes an increasingly important determinant of the level of school spending.[49]

1. The Miller Formula

In 1968, Vermont adopted a formula for distributing state aid to school districts called the *Miller Formula*.[50] The apparent intent of the *Miller Formula* was twofold: (1) to leave maximum financial control of education with local residents; and (2) to "equalize" the capacity of Vermont towns to spend the same amount per pupil on education.[51] The formula took into account four factors: (1) "wealth" of each school district; (2) amount of money spent on education in each school district; (3) number of pupils in each district; and (4) total amount of state aid money available for distribution to local districts.[52] However, as a result of various criticisms

45. J. AUGENBLICK, SCHOOL FINANCE IN VERMONT: ISSUES AND RECOMMENDATIONS 6 (1986). *See infra* text accompanying note 68.

46. *See, e.g.*, Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977) [hereinafter *Serrano II*]; Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1976).

47. J. AUGENBLICK, *supra* note 45, at 6.

48. VT. BD. OF EDUC., REPORT ON THE FINANCING OF PUBLIC EDUCATION IN VERMONT 14 (1979) [hereinafter FINANCING REPORT].

49. STATE AID, *supra* note 15, at 5.

50. B. HUFFMAN, *supra* note 28, at 70.

51. B. HUFFMAN, *supra* note 39, at 5.

52. B. HUFFMAN, *supra* note 28, at 70.

of the *Miller Formula*,[53] in 1981, Vermont enacted its current method of distributing general state aid, the *Morse-Giuliani Formula*.[54]

2. *The Morse-Giuliani Formula*

Both the *Morse-Giuliani Formula* and its predecessor *Miller Formula* are percentage-equalizing formulas. Percentage-equalizing formulas are intended to ensure that all school districts of equal relative wealth are given an equal percentage of their eligible expenses as equalization aid.[55] This means that towns of lower relative wealth should receive a greater amount of equalization aid than towns with higher relative wealth. Percentage-equalizing formulas are based upon the concept that all school districts, regardless of wealth, should experience the same local tax rate. In addition, the formulas are intended to ensure that each school district provides a similar quality of education by minimizing the disparities in per-pupil expenditures.[56]

Both the *Miller Formula* and the *Morse-Giuliani Formula* calculate relative wealth indices for each school district.[57] However, the *Morse-Giuliani Formula* considers both real property and income to determine a town's relative wealth, while the *Miller Formula* used only real property values.[58] Moreover, the *Morse-Giuliani Formula* averages wealth data over the most recent three years to minimize reactions in the formula to annual changes in a town's state-aid data.[59] The *Morse-Giuliani Formula* also limits reimbursable expenditures to ensure that districts cannot finance extraordinary spending levels with state aid.[60]

The *Morse-Giuliani Formula* includes three different formulas.[61] The formulas are calculated separately. The results are then combined to determine the amount of state aid a school district

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53. A major criticism of the *Miller Formula* was that it did not adequately consider the relative income of school district taxpayers. B. HUFFMAN, *supra* note 28, at 74.

54. VT. STAT. ANN. tit. 16, §§ 3472-3476 (1982 & Supp. 1986).

55. VT. DEP'T OF EDUC., STATE AID TO EDUCATION MORSE-GIULIANI 2 (1984).

56. *See* VT. DEP'T OF EDUC., VERMONT'S STATE AID TO EDUCATION PROGRAM 1-2 (Draft June, 1986) [hereinafter EDUCATION PROGRAM].

57. *Id.* at 2.

58. *Id.* Under the *Miller Formula*, real property values were calculated using the equalized grand list on a per-student basis. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

will receive in a given year.[62] The *Morse-Giuliani Formula* also contains a "hold harmless" provision.[63] The provision guarantees that a school district will receive at least a certain percentage of the amount of state aid that it received in the last year of the *Miller Formula*.[64] Ultimately, the total amount of state aid distributed to individual school districts is equal to the amount of flat grant aid[65] plus the amount of equalization aid[66] less the listing penalty.[67]

The components of the *Morse-Giuliani Formula* take into

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62. *Id.*

63. *Id.*

64. *Id.*

65. Flat grant aid is distributed to each individual school district, regardless of its relative wealth. VT. STAT. ANN. tit. 16, § 3474 (Supp. 1986). Every school district receives $100 for each resident student. *Id.* The number of resident students is based on the long-term average daily membership. *Id.* § 3441.

> The average daily membership of a school district in any year means the average enrollment of pupils who are legal residents of the district attending public schools, or for whom the district must reimburse the commissioner under this title, during the two annual census periods. The first census period consists of the first 30 days of the school year in which school is actually in session. The second census period consists of the first 30 days after January 15 in which school is actually in session. The average daily membership equals the aggregate daily membership of resident pupils in the school district during the two census periods divided by 60. (2) The long-term membership of a school district in any school year means the mean average of the district's average daily membership over the preceding three school years.

Id. In fiscal year 1986, flat grant aid amounted to $9.3 million out of a total education appropriation of $78.7 million. EDUCATION PROGRAM, *supra* note 56, at 3. Thus, approximately $69.4 million was left for equalization aid. *Id.*

66. Equalization aid is calculated on the basis of the relative wealth and spending in a school district. EDUCATION PROGRAM, *supra* note 56, at 4. The equalization formula is computed in three steps. First, the local share is calculated. The local share for each district considers two factors: (1) the relative property and income wealth of the district; and (2) an appropriation constant "selected so that all funds available for equalization aid are distributed." *See* VT. STAT. ANN. tit. 16, §§ 3472-3473 (1982 & Supp. 1986). Second, a decimal fraction is calculated by subtracting the local share from the number one to determine the state share. *Id.* § 3473 (1982). The state share is the percentage of a district's expenses that the state pays as equalization aid. STATE AID, *supra* note 15, at 19. Third, the state share is multiplied by the adjusted expenditures to determine the amount of equalization aid that a particular school district will receive. *Id.* Adjusted current expenses are a subtotal of all expenses allowed by statute to be included in calculating state aid. Expenses are further limited for districts which spend over the state average on a per-student basis. VT. STAT. ANN. tit. 16, §§ 3472-3473 (1982 & Supp. 1986).

67. The penalty provides an incentive for towns to assess property at one-hundred percent of the fair market value. STATE AID, *supra* note 15, at 20. As a result, property taxpayers in a community are likely to be taxed fairly in relation to each other. *Id.* The listing penalty, however, may never be more than twenty percent of the total aid calculated for a district. *Id.*

consideration spending, wealth, tax rates, and funding level variations between school districts. Assuming financial equality is the yardstick by which to measure educational quality, the *Morse-Giuliani Formula* should create financial equality between school districts. Unfortunately, that result has not been achieved. State aid has not alleviated the wide disparity in local spending. The three principal reasons for the disparity are: (1) the variation in local property wealth and tax rates; (2) the limitation on state aid appropriations; and (3) the disproportionate rising educational costs in relation to state aid. The principal result of the disparity is the variation in per-pupil spending.

For example, in 1985, one study indicates that per-pupil spending varied from $1,648 to $4,805.[68] Although the high spending districts had 11 out of 26 districts which taxed themselves at rates over $1.00, the low spending districts had 15 out of 26 districts which taxed themselves at rates over $1.00. This suggests that the low spending districts are making stronger efforts than the high spending districts to generate property tax revenues through high tax rates. Even so, the differences in total property wealth preclude the low spending districts from raising and spending the same amounts on education as the high spending districts. In fact, "[t]here are numerous districts of similar size . . . for which there is an inverse relationship between tax rates and per pupil spending levels."[69] As a result, the *Morse-Giuliani Formula* does not, in reality, equalize the per-pupil expenditures of school districts.

Assuming a correlation between per-pupil expenditures and educational opportunity, the *Morse-Giuliani Formula* does not achieve equal educational opportunity. Accepting that assumption, this note examines whether Vermont's public school finance system violates the equal protection clause in the United States Constitution, and/or equality and education provisions in the Vermont Constitution.

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68. J. AUGENBLICK, *supra* note 45, at 18. In his report prepared for the House and Senate Education Committees of the Vermont General Assembly, Augenblick found that "[o]f the 26 high spending districts, 11 had relatively high property tax rates (over $1.25); however, 15 districts had tax rates under $1.00." *Id.* In comparison "[o]f the 26 low spending districts, 11 had tax rates under $1.00; however, six districts had tax rates over $1.25." *Id.*

69. *Id.*

II. CONSTITUTIONAL ISSUES

Written guarantees of equality are embodied in the United States and Vermont Constitutions.[70] If the constitutional validity of the Vermont public school finance system is questioned, it is likely that the Vermont Supreme Court will evaluate claims under both constitutions.[71] Moreover, the court's recent activist approach to constitutional decisionmaking demonstrates its willingness to address state and federal constitutional claims separately.[72] This means that even if Vermont's system is permissible under the United States Constitution, it could be invalidated under the Vermont Constitution.

