

## ARTICLE

# ADEQUACY IN EDUCATION: AN ANALYSIS OF THE CONSTITUTIONAL STANDARD IN VERMONT

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### INTRODUCTION

In 1987, in an effort to provide an equitable distribution of the new infusion of state funds to aid local school districts, Vermont adopted the Foundation Formula for state aid to education.<sup>1</sup> In the same year, a wave of education finance reform litigation began sweeping across the nation.<sup>2</sup> The new wave of finance cases used state constitutional provisions as the basis for alleging impermissible funding inequity or inadequacy on behalf of low spending school districts. States as diverse as Kentucky, New Jersey, Montana, and Texas have since seen their state supreme courts define and require minimal levels of state support for local education.<sup>3</sup>

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1. Foundation Formula Act, 1987 Vt. Laws 261 (codified as amended at VT. STAT. ANN. tit. 16, §§ 3441-3449 (1989 & Supp. 1993)). The Foundation Formula is designed to provide aid to school districts whose ability to pay for education is less than their educational needs. Theoretically, under a pure foundation formula, if a community's ability to pay were greater than its needs, it would receive no aid in a given year. See Peter Bluhm, *Understanding State Aid*, VT. AFF., Winter 1987, at 3 (discussing the factors leading to the legislative decision to implement a foundation formula for distribution of state aid to education); William Mathis, *Myths and Choices*, VT. AFF., Winter 1987 at 9 (same).

2. See, e.g., Richard J. Stark, *Education Reform: Judicial Interpretation of State Constitutions' Education Finance Provisions—Adequacy vs. Equality*, 1991 ANN. SURV. AM. L. 609 (providing an appendix with a summary of decisions and constitutional provisions for every state); William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639 (1989); Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517 (1991).

3. PATRICIA G. ANTHONY, CASE CITATIONS IN SCHOOL FINANCE 28-33 (Educational Pol'y & Admin., U. Mass. (Amherst) 10th Series No. 5, 1992); see William E. Thro, Commentary, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 Educ. L. Rep. (West) 19, 19 n.3 (1993) (citing challenges brought in more than half the states as of Feb. 1993).

In fact, almost thirty states have recently become embroiled in school finance litigation. The *New York Times* reported in September 1992 that twenty-three states were at that time involved in equity or adequacy lawsuits.<sup>4</sup> By June 1993, the number had risen to at least twenty-eight.<sup>5</sup> The finance cases in some states have resulted in bold, systemic reform legislation,<sup>6</sup> while other states have made less progress toward real change.<sup>7</sup>

The purpose of this article is to establish the viability of the Vermont Constitution's Education Clause as a standard for educational adequacy so that policy makers can assess fiscal or programmatic reform proposals in light of the state's obligations to all students. The article begins with a discussion of the equity and adequacy records in Vermont and proceeds to discuss the importance of establishing state adequacy standards. The article then focuses upon the specific question of whether Vermont must create an educational system which insures a level of adequacy for all students regardless of where they live within the state. Textual and historical analyses are employed, as are comparisons between Vermont and the leading states tackling this issue. Finally, the article explores the policy implications and alternatives which arise as a result of finding that Vermont has an obligation to insure a level of adequacy for all students throughout the state.

## I. BACKGROUND

### A. *The Equity Record in Vermont*

Vermont has demonstrated a strong fiscal commitment to education, yet arguably it has been unable to provide equity for all students regardless of where they live.

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4. William Celis 3d, *23 States Face Suits On School Funds*, N.Y. TIMES, Sept. 2, 1992, at B7.

5. *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 519 n.7 (Mass. 1993).

6. Bert T. Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 HARV. J. ON LEGIS. 367, 376 (1991).

7. Lonnie Harp, *Texas Lawmakers Again Adjourn Stalled Over Finance*, EDUC. WK., Dec. 16, 1992, at 17; Mark G. Yudof, *School Finance Reform: Don't Worry, Be Happy*, 10 REV. LITIG. 585, 593-98 (1991) (detailing the Texas experience).