There are several reasons why the Vermont Constitution may offer different protections than the United States Constitution in the area of public school financing. First, the equality provisions of the Vermont Constitution predate the fourteenth amendment of the United States Constitution.[73] In fact, many parts of the Vermont Constitution were taken, not from the United States Constitution, but from the Pennsylvania Constitution of 1776.[74] The Vermont Constitution was, therefore, not derived from the United States Constitution and accordingly their interpretations may vary. Second, the wording of the equality provisions of the Vermont Constitution differs from the federal equal protection clause.[75] Finally, the Vermont Constitution and the United States

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70. U.S. CONST., amend. XIV, § 1; VT. CONST. ch. I, art. 7; VT. CONST. ch. I, art. 9. For the text of these provisions, see *supra* notes 4-6.

71. *See, e.g.*, State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982); *In re* E.T.C., 141 Vt. 375, 449 A.2d 937 (1982). Although a challenge to the Vermont public school finance system could be filed in either federal or state court, for analytical purposes this note assumes that a challenge is filed in state court.

72. *See, e.g.*, State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985); *Badger*, 141 Vt. 430, 450 A.2d 336; *In re* E.T.C., 141 Vt. 375, 449 A.2d 937. *See also* Development Note, *The Principle Problem: State v. Jewett and the New Judicial Federalism*, 10 VT. L. REV. 437 (1985) (discussing the court's new activist approach).

73. *Compare* VT. CONST. ch. I, art. 7 and ch. I, art 9 (adopted 1777) *with* U.S. CONST. amend. XIV, § 1 (adopted 1868). *See, e.g.*, Bamberger, *Boosting Your Case With Your State Constitution*, A.B.A. J., Mar. 1, 1986, at 49 (indicating that state constitutional provisions may predate their federal counterparts).

74. *See* Development Note, *An Automatic Standing Rule May Be Promulgated Under Article 11 of the Vermont Constitution*, 10 VT. L. REV. 459, 462 (1985). The framers of the Vermont Constitution used the Pennsylvania Constitution as a model, but they did not follow it blindly. Martin, *The 1777 Constitution: Liberty Demanded*, VT. LIFE REP., Autumn 1986, at 48. For instance, the Vermont Constitution prohibited slavery and the Pennsylvania Constitution did not. *Id.*

75. *See supra* notes 4-6. "Language variation may provide a basis for finding a state

Constitution differ in the range of subjects that they encompass. For instance, the Vermont Constitution contains an education clause[76] whereas the United States Constitution does not. The language variations and different historical backgrounds, although not requirements for independent state analysis, lend further support to the notion that the Vermont Supreme Court is not bound by interpretations of the United States Constitution when deciding a claim under the Vermont Constitution.

A determination of whether the Vermont public school finance system is permissible under the United States Constitution and the Vermont Constitution involves three separate inquiries: (1) whether the Vermont system violates the equal protection clause of the fourteenth amendment of the United States Constitution; (2) whether the system violates equality provisions in the Vermont Constitution; and (3) whether the system complies with the education clause in the Vermont Constitution.

A. The United States Constitution

The first constitutional issue raised in evaluating Vermont's public school finance system is whether it denies equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution. It is possible that opponents of the system could argue that the system violates the equal protection clause because it interferes with a fundamental right[77]—the right to education—and creates a suspect classification[78] based on

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constitutional right to be more expansive than its federal analogue." Bamberger, *supra* note 73, at 49, 50.

76. VT. CONST. ch. II, § 68. For the text of this provision, see *supra* note 7.

77. The United States Supreme Court has stated that:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'

Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'." *Id.* (Goldberg, J., concurring) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).

78. The United States Supreme Court defines a suspect class as one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian process." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28, *reh'g denied*, 411 U.S. 959 (1973).

wealth. However, in addressing these same arguments, the United States Supreme Court, in 1973, held that the Texas public school finance system did not violate the equal protection clause of the fourteenth amendment.[79] Therefore, under the equal protection clause, it is unlikely that the Vermont Supreme Court would invalidate Vermont's public school finance system.

In *San Antonio Independent School District v. Rodriguez*, the plaintiffs alleged that the Texas system discriminated against them by providing fewer educational resources, and thereby resulted in a lower quality of education.[80] The *Rodriguez* Court used a two-tier approach to decide whether the Texas system violated the federal equal protection clause.[81] The Court stated, "[w]e must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny."[82] The Court further stated that if neither a suspect class nor a fundamental right existed, it would examine the legislation to determine if it "rationally further[ed] some legitimate, articulated state purpose . . . ."[83] The Court found that the school finance system did not implicate either a suspect classification[84] or a fundamental interest.[85] There-

79. *Id.* at 55.

80. *Id.* at 23-24. In *Rodriguez*, the poorest school district in San Antonio had an assessed property value per pupil of approximately $6,000. *Id.* at 12. Conversely, the wealthiest school district had an assessed property value per pupil of over $49,000. *Id.* at 13. The property tax in the poorest district raised $26 per pupil, whereas the property tax in the wealthiest district, with a lower tax rate, raised $333 per pupil. *Id.* at 12-13. As a result of state aid, per-pupil expenditures in the poorest district totalled $356 and in the wealthiest district expenditures totalled $594. *Id.* at 13. The Texas system for distributing state aid was a "foundation program" which attempted to equalize disparities among district tax bases, although district expenditures depended heavily upon local property wealth. *Id.* at 9-10. Typically, under a foundation program, the state guarantees that each school district will have a minimum "foundation" level available for school expenditures. *See, e.g.*, A. ODDEN & J. AUGENBLICK, School Finance Reform in the States: 1981 2 (1981). In some cases, the state may supply the local district with the difference between the foundation level of expenditures and the amount of local revenues that the district can raise. *Id.*

81. *Rodriguez*, 411 U.S. at 16-17.

82. *Id.* at 17.

83. *Id.*

84. *Id.* at 18. With respect to a suspect classification, the *Rodriguez* Court stated that the Texas system had not been shown to discriminate against poor persons. *Id.* at 25. The Court found no basis for assuming that the poorest people were concentrated in the poorest-property districts. *Id.* at 23. Therefore, the system had not been shown to discriminate against any suspect class on the basis of wealth. *Id.* at 28.

The classification in *Rodriguez* was not suspect, according to the Court, because there was no absolute deprivation of a desired benefit since the students in the poorest district

fore, the Court applied the rational relation test.[86] Texas "passed" the test because the system encouraged participation in and control of each district's school expenditures at the community level.[87]

The United States Supreme Court's decision in *Rodriguez* will control a federal equal protection challenge to Vermont's public school finance system. Absent the ability to distinguish the Vermont system from the Texas system, a federal equal protection claim will not prevail. Because *Rodriguez* controls an equal protec-

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were not *totally* deprived of an education. *Id.* at 25. However, total deprivation of a right is not a requirement to apply strict scrutiny.

For example, in *Reynolds v. Sims*, the plaintiffs were not denied the right to vote but claimed that malapportionment of the state legislature diluted their votes. 377 U.S. 533, 537-40, *reh'g denied*, 379 U.S. 870 (1964). The plaintiffs alleged that they were thereby deprived of rights under the equal protection clause. *Id.* at 540. The Court agreed with the plaintiffs because "the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Id.* at 565. According to the Court, the equal protection guarantee was violated because of the lack of uniform treatment in relation to the right to vote. *Id.* at 565-66.

85. *Rodriguez*, 411 U.S. at 18. In addition to its conclusion that there was no wealth classification involved, the *Rodriguez* Court held that the Texas system did not violate a substantive, fundamental right "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34. The Court stated that education is not a fundamental right guaranteed by the Constitution. *Id.* at 37. Yet, since its decision in *Rodriguez*, the Supreme Court has stated that although education is not a "right" granted by the Constitution, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." Plyler v. Doe, 457 U.S. 202, 221, *reh'g denied*, 458 U.S. 1131 (1982).

The Court further stated that "[b]oth the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction" between education and other governmental benefits. *Id.* Citing a number of earlier Supreme Court decisions, the Court in *Plyler v. Doe* concluded that "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society." *Id.* (citing Ambach v. Norwick, 411 U.S. 68, 76 (1979); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); Meyer v. Nebraska, 262 U.S. 390, 400 (1923)). *Plyler* suggests that education should be given at least special treatment, if not fundamental-right status.

The significance of education is further demonstrated by the fact that almost every state constitution has an education provision. *See* Glickstein & Want, *Inequality in School Financing: The Role of the Law*, 25 STAN. L. REV. 335, 341-42 (1973). In addition, states often make education compulsory and spend large amounts of their revenues on public schools, which suggests that education is an important function of a state and therefore should be given special treatment in equal protection analysis. In *Wisconsin v. Yoder*, the Supreme Court stated that "[p]roviding public schools ranks at the very apex of the function of a State." 406 U.S. at 213. Although the Court has never explicitly referred to the right to education as fundamental, it has in prior dicta, especially in racial segregation cases, intimated that education is deserving of special protection. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

86. *Rodriguez*, 411 U.S. at 40.

87. *Id.* at 49.

tion claim, opponents of the Vermont public school finance system should independently challenge the system under the Vermont Constitution.

The Vermont Supreme Court has recognized the existence of independent rights under the Vermont Constitution.[88] Furthermore, the court has never suggested that the meaning of the Vermont Constitution and the United States Constitution is the same.[89] The court has interpreted the Vermont Constitution as protecting rights which are "explicitly excluded from federal protection."[90] In addition, the court may "provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter."[91] Because the Vermont Constitution specifically mentions education, it may afford greater protection than the federal constitution in a challenge to the Vermont public school finance system.

B. The Vermont Constitution

The Vermont Constitution contains several provisions which might be invoked to invalidate the public school finance system in Vermont.[92] Together, the provisions suggest the possibility of greater rights and responsibilities afforded to Vermont citizens.

First, chapter I, article 7 (the "common benefit clause") declares "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community."[93] Second, chapter I, article 9 (the "proportional contribution clause") provides "[t]hat every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to *contribute his proportion towards the expence of that protection.*"[94] Third, chapter II, section 68 (the "education clause") of the Vermont Constitution states that "a *com-*

88. *See* State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982).

89. *Id.* at 449, 450 A.2d at 347.

90. *Id.*

91. *Id.*

92. The three provisions which might be invoked are the common benefit clause, the proportional contribution clause, and the education clause. *See* VT. CONST. ch. I, art. 7; VT. CONST. ch. I, art. 9; VT. CONST. ch. II, § 68.

93. VT. CONST. ch. I, art. 7.

94. VT. CONST. ch. I, art. 9 (emphasis added).

petent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth."[95]

The Vermont Supreme Court has not decided any cases challenging the Vermont public school finance system. Nevertheless, the Vermont Supreme Court's previous interpretations of the common benefit, proportional contribution, and education clauses, are suggestive of how the court will assess the finance system. Subsection one will take a historical and textual approach to constitutional interpretation. Subsection two will evaluate other state constitutional challenges to school financing systems and the implications for Vermont.

1. Historical and Textual Interpretation

a. The Common Benefit Clause

Vermont's current constitution is very similar to the original document developed in 1777.[96] Chapter I is a declaration of the rights of the inhabitants of the State of Vermont.[97] Article 7 declares that government is or ought to be for the common benefit, protection, and security of the people and not for the advantage of any single individual or group of individuals.[98] This clause suggests that preferential legislation is not allowed in Vermont.

In early cases construing this provision, the Vermont Supreme Court applied a rational relation test to economic legislation. For instance, in *State v. Harrington*,[99] the respondents contended that a law requiring itinerant vendors to obtain a license was unconstitutional.[100] They claimed that under the common benefit clause the law discriminated between the classes of itinerant vendors and resident vendors.[101] The court found that the law, as a police regulation, did not violate the Vermont Constitution.[102]

In *Harrington*, the court suggested that there was no class in-

95. VT. CONST. ch. II, § 68 (emphasis added).

96. *Compare* VT. CONST. (amended 1982) *with* VT. CONST. (adopted 1777, established 1793).

97. VT. CONST. ch. I.

98. VT. CONST. ch. I, art. 7.

99. 68 Vt. 622, 35 A. 515 (1896).

100. *Id.* at 625, 35 A. at 516.

101. *Id.*

102. *Id.* at 637, 35 A. at 520.

volved because both resident and non-resident itinerant vendors were subject to the law.[103] Several years later, however, the court relied in part on the common benefit clause to strike down a statute on equal protection grounds.[104] In *State v. Cadigan*, the court held that a statute discriminated between agents of firms organized under Vermont law, and agents of firms organized under the laws of other states.[105] Because certain actions of the latter would be unlawful, while similar actions of the former would be lawful, the court ruled that the statute violated the equal protection of the laws guaranteed by the common benefit clause of the Vermont Constitution.[106]

Later, in *State v. Auclair*,[107] the Vermont Supreme Court retreated from the higher level of judicial scrutiny imposed in *Cadigan*. The court, in upholding the constitutionality of a statute regulating the sale and distribution of milk, stated with respect to the common benefit clause: "In cases in which a violation of this provision has been asserted, it has been repeatedly recognized that, in the exercise of the police power of the State, a legislative classification that is not arbitrary or irrational may be established."[108] The court found nothing in the statute that showed the existence of an arbitrary discrimination and therefore the statute was constitutional.[109]

However, when faced with a fundamental right, the supreme court further refined its approach to evaluating claims under the common benefit clause.[110] *Vielleux v. Springer*[111] involved a challenge to Vermont's implied consent law.[112] The plaintiff alleged that the statute violated his right to equal protection under the law guaranteed in the fourteenth amendment and the common benefit clause.[113] The statute imposed the threat of a license sus-

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103. *Id.*

104. State v. Cadigan, 73 Vt. 245, 50 A. 1079 (1901). The court also relied on the fourteenth amendment of the United States Constitution and on the first and fourth articles of chapter one of the Vermont Constitution to strike down the statute. *Id.* at 252-53, 50 A. at 1082.

105. *Id.* at 250, 50 A. at 1081.

106. *Id.* at 252-53, 50 A. at 1082.

107. 110 Vt. 147, 4 A.2d 107 (1939).

108. *Id.* at 161, 4 A.2d at 113.

109. *Id.*

110. Veilleux v. Springer, 131 Vt. 33, 300 A.2d 620 (1973).

111. *Id.*

112. *Id.* at 34, 300 A.2d at 622.

113. *Id.* at 36-37, 300 A.2d at 623.

pension upon motor vehicle operators charged with an offense who withdrew their implied consent to take a chemical test after pleading not guilty in a subsequent criminal proceeding.[114] No threat was imposed against those who withdrew their consent and pleaded guilty.[115] The court stated that:

> It is fundamental that a person accused of a criminal offense has a right to plead not guilty, for only after such a plea may he exercise his rights pertaining to the actual trial of such offense guaranteed in Article Ten of the Declaration of Rights of the Vermont Constitution . . . .[116]

The license suspension applied only to those individuals who exercised their fundamental right to plead not guilty to a criminal charge.[117] The court noted that the right to plead not guilty is as important as the right to equal legislative representation.[118]

Quoting *Reynolds v. Sims*, the Vermont Supreme Court stated that, "[a]ny classification affecting a fundamental right of this stature . . . 'must be carefully and meticulously scrutinized.' "[119] Furthermore, the court stated that, "[u]nless such classification which serves to penalize the exercise of that right can be shown to promote a compelling governmental interest, it is unconstitutional."[120] Because there was no compelling state interest to justify the statute, the court found it unconstitutional.[121]

In *Springer*, the court found that fundamental rights deserve special protection under the common benefit clause. Accordingly, if education is deemed a fundamental right in Vermont and no compelling state interest is shown for the financing system, the Vermont Supreme Court could find the system unconstitutional.

The court more recently held that a Sunday closing law violated the common benefit clause in *State v. Shop and Save Food Markets, Inc.*[122] The court prefaced its decision by saying that its

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114. *Id.* at 39, 300 A.2d at 624.

115. *Id.*

116. *Id.* at 38, 300 A.2d at 623.

117. *Id.* at 40, 300 A.2d at 625.

118. *Id.* (citation omitted).

119. *Id.* (quoting Reynolds v. Sims, 377 U.S. 533, 562 *reh'g denied*, 379 U.S. 870 (1964)).

120. *Id.* (citation omitted).

121. *Id.* at 41, 300 A.2d at 625.

122. 138 Vt. 332, 338, 415 A.2d 235, 238 (1980). A Sunday closing law is one which regulates Sunday business activity. *Id.*

"obligation to examine the statutory classification for rationality is no mere formality. Not every classification in legislation intended to accomplish economic regulation will survive such scrutiny."[123] Furthermore, citing the common benefit clause, the court asserted that "the mere fact of classification by a legislature does not establish, by itself, that the enactment is rationally related to a permissible state purpose."[124]

In *Shop and Save*, the statute in question provided certain exemptions from the Sunday store closing requirement.[125] The court found that the relationship between the classifications and the expressed purpose of the statute was one of "unjustified overinclusiveness."[126] Therefore, the classification was not rationally related to the purpose of the statute.[127] The court looked at what ends were promoted by the classification and rejected the justification that the classification promoted the family ownership of food stores.[128] According to the court, economic discrimination based solely on familial relationships was impermissible.[129] The court also rejected the justification that the classification promoted locally owned businesses.[130] It stated that "[s]uch protectionism, also, is not a permissible state objective."[131] In addition, the concurring justices stated that:

> The whole direction of this act is irrationally and arbitrarily to prefer certain groups over other groups. Such preferences run squarely afoul of our constitution's mandate . . . . Therefore, although this act does not violate the undemanding test of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, we concur in the majority's subtle holding that our state constitution imposes a *more rigorous test*, which this act cannot meet.[132]

The decision in *Shop and Save* is significant to an analysis of the Vermont public school finance scheme for at least two reasons.

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123. *Id.* at 335, 415 A.2d at 236 (citation omitted).
124. *Id.* at 335, 415 A.2d at 237 (citations omitted).
125. *Id.* at 336, 415 A.2d at 237.
126. *Id.*
127. *Id.* at 337, 415 A.2d at 238.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* (citations omitted).
132. *Id.* at 343, 415 A.2d at 241 (Daley & Hill, JJ., concurring) (citations omitted) (emphasis added).

First, there was no fundamental right involved in *Shop and Save* and yet the statute was subjected to a "more rigorous test" than a federal rational basis test.[133] This suggests that even if education is not found to be a fundamental right under the Vermont Constitution, it could still require a more vigorous judicial scrutiny. Additionally, the court specifically rejected the promotion of locally owned businesses as a permissible state objective.[134] In the context of a fundamental right, the promotion of locally owned businesses would be rejected as a permissible state objective. Arguably, if education is a fundamental right, the promotion of fiscal control over local school districts would not be a permissible state objective of the school financing scheme.

The court in *Shop and Save* implicitly acknowledged that the common benefit clause, like the equal protection clause, demands higher scrutiny in some circumstances and not necessarily just in those cases where fundamental rights are at issue.[135] The Vermont financing statute, although perhaps intended to equalize educational opportunity, has not fulfilled that goal. This does not mean that precise mathematical equality in expenditures is required, but the quality of education in each school district should be the same given the court's interpretation of the common benefit clause in *Shop and Save.*

More recently, the supreme court again evaluated the constitutional validity of the Sunday closing law in *State v. Ludlow Supermarkets, Inc.*[136] At the outset of *Ludlow*, the court noted that it was concerned with the "propriety of the legislature's exercise of its general police power, and whether that power has been exercised so as to affect all citizens *equally.*"[137] Acknowledging that legislation is often uneven in impact, the court stated that "[s]uch inequalities are not fatal with respect to constitutional standards if the underlying policy supporting the regulation is a compelling one, and the unbalanced impact is, as a practical matter, a necessary consequence of the most reasonable way of implementing that policy."[138]

The court in *Ludlow* interpreted the common benefit clause to

133. *Id.*
134. *Id.* at 337-38, 415 A.2d at 237-38.
135. *Id.* at 343, 415 A.2d at 241 (Daley & Hill, JJ., concurring).
136. 141 Vt. 261, 448 A.2d 791 (1982).
137. *Id.* at 265, 448 A.2d at 793 (emphasis added).
138. *Id.*

mean that the statutory classifications involved in the Sunday closing law would be allowed if a case of "necessity" could be established.[139] However, the statute's objective was to promote the economic health of small business enterprises and the court found this objective of "favoring one part of the community over another . . . totally irreconcilable with the Vermont Constitution. It is the very kind of benefit prohibited as an improper purpose of [the common benefit clause]."[140] Regarding preferential legislation, the purpose "must be to further a goal independent of the preference awarded, sufficient to withstand constitutional scrutiny."[141]

Even though the court acknowledged that two other named objectives of the statute were legislatively valid (establishment of a common day of rest and energy conservation), it did not accept those purposes, because the state did not demonstrate that they could not be achieved without the statute.[142] Therefore, the court held the statute invalid under the Vermont Constitution.[143]

Thus, under *Ludlow*, the Vermont public school finance system might also be invalidated under the Vermont Constitution. The legislature has not exercised its power so that all children in Vermont schools are treated equally.[144] Furthermore, the unbalanced impact upon property-poor districts and property-rich districts is not "a necessary consequence of the most reasonable way" of financing public schools in Vermont. Finally, local control of school districts is not a "necessity" in Vermont. Local control in effect favors one part of the community over another because property-poor districts cannot exercise fiscal control over school district expenditures in the same way that property-rich districts can. State aid assists property-poor districts in exercising fiscal control but there are still disparities in per-pupil expenditures.[145] Therefore, under the court's interpretation of the common benefit clause in *Ludlow*, the present school finance system would probably not sustain a constitutional challenge.

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139. *Id.* (citation omitted).

140. *Id.* at 268, 448 A.2d at 795.

141. *Id.* at 269, 448 A.2d at 795.

142. *Id.* at 269-70, 448 A.2d at 796.

143. *Id.*

144. *See supra* text accompanying note 68.

145. *Id.*

b. The Proportional Contribution Clause

In addition to the common benefit clause, the Vermont Constitution further provides for equality in the proportional contribution clause of chapter 1, article 9.[146] The Vermont Supreme Court has determined that the proportional contribution clause of this article has the same effect as the equal protection clause of the fourteenth amendment to the United States Constitution,[147] at least concerning taxation statutes.[148] Because the funding of education in Vermont is intimately tied to real property taxation, the proportional contribution clause may offer some protections in terms of equality of educational opportunities. Under a plain reading of the proportional contribution clause, residents of property-poor districts could argue that they are disproportionately burdened by the financing scheme. Because property-poor districts must tax themselves at a higher rate than the property-rich districts to generate equivalent educational funds,[149] their proportional contribution exceeds that of the property-rich districts.

The Vermont Supreme Court has never applied the proportional contribution clause to an educational financing scheme. The state, in support of the present scheme, could argue that the proportional contribution clause only requires statutes to withstand a rational basis test. To date, all supreme court interpretations of the clause have been under a rational basis analysis. However, nowhere has the court indicated that the rational basis test is the *only* level of judicial scrutiny under the proportional contribution clause. In fact, the court has analogized the proportional contribution clause to the equal protection clause which requires multiple levels of judicial scrutiny.[150] Additionally, a constitutional challenge to the educational financing scheme can be distinguished from all prior cases interpreting the proportional contribution clause.

One of the earliest cases in which the court construed the proportional contribution clause was *Barnes v. Dyer*.[151] The court in

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146. VT. CONST. ch. I, art. 9. For the text of this provision, see *supra* note 6.

147. *See, e.g.*, Pabst v. Commissioner of Taxes, 136 Vt. 126, 131, 388 A.2d 1181, 1184, *appeal dismissed*, 439 U.S. 922 (1978); State v. Auclair, 110 Vt. 147, 161, 4 A.2d 107, 114 (1939).

148. *Id.*

149. *See* STATE AID, *supra* note 15, at 5-8.

150. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

151. 56 Vt. 469 (1884).

Barnes stated that "[i]t is everywhere treated as a general constitutional principle that no member of society shall be compelled to contribute more than his proportion. Unless this is so there is no protection against arbitrary injustice in the imposition of taxes."[152] As early as 1884, the court recognized that the proportional contribution clause protects against disproportionate tax burdens.[153]

Referring to the proportional contribution clause, the supreme court later stated that a tax could not be raised unless the purpose for the increase appeared "evident to the Legislature to be of more service to the community than the money would be if not collected."[154] Under the clause, the government expenses should be apportioned equally.[155] From these cases, it is apparent that, historically, the proportional contribution clause has stood for the principle that taxes must be assessed proportionately. Also, taxes must relate to the entire burden cast upon the taxpayer.

In 1939, the Vermont Supreme Court applied the same analysis used in a federal equal protection claim to an assertion that a Vermont statute was repugnant to the proportional contribution and common benefit clauses of the Vermont Constitution.[156] Concerning methods of classification, the court in *State v. Auclair* concluded that the equality clause of the fourteenth amendment and the proportional contribution clause of the Vermont Constitution were, in effect, the same.[157] The court did not elaborate on why it believed the effects of the two constitutional provisions were the same. However, earlier case law reveals that the proportional contribution clause does "not forbid any classification of property for the purpose of taxation, or the adoption of any scheme of taxation, provided that they do not offend the federal Constitution, the equality clause in the one and the uniform [or proportional contribution] clause in the other [the Vermont Constitution] being in effect the same *for such purposes*."[158] In these circumstances, the legislature possesses a wide, although not unlimited discretion.[159]

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152. *Id.*

153. *Id.*

154. Burlington v. Central Vt. Ry., 82 Vt. 5, 10, 71 A. 826, 827 (1909).

155. *Id.*

156. State v. Auclair, 110 Vt. 147, 4 A.2d 107 (1939).

157. *Id.* at 161, 4 A.2d at 113.

158. Clark v. City of Burlington, 101 Vt. 391, 405, 143 A. 677, 683 (1928) (citations omitted) (emphasis added).

159. *Id.*

Addressing the level of scrutiny, the court in *Auclair* established the rule that every presumption is to be made in favor of the constitutionality of a legislative act and that it will not be held unconstitutional without clear and irrefutable proof that it "infringes the paramount law."[160] *Auclair* indicates that the court will show deference to the legislature unless a statute infringes upon a fundamental right. Where a fundamental right is implicated, deference is inappropriate and a court will more closely scrutinize burdens created by a statute.

If opponents of the Vermont financing scheme could show that a more rigorous test than the one in *Auclair* should be imposed under the proportional contribution clause, because education is a fundamental right,[161] the financing system would fail. Under a higher level of scrutiny, the court would not tolerate the disproportionate burden imposed upon the poorer property districts.

More recently, the Vermont Supreme Court reviewed an equal protection challenge to a Vermont gift tax law in *Pabst v. Commissioner of Taxes*.[162] In *Pabst*, the plaintiff claimed, *inter alia*, that two aspects of the gift tax law gave rise to arbitrary discrimination between taxpayers in violation of the equal protection clause of the United States Constitution and the proportional contribution clause of the Vermont Constitution.[163] The court developed a test to apply whenever a person subject to a statutory classification challenges that classification on equal protection grounds and no suspect class or fundamental right is involved.[164] The test requires that a classification must be upheld if it "serves any of the purposes that are conceivably behind the statute in question and that are within the powers of the legislature to pursue."[165] This test is even more deferential than the rational basis test. Under the proportional contribution clause, the court has also stated that legislative classifications may be imposed, when based upon a real and substantial difference, and the classifications are not purely arbitrary or irrational.[166]

Pabst lends further support to the reasoning of *Auclair* that

160. *Auclair*, 110 Vt. at 156, 4 A.2d at 111 (citation omitted).
161. *See infra* text accompanying notes 173-189.
162. 136 Vt. 126, 388 A.2d 1181, *appeal dismissed*, 439 U.S. 922 (1978).
163. *Id.* at 131, 388 A.2d at 1184.
164. *Id.* at 132-33, 388 A.2d at 1184-85 (citation omitted).
165. *Id.* at 133, 388 A.2d at 1185 (citation omitted).
166. *In re* Estate of Eddy, 135 Vt. 468, 472-73, 380 A.2d 530, 534 (1977).

deference is appropriate where no suspect class or fundamental right is involved. Although education was broadly at issue in a recent supreme court case, it did not specifically address whether education implicated a fundamental right. In *Stoneman v. Vergennes Union High School District No. 5*,[167] the plaintiff, the Commissioner of the Department of Social and Rehabilitation Services, was the legal custodian of seven children who were placed in a group home in one of the defendant school districts.[168] The Vermont statute in question was section 830 of title 16 of Vermont Statutes Annotated, which provides that the Department of Social and Rehabilitation Services shall pay the tuition of students who are in its care, but that if there is an insufficient appropriation to cover tuition costs "the per pupil payment shall be reduced uniformly and equitably."[169] The defendants argued that if the statute did not require the plaintiff to pay for the tuition of students under the plaintiff's care, then the unequal burden placed upon communities with group homes within their borders would violate the proportional contribution clause of the Vermont Constitution.[170]

Disagreeing, the court applied a rational basis test and found that the statute was neither arbitrary nor unreasonable.[171] Specifically, the court found that the burden reasonably related to the purpose of treating the students as normal residents of the community.[172]

Although the statute in *Stoneman* concerned education, the case turned on who should pay for the education of children rather than on notions of equal opportunity. Accordingly, *Stoneman* does not stand for the proposition that all challenges to education stat-

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167. 139 Vt. 50, 421 A.2d 1307 (1980).

168. *Id.* at 52, 421 A.2d at 1308-09. The defendant school district, Ferrisburg, did not maintain a high school so it paid tuition to the defendant Vergennes Union High School District for the education of its resident children. *Id.* Vergennes school district incurred tuition costs for the group-home children and looked to Ferrisburg for payment. *Id.* Ferrisburg voted that four of the group-home children were not residents of Ferrisburg and refused to pay their tuition. *Id.* at 52, 421 A.2d at 1309. Vergennes then notified the group home that all seven of the children would be expelled. *Id.*

169. *Id.* at 54, 421 A.2d at 1309. Defendants claimed that because section 824(a) of title 16 of the Vermont Statutes Annotated required each school district to pay the tuition of its residents, by placing students in the group homes, the state had unfairly burdened the defendant school districts. *Id.* at 55, 421 A.2d at 310.

170. *Id.* at 53, 421 A.2d at 1309.

171. *Id.* at 56, 421 A.2d at 1310-11.

172. *Id.* at 56, 421 A.2d at 1311.

utes deserve rational basis scrutiny. Where equality of educational opportunity is implicated, a higher level of scrutiny may be appropriate. Although the Vermont Supreme Court's past interpretation of the proportional contribution clause indicates that deference to the legislature is generally appropriate, the court has recognized that classifications impacting fundamental rights are deserving of more exacting scrutiny. Assuming education is deemed a fundamental right under the education clause, as discussed below, a Vermont court would probably strike down the system as unconstitutional.

c. *The Education Clause*

The Vermont Constitution explicitly mentions the importance of education in chapter II, section 68, the education clause.[173] The Vermont Supreme Court has said that this section imposes a duty on the Vermont Legislature in regard to education that is universally accepted as a "proper public purpose."[174] According to the court, if the principal interest served by an education statute is the general public benefit, the constitution is not violated.[175] The interest of the state "is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."[176] This indicates the high level of concern with education in Vermont.

Furthermore, the mere fact that education is mentioned at all in the Vermont Constitution suggests that the framers believed that the education of Vermont's children was of the utmost importance.[177] Even prior to the admission of Vermont as a state, a legislative enactment provided for the establishment and support of schools and the creation of school districts.[178] In 1869, the Governor of Vermont in his message to the general assembly stated that:

> [T]he State is under [an] obligation to provide free schools for the education of all its children; and from this follows naturally the requirement, that the schools thus provided shall

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173. VT. CONST. ch. II, § 68. For the text of this provision, see *supra* note 7.

174. Vermont Educ. Bldgs. Fin. Agency v. Mann, 127 Vt. 262, 266, 247 A.2d 68, 71 (1968), *appeal dismissed*, 396 U.S. 801 (1969) (citations omitted).

175. *Id.* at 266, 247 A.2d at 71.

176. *Id.* (citation omitted).

177. Education continues to be recognized as important as demonstrated by the compulsory education law. *See* VT. STAT. ANN. tit. 16, § 1126 (1982 & Supp. 1986).

178. R. ROBINSON, VERMONT, A STUDY OF INDEPENDENCE 310 (Spec. ed. 1975).

> be the best of their kind, which can be furnished for the amount of money expended, and that those, for whose benefit they are furnished, shall partake of their advantages.[179]

The recognition of the high value placed on education in Vermont is supported by an early decision of the Vermont Supreme Court.[180] In *Williams v. School District No. 6*, the court stated that the legislature, in accordance with the provision regarding schools in the constitution (referring to the education clause), provided early on for the support of schools at the public expense, and that "it has always been understood to be one of the first and highest duties of the government."[181] The court went on to say that to attain this purpose, it was necessary that a system be devised by which the state would be divided into "such convenient territorial subdivisions as would bring schools within reach of all its inhabitants."[182] The court stated that:

> It was therefore early provided by law that each town should keep and maintain at least one school within its limits, and when all the inhabitants of any town could not conveniently be accommodated at one school, it was made the duty of such town to divide the town into such number of school districts as would be convenient for the inhabitants.[183]

The Vermont Supreme Court in *Williams* recognized the importance of education in Vermont. The court has also stated that "[f]rom the earliest period in this state, the proper education of all children of its inhabitants has been regarded as a matter of vital interest to the State, a duty which devolved upon its government, and which should be fulfilled at the public expense.[184] These recognitions, combined with the historical importance of education in Vermont, the constitutional mandates and the statutory requirements strongly suggest that education is a right deserving of heightened scrutiny in Vermont. As such, the public school finance system requires more than a rational basis to withstand constitutional challenge.

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179. Message of Governor Washburn to the Vermont General Assembly 7 (Oct. 16, 1869) (available at Vermont Law School Library).

180. Williams v. School Dist. No. 6., 33 Vt. 271 (1860).

181. *Id.* at 274.

182. *Id.*

183. *Id.* at 275.

184. *Id.* at 274.

The vital importance of education in Vermont provides one basis for requiring heightened judicial scrutiny. The United States Supreme Court has proposed an alternative test for determining if education is a fundamental right.[185] In *San Antonio Independent School District v. Rodriguez*, the Supreme Court specified that "[t]he key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education . . . . Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[186] The explicit or implicit guarantee of education in the Vermont Constitution[187] indicates that education is a fundamental right in Vermont under the *Rodriguez* test.

Assuming education is a fundamental right, the Vermont public school financing statute would fail under a strict scrutiny test of the common benefit and proportional contribution clauses unless a compelling state interest could be shown. Although it might be argued that local control is a legitimate state interest, it is not a compelling state interest. Therefore, the Vermont public school finance system would fail under the method of analysis provided by the United States Supreme Court in *Rodriguez*.

The preceding historical, textual, and interpretive analysis is one method for evaluating the constitutionality of Vermont's public school finance scheme. The Vermont Supreme Court in *State v. Jewett*[188] acknowledged that another approach to constitutional decisionmaking involves looking at what other states have done.[189] Consequently, other states' equal protection and education clauses will be examined to further the constitutional analysis of the Vermont public school finance system.

2. *Comparative State Constitutions*

Vermont's common benefit, proportional contribution, and education clauses together suggest that education is a right that

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185. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34, *reh'g denied*, 411 U.S. 959 (1973) (citations omitted).

186. *Id.*

187. VT. CONST. ch. II, § 68. At a minimum the clause mandates that schools be maintained or that the state provide an alternative educational system.

188. 146 Vt. 221, 500 A.2d 233 (1985).

189. *Id.* The court acknowledged the use of a "sibling state approach" in state constitutional argument. *Id.* at 227, 500 A.2d at 237. A sibling state is one with a similar constitutional clause. *Id.*

might justify some level of judicial scrutiny higher than rational basis. Under the clauses, the court might invalidate the Vermont public school finance system if: (1) education is a fundamental right or important interest; and (2) local control is rejected as a compelling state interest. In fact, a number of other states have used equal protection and/or education clauses in their constitutions to declare that education is a fundamental right and, therefore, entitled to strict scrutiny in an equal protection analysis.[190]

For instance, in *Washakie County School District Number One v. Herschler*,[191] the Supreme Court of Wyoming held Wyoming's public school finance system unconstitutional because it violated the equal protection clause of the state constitution.[192] In *Washakie*, the plaintiffs' complaint alleged that under the Wyoming Constitution they had a right to a school financing system that provided relatively uniform annual expenditures per pupil for each school district.[193] The plaintiffs claimed that they were denied an equal education opportunity under the established financing system because of unequal per-pupil expenditures.[194]

After equating expenditures with educational opportunity, the Supreme Court of Wyoming found the classification created by the Wyoming financing system suspect because funds were distributed on the basis of wealth or lack of it.[195] The court stated that the Wyoming system failed to provide equal educational opportunity because the tax bases of the school districts and their per-student resources reflected "discordant correlations."[196] According to the court, any system that the legislature adopted could not create a level of spending which was a function of wealth other than the wealth of the state as a whole.[197]

The court stated that providing a school system and financing it are responsibilities of the legislature,[198] subject to judicial review. The court also found Wyoming's foundation program in violation

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190. *See, e.g.*, Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); Horton v. Meskill, 172 Conn. 592, 376 A.2d 359 (1977); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

191. 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

192. *Id.* at 315.

193. *Id.*

194. *Id.*

195. *Id.* at 336-37.

196. *Id.* at 334.

197. *Id.* at 336.

198. *Id.* at 334.

of the Wyoming Constitution because it fell short of raising the level of educational expenditures of poor counties to that of rich counties.[199] Consequently, the court proscribed "any system which makes the quality of a child's education a function of district wealth."[200]

After the *Washakie* court found a suspect wealth classification, it decisively concluded that education is a matter of "fundamental interest of great importance" because of the specific mention of education in the Wyoming Constitution.[201] The constitution contains several provisions with respect to education[202] including section 28, article XXI which provides that "[t]he legislature shall make laws for the establishment and maintenance of systems of public schools which shall be open to all the children of the state and free from sectarian control."[203] The *Washakie* court quoted *Brown v. Board of Education of Topeka*[204] to emphasize the importance of education:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[205]

The method of analysis in *Washakie* is applicable to Vermont for two reasons: (1) Wyoming and Vermont share similar constitutional provisions; and (2) unequal per-pupil expenditures exist in both states. Given the opportunity, the Vermont Supreme Court

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199. *Id.*
200. *Id.* at 336.
201. *Id.*
202. WYO. CONST. art. VII, § 1; art. I, § 23; art. XXI, § 28.
203. WYO. CONST. art. XXI, § 28.
204. Brown v. Board of Educ., 347 U.S. 483 (1954).
205. *Washakie*, 606 P.2d at 333-34 (quoting *Brown*, 347 U.S. at 493).

should adopt a similar view of education as the Supreme Court of Wyoming because of the Vermont Constitution's explicit mention of education, the historical importance of public schools in Vermont, the compulsory nature of education in Vermont, and the traditional high expenditures for education in Vermont.

The education provision in Vermont's Constitution is similar to the corresponding provision in the Wyoming Constitution.[206] Despite a minor language variation—the Wyoming Constitution states that the legislature "shall" maintain an educational system while the Vermont Constitution states that the legislature "ought" to maintain a system—both constitutions manifest the respective states' recognition of the importance of education. Because the Wyoming and Vermont education provisions are similar in scope, the reasoning of the *Washakie* court is persuasive authority for the proposition that the Vermont public school finance system is unconstitutional.

The court in *Washakie* equated expenditures with educational opportunity and found that disparate educational expenditures created a wealth classification.[207] Similarly, the Vermont Board of Education has stated that "wealth and educational opportunity are [clearly] related in Vermont. Students fortunate enough to live in towns with a substantial property tax base attend schools that are able to offer more than students from towns with little tax base. . . ."[208] In other words, the quality of a student's education is determined in part by the wealth of the school district in which that student lives. The result of the differences in spending between relatively poor and relatively rich districts[209] is that the poorer districts have inferior educational resources and reduced educational opportunities.

The *Washakie* court acknowledged that disparate educational expenditures are constitutionally proscribed. Because these same disparities exist in Vermont, the Vermont Supreme Court should similarly find the Vermont system unconstitutional.

Other courts have equated per-pupil expenditures with equal educational opportunity. In *Serrano v. Priest* (*Serrano II*),[210] the

206. *Compare* VT. CONST. ch. II, § 68 *with* WYO. CONST. art. XXI, § 28.
207. *See supra* text accompanying notes 193-206.
208. STATE AID, *supra* note 15, at 7.
209. *See supra* text accompanying note 68.
210. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907

Supreme Court of California described equal educational opportunity in these terms:

> Substantial disparities in expenditures per pupil among school districts cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities. For this reason the school financing system before the court fails to provide equality of treatment to all pupils in the state. Although an equal expenditure level per pupil in every district is not educationally sound or desirable because of differing educational needs, 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. The system before the court fails in this respect, for it gives high-wealth districts a substantial advantage in obtaining higher quality staff, program expansion and variety, beneficial teacher-pupil ratios and class sizes, modern equipment and materials, and high-quality buildings.[211]

Therefore, the court in *Serrano II* found that there is a direct relationship between per-pupil expenditures and quality of educational opportunities afforded.[212]

Another method to measure educational quality is performance on statewide achievement tests. However, the *Serrano II* court believed that testing could not be the only measure of quality, because "such tests do not measure all the benefits and detriments that a child may receive from his educational experience."[213] Nevertheless, the court reasoned that using pupil performance alone to measure educational quality of school districts demonstrates that differences in expenditures result in differences in pupil achievement.[214]

California is not the only state to acknowledge the direct relationship between per-pupil spending and equal educational opportunity. For instance, the Supreme Court of New Jersey in *Robinson v. Cahill*[215] accepted the proposition that equal educational opportunity depends "in substantial measure upon the number of

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(1977).

211. *Id.* at 747-48, 557 P.2d at 939, 135 Cal. Rptr. at 355.

212. *Id.*

213. *Id.*

214. *Id.*

215. 62 N.J. 473, 303 A.2d 273 (1973).

dollars invested, notwithstanding that the impact upon the students may be unequal because of other factors, natural or environmental."[216] Similarly, the Supreme Court of Connecticut found that "equalizing the ability of the various towns to finance education would provide all towns, property-poor and property-rich, with the opportunity to exercise a meaningful choice as to educational services to be offered to students."[217] The court further elaborated that:

> The criteria for evaluating the 'quality of education' in a town include[d] the following: (a) size of classes; (b) training experience and background of teaching staff; (c) materials, books and supplies; (d) school philosophy and objectives; (e) type of local control; (f) test scores as measured against ability; (g) degree of motivation and application of the students; (h) course offerings and extracurricular activities. In most cases, the optimal version of these criteria is achieved by higher per pupil operating expenditures, and because many of the elements of a quality education require higher per pupil operating expenditures, *there is a direct relationship between per pupil school expenditures and the breadth and quality of educational programs.*[218]

The Supreme Court of Arkansas also struck down a public school financing system under that state's constitution in *Dupree v. Alma School District No. 30.*[219] Arkansas, like Wyoming, had a minimum foundation program which was challenged under the state constitution's guarantee of equal protection and the requirement that the state provide a general, suitable, and efficient system of education.[220] The *Dupree* court acknowledged the "undisputed evidence that there are sharp disparities among school districts in the expenditures per pupil and the education opportunities available as reflected by staff, class size, curriculums, remedial services, facilities, materials and equipment."[221]

In *Dupree*, the court found no legitimate state purpose to support the Arkansas system and held that expenditures were deter-

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216. *Id.* at ___, 303 A.2d at 277.
217. Horton v. Meskill, 172 Conn. 615, 635, 376 A.2d 359, 368 (1977).
218. *Id.* at 634-35, 376 A.2d at 368 (emphasis added).
219. 279 Ark. 340, 651 S.W.2d 90 (1983).
220. *Id.* at ___, 651 S.W.2d at 91.
221. *Id.* at ___, 651 S.W.2d at 92.

mined primarily by the tax base of each district.[222] The court further found that the system did not bear a rational relationship to the educational needs of the individual districts.[223] The court stated that educational opportunity should not be controlled by residence because "[s]uch a system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged."[224]

The court rejected the reasoning of other jurisdictions which found no equal protection violation in their financing systems.[225] Those jurisdictions had upheld their systems by finding a legitimate state purpose in maintaining local control.[226]

The Arkansas court rejected the local control reasoning finding that a change in the financing system to provide greater equalization among districts would not cause local control to be reduced.[227] The court relied on the reasoning of *Serrano II*[228] to hold that: "The notion of local control was a 'cruel illusion' for the poor districts due to limitations placed upon them by the system itself. . . . Far from being necessary to promote local fiscal choice, the present system actually deprives the less wealthy districts of the option."[229]

The court in *Dupree* found that the Arkansas system had no rational bearing on the educational needs of the districts even without deciding whether the right to education is fundamental.[230] The court believed that the right to equal educational opportunity is "basic to our society."[231] Furthermore, the court stressed that "[e]ducation becomes the essential requisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights."[232] In support of its conclusion, the court relied on the state's constitutional mandate to maintain a "general, suita-

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222. *Id.* at ___, 651 S.W.2d at 93.
223. *Id.* at ___, 651 S.W.2d at 93.
224. *Id.* at ___, 651 S.W.2d at 93.
225. *Id.* at ___, 651 S.W.2d at 93.
226. *Id.* at ___, 651 S.W.2d at 93.
227. *Id.* at ___, 651 S.W.2d at 93.
228. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).
229. *Dupree*, 279 Ark. at ___, 651 S.W.2d at 93 (quoting *Serrano II*, 18 Cal. 3d at 761, 557 P.2d at 948, 135 Cal. Rptr. at 364).
230. *Id.* at ___, 651 S.W.2d at 93.
231. *Id.* at ___, 651 S.W.2d at 93.
232. *Id.* at ___, 651 S.W.2d at 93.

ble and efficient system of free public schools."[233]

Vermont, like Arkansas, has state constitutional guarantees of equality and education, disparate per-pupil expenditures, and has, at least in other contexts, rejected local control as a legitimate state purpose.[234] Therefore, according to the reasoning in *Dupree*, Vermont's system would also be unconstitutional.

Other states have relied on education clauses to invalidate school financing statutes.[235] The Supreme Court of Connecticut found the Connecticut system of financing public schools unconstitutional.[236] The court declared "that in Connecticut the *right to education is so basic and fundamental* that any infringement of that right must be strictly scrutinized."[237] In *Horton v. Meskill*,[238] the Supreme Court of Connecticut found that wide disparities existed in the amount spent on education by the various towns, resulting primarily from wide disparities that existed in the taxable wealth of the towns.[239] The State of Connecticut distributed aid to local school districts as a flat grant, a reimbursement grant for special education, and as miscellaneous grants.[240] Most of these grants were distributed regardless of a town's ability to finance education.[241]

The court in *Horton* agreed with the trial court that there is a direct relationship between per-pupil school expenditures and the quality of educational programs.[242] The trial court had reasoned that the "variations in money available to different towns produce variations in quality of instruction."[243] The financing system discriminated against students in property-poor towns, because the quality of education they received was lower than in property-rich towns.[244]

The plaintiffs in *Horton* relied upon the Connecticut Constitu-

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233. ARK. CONST. art. XIV, § 1.

234. *See supra* text accompanying notes 122-45.

235. *See, e.g.*, *Dupree*, 279 Ark. 340, 651 S.W.2d 90; Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

236. Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977).

237. *Id.* at 649, 376 A.2d at 373 (emphasis added).

238. 172 Conn. 615, 376 A.2d 359.

239. *Id.* at 633-34, 376 A.2d at 368.

240. *Id.* at 629, 376 A.2d at 366.

241. *Id.*

242. *Id.* at 633, 376 A.2d at 368.

243. *Id.* at 638, 376 A.2d at 370.

244. *Id.*

tion which provides that "there shall always be free public elementary and secondary schools in the State. The general assembly shall implement this principle by appropriate legislation."[245] The constitution further provides that the distribution of the interest from the school funds "shall be inviolably appropriated to the support and encouragement of the public schools throughout the state, and for the equal benefit of all the people thereof."[246] Relying in part on the constitutional provisions the court held that:

> Elementary and secondary education is a fundamental right, that pupils in the public schools are entitled to the equal enjoyment of that right, and that the state system of financing public elementary and secondary education as it presently exists and operates cannot pass the test of 'strict judicial scrutiny' as to its constitutionality.[247]

The Vermont school financing system includes a flat grant[248] like the Connecticut system. However, the Vermont system also includes equalization aid,[249] whereas the Connecticut system did not distribute the majority of state funds on the basis of a town's ability to finance education.[250] Even so, the Connecticut system and the Vermont system are similar because neither equalize per-pupil expenditures throughout the state.[251] If the Vermont Supreme Court adopts the reasoning of *Horton* and finds that low per-pupil expenditures mean low quality of educational programs, then it should similarly invalidate the Vermont system.

Additionally, even though Vermont's education clause alone is not as comprehensive as Connecticut's,[252] Vermont's education and equality clauses together are substantially the same as the Connecticut education clause.[253] Therefore, applying the *Horton* rationale to Vermont demonstrates that equal educational opportunity should be guaranteed in this state.

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245. CONN. CONST. art. VIII, § 1.

246. CONN. CONST. art. VIII, § 4.

247. *Horton*, 172 Conn. at 648-49, 376 A.2d at 374.

248. *See supra* note 65.

249. *See supra* note 66.

250. *Horton*, 172 Conn. at 629, 376 A.2d at 366.

251. *See supra* text accompanying note 68; *Horton*, 172 Conn. at 630, 376 A.2d at 367-68.

252. *Compare* VT. CONST. ch. II, § 68 *with* CONN. CONST. art. VIII, § 4.

253. *Compare* VT. CONST. ch. II, § 68 and VT. CONST. ch. I, art. 7 and ch. I, art. 9 *with* CONN. CONST. art. VIII, § 4.

A California court in *Serrano v. Priest (Serrano I)* found that the state's education financing system violated the state constitution.[254] California's system of distributing state aid was a foundation program.[255] The program consisted of basic state aid (a flat grant to each district of $125 per pupil per year), distributed regardless of the relative wealth of the district, and equalization aid distributed in inverse proportion to the wealth of the district.[256] It should be noted that Vermont also distributes equalization aid in inverse proportion to the wealth of the district but only $100 per pupil in flat grant aid.[257]

The court in *Serrano I* concluded that because the California system established and perpetuated a classification based upon district wealth which affected the "fundamental interest" of education, strict scrutiny applied.[258] The court relied on five factors to determine whether education was a "fundamental interest": (1) its "preserv[ation] [of] an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background"; (2) its "univers[al] relevan[ce] (*i.e.* large numbers of persons benefit from it); (3) the long period of time it affects individuals; (4) the extent to which it "molds the personality of the youth of society"; and (5) the fact that the state has made it compulsory.[259]

The Vermont system, like the California system, distributes a flat grant to each school district and equalization aid based on the relative wealth of school districts.[260] The five factors which the *Serrano I* court relied upon to find that education is a fundamental interest also apply to Vermont. The first four factors are not state-specific. Vermont also satisfies the fifth factor because education is compulsory for certain age groups.[261] Therefore, the Vermont system, like the California system, affects the fundamental interest of education and strict scrutiny should apply in a challenge to the educational financing scheme. Absent any compelling state interests, the system will be unconstitutional.

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254. 5 Cal. 3d 584, 626, 487 P.2d 1241, 1266, 96 Cal. Rptr 601, 618 (1971) [hereinafter *Serrano I*].

255. *Id.* at 592, 487 P.2d at 1246, 96 Cal. Rptr. at 606.

256. *Id.* at 593, 487 P.2d at 1247, 96 Cal. Rptr. at 607.

257. *See supra* note 65.

258. *Serrano I*, 5 Cal. 3d at 614, 487 P.2d at 1263, 96 Cal. Rptr. at 623.

259. *Id.* at 609-10, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19.

260. *See supra* notes 65-66.

261. *See* VT. STAT. ANN. tit. 16, § 1126 (1982 & Supp. 1986).

In *Serrano I*, local control was not a compelling state interest because "[n]o matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts."[262] Hence, given the Vermont Supreme Court's belief that local control is not a legitimate state interest in some circumstances,[263] it certainly would not be a compelling state interest either.

Although a number of states have invalidated their public school finance systems upon independent state constitutional grounds,[264] some states have upheld systems similar to the Vermont system.[265] For instance, the supreme courts of Arizona and Oregon found that their school financing systems did not violate their respective constitutional provisions requiring a "uniform" system of schools.[266] Both courts rejected the argument that "uniform" means that the amounts available for providing educational opportunities in every district must approach equality.[267] However, the Arizona court held that the Arizona Constitution established the right to a basic education as a fundamental right.[268]

Similarly, the Supreme Court of Idaho rejected a challenge to that state's school finance system in *Thompson v. Engelking*.[269] The Idaho Constitution provides that "it shall be the duty of the legislature to establish and maintain a general, uniform and thorough system of public, free common schools."[270] The Idaho court held that the Idaho Constitution did not establish education as a basic fundamental right and did not dictate a central state system of equal expenditures per pupil.[271] To distinguish *Thompson*, the Vermont Supreme Court could reason that "competent" does not

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262. *Serrano I*, 5 Cal. 3d at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

263. *See supra* text accompanying notes 122-45.

264. *See, e.g.*, Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); *Serrano II*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 472 U.S. 907 (1977); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977).

265. *See, e.g.*, Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Board of Educ. v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 358, 453 N.Y.S.2d 643 (1982); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979); Olsen v. State of Oregon, 276 Or. 9, 554 P.2d 139 (1976).

266. *Shofstall*, 110 Ariz. 88, 515 P.2d 590; *Olsen*, 276 Or. 9, 554 P.2d 139.

267. *Shofstall*, 110 Ariz. at ___, 515 P.2d at 592; *Olsen*, 276 Or. at ___, 554 P.2d at 148.

268. *Shofstall*, 110 Ariz. at ___, 515 P.2d at 592.

269. 96 Idaho 793, 537 P.2d 635.

270. IDAHO CONST. art. IX, § 1.

271. *Thompson*, 96 Idaho at ___, 537 P.2d at 647.

mean the same as general, uniform, or thorough and that the common benefit and proportional contribution clauses require equality in terms of per-pupil expenditures. The court could also find that the Vermont Constitution establishes education as a fundamental right because of the high degree of importance placed on education in Vermont.

Based on the foregoing analysis, the Vermont Supreme Court could find that the Vermont system of financing public schools violates the education clause and equality clauses of the Vermont Constitution. The education clause places a duty upon the legislature to pass laws to carry out the object of maintaining a competent number of schools in each town for the convenient instruction of youth.[272] Although the education clause alone might suggest that the *number* of schools be competent and not necessarily that the *schools* themselves be competent, the common benefit and proportional contribution clauses also suggest that equality of educational opportunities is required.[273]

III. Alternatives To The Vermont System

The Vermont Legislature must decide before July 1, 1987, if it will adhere to the existing formula for distributing state aid to education or whether it will adopt one of the numerous alternative reform proposals.[274] One proposal which has received a great deal of attention lately is a foundation plan.[275] Recently, a fifteen-person State Aid and Property Tax Commission appointed by Vermont's Governor Kunin recommended to the legislature a "new" foundation method for distributing state aid to local school districts.[276] Actually, foundation plans are not new to Vermont.[277]

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272. Vt. Const. ch. II, § 68.

273. Vt. Const. ch. I, art. 7.

274. Among the alternative proposals are: (1) full state funding based on a statewide property tax; (2) school district boundary realignments to equalize assessed valuations of real property; (3) removal of commercial and industrial property from local taxation and taxation of such property at the state level or taxation of such property at different rates; (4) district power equalizing which guarantees that for a given level of tax effort, all communities will be guaranteed an equal level of spending through a combination of local and state revenues; (5) a voucher system whereby a system of grants is provided by the state to families or to the school of their choice to cover all or part of the cost of tuition at that school; (6) a minimum foundation program; (7) a guaranteed tax base designed to assure that every district can act as though it had a minimum tax base; and (8) a combination of more than one of the above. *See* Financing Report, *supra* note 48, at 32-58.

275. *See infra* text accompanying notes 281-285.

276. Bluhm, *supra* note 10, at 53-54.

277. Kaagan & Luciano, *supra* note 11, at 14.

Prior to the adoption of the *Miller Formula*,[278] Vermont instituted a foundation plan which set minimum school spending levels and distributed aid based on relative property wealth.[279] The goal of that plan was to equalize tax burdens among Vermont towns to encourage equal spending and thereby result in equal educational opportunity for all Vermont public school students.[280]

The proposed foundation plan assumes that it costs $3,400 to educate a student in Vermont.[281] The plan assures that if each Vermont town taxes its property at a $1.25 rate, it will have $3,400 per pupil available to it.[282] If a town is unable to raise $3,400 per pupil at the $1.25 rate, state aid will provide the difference.[283] If a town taxes at a rate of $1.00 per hundred and can raise more than $3,400 per pupil, it must remit to the state the excess over $3,400 which is then redistributed to property-poor towns.[284] One proposal also calls for a local option which would allow towns to choose between a sales and/or rooms and meals tax instead of a property tax to determine funds for education.[285]

Although the proposed foundation plan is easy to understand, it is difficult to decide on an appropriate education financing system for Vermont because of the conflicting objectives of various policy makers.[286] For instance, in August 1985, the Vermont State Board of Education adopted nine state-aid principles to guide state-aid reform.[287] According to the Board of Education, the overall goal of state aid is to guarantee equal access to a quality education for all of Vermont's students.[288] One problem with such a goal is the difficulty in measuring if the goal is reached. If educational quality is linked to school spending in Vermont, then a constitutionally permissible system must provide for equal school spending between school districts and some sort of system for monitoring educational opportunity.

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278. *See supra* text accompanying notes 50-52.
279. Kaagan & Luciano, *supra* note 11, at 14.
280. *Id.*
281. Bluhm, *supra* note 10, at 53.
282. *Id.*
283. *Id.*
284. *Id.* at 54.
285. Chase, *Dean's Forum*, Vt. Law Sch. F., Feb. 13, 1987, at 8, col.2.
286. *See* FINANCING REPORT, *supra* note 48, at 32-58.
287. VT. ST. BD. OF EDUC., STATE AID PRINCIPLES TO GUIDE STATE AID REFORM 1-5 (Undated).
288. *Id.*

The newly instituted Public School Approval Standards[289] allow the state to compare schools in terms of resources available to a school and the relative success of a school in meeting the standards.[290] One study indicates that higher spending districts are much more likely than lower spending districts to meet or exceed a greater number of standards.[291] This study shows that "there is an important association in Vermont between the resources devoted to a child's schooling and the quality of education that he or she receives."[292] If there is a link between per-pupil expenditures and educational opportunity, a court would more likely strike down any statute which does not equalize per-pupil expenditures and educational opportunity.

Although school quality may be a consequence of many influences, a step toward equalizing educational opportunity is to require that school districts have an equal revenue ability to provide students with similar opportunities for learning. Because of unequal property wealth between school districts in Vermont, the state must provide equalization aid in one manner or another so that per-pupil expenditures are equalized throughout the state. Of course other methods are available to fund school districts. For instance, the revenues from a statewide sales or property tax could be distributed on an equalized per-pupil basis.

In enacting the *Morse-Giuliani* Legislation, the Vermont Legislature set forth several objectives for a state-aid to education program.[293] The same issues raised by these objectives must be consid-

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289. *See* VT. STAT. ANN. tit. 16, §§ 164-165 (1974 & Supp. 1986).

290. Brewer & Johnson, *Educational Quality and School Spending*, 11 VT. EDUC. 2, 2 (1986).

291. *Id.*

292. *Id.*

293. The objectives are:

> (1) It should protect the ability of each school district to establish its own level of educational spending; (2) It should grant an aid amount to each district, based on its enrollment, in order to assist in a portion of the district's spending; (3) It should provide equalization aid that improves the ability of each low capacity district to support an average level of educational spending without unduly straining its tax resources; (4) It should be sensitive to the capacity of each school district to raise revenue for schools through the property tax; (5) It should be sensitive to the capacity of the typical taxpayer in each district to pay from his income the property taxes that become due on a residence of a given value; (6) It should conserve state resources by reducing the financial incentive for spending beyond an average level; (7) It should grant aid in amounts that do not fluctuate greatly from year to year; (8) It should ncourage periodic reappraisal of local property values to ensure that

ered by the legislature in its evaluation of alternative methods to finance education. Some of these issues include: (1) local control versus state control of funding; (2) property tax relief; (3) methods of distributing aid; (4) real property appraisals; and (5) methods of evaluating educational quality and equal educational opportunity.

The ultimate decision regarding the method of state aid distribution is in the hands of the legislature. In enacting any new school finance system, the legislature must ensure that the system results in equal educational opportunity.

CONCLUSION

The current method of distributing state aid to school districts in Vermont is scheduled to expire on July 1, 1987. The *Morse-Giuliani Formula* is complicated, and considers relative school district wealth and income, as well as spending. Unfortunately, the portion of the formula which is entitled "equalization aid" does not live up to its goal. There are disparities in per-pupil expenditures in Vermont because of the relative differences in real property wealth throughout the state. State aid is not unlimited. Therefore, as school spending increases a greater burden is placed on school districts to generate funds locally through increased property tax rates. The net result of the unequal expenditures per pupil is that those children who reside in the relatively poor districts are receiving an inferior education.

The Vermont public school finance system could be challenged on three separate grounds. Under the federal equal protection clause, the system would probably be upheld if the Vermont Supreme Court adopts the holding of the United States Supreme Court in *Rodriguez*. However, since its decision in *Rodriguez*, the United States Supreme Court has increasingly recognized the significance of education in society and a number of states have found education to be a fundamental right.

Accordingly, the Vermont Supreme Court could look to the Vermont Constitution and strike down the Vermont system under the common benefit, proportional contribution, and education

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tax equity within school districts is maintained; (9) It should not impose undue administrative costs; and (10) It should not require the state treasurer to borrow excessive sums in anticipation of tax receipts.

See legislative history accompanying VT. STAT. ANN. tit. 16, § 3441 (1982).

clauses. The Vermont education clause suggests that education is a fundamental or important interest and the common benefit and proportional contribution clauses require equal educational opportunity for all Vermont students. Taken together, the provisions of the Vermont Constitution strongly suggest that education should be afforded close judicial scrutiny by the Vermont Supreme Court. Furthermore, a number of states have already held that education is a fundamental right or that equal educational opportunities are required by the education and equality provisions of their state constitutions.

Vermont's newly instituted Public School Approval Standards represent a significant step toward measuring and achieving educational equality in Vermont. The standards could be used to measure the correlation between per-pupil expenditures and educational opportunity throughout the state. Nonetheless, it is up to the Vermont Legislature to decide upon the appropriate method of providing funds to local school districts to provide equal educational opportunity. The ultimate goal must be to guarantee that Vermont students receive the same level of education regardless of the wealth of the school districts where they reside.

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