## 1. The Growth in State Financial Support

In Vermont, the Foundation Formula has been accompanied by significant increases in education spending. Even before the Foundation Formula was adopted, education spending at all levels of government had begun to increase dramatically. Between 1983 and 1992, local tax revenues devoted to education increased by 148%, while state tax revenues devoted to education grew by 102%, and federal tax revenues designated for educational purposes increased by 97%.<sup>8</sup>

During the same period, public school enrollment in Vermont grew by only 4.6% and the Consumer Price Index increased by less than 40%.<sup>9</sup> In 1990, the Education Commission of the States ("ECS") reported that Vermont's increase in total state spending for education since 1982-83 had been surpassed by only two states, Connecticut and Rhode Island.<sup>10</sup> Increases in local spending for education had been higher in only three states, South Carolina, Virginia, and Nevada.<sup>11</sup> Vermont ranked second to Connecticut in combined local and state percentage growth in education spending over the period analyzed by the ECS.<sup>12</sup>

Vermont has achieved these results through considerable efforts. The Education Testing Service reported that in 1988 Vermont ranked near the top among the states in per pupil expenditures as a percent of personal income.<sup>13</sup> Only five states surpassed Vermont's rate of 4.8%.<sup>14</sup> In 1989-90, Vermont ranked twelfth among the states in average per pupil expenditures,<sup>15</sup> and rose to eighth when the per pupil expenditure figure was adjusted for cost of living.<sup>16</sup>

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8. VERMONT DEP'T OF EDUC., *THE CONDITION OF EDUCATION 1992*, at 32 (1992) [hereinafter *CONDITION 1992*].

9. *Id.*

10. JOHN AUGENBLICK ET AL., *EDUCATION FINANCE IN THE 1990S* 17 (1990).

11. *Id.*

12. *Id.*

13. PAUL E. BARTON, *THE STATE OF INEQUALITY* 6 (1991).

14. *Id.* at 28. However, comparisons based on "per pupil spending" may be misleading, especially when used to compare states, because there is no common definition of the term.

15. *Id.* at 4.

16. *Id.* at 5.

## 2. Disparities between Rich and Poor Districts

While these figures reflect a considerable statewide commitment to education, there are indications that Vermont has not been able to provide equity for students throughout the state. The highest per pupil spending in Vermont occurs in school districts with the highest equalized grand lists per average daily membership ("ADM"),<sup>17</sup> with comparatively lower effective tax rates,<sup>18</sup> and with comparatively lower tax burdens.<sup>19</sup> On average, the tax burden, defined as the percent of after-tax adjusted gross income ("AGI") which goes to local school taxes paid by residents, is 30% to 40% higher for the lowest income towns than for the highest income towns.<sup>20</sup>

Student equity, as measured by the increasing gap between spending in high and low spending school districts, has diminished since 1985. The current expense<sup>21</sup> per ADM in 1985 ranged from a low of \$1865 to a high of \$4820.<sup>22</sup> In 1991, the

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17. ADM is statutorily defined as "the average enrollment of pupils who are legal residents of the district attending public schools . . . during the annual census period. The census period consists of the first 40 days of the school year in which school is actually in session." VT. STAT. ANN. tit. 16, § 3441(1) (1989). A recent comparison of state aid formulas in New England, published by the Federal Reserve Bank of Boston, shows that Vermont "goes a long way toward equalization" given "fairly pronounced tax base disparities." The study concludes: "Vermont could achieve greater equity in spending, should it wish to do so, by adding more dollars to the school aid pool; its aid commitment is currently in the low to middle range among the New England states." Katharine L. Bradbury, *Equity in School Finance: State Aid to Local Schools in New England*, NEW ENGLAND ECON. REV., Mar./Apr. 1993, at 25, 40.

18. VERMONT DEPT OF EDUC., SCORE—90: A SCORECARD FOR SCHOOL FINANCE 16 (1990).

Effective tax rates are similar to the tax rates that are set by the selectmen in each town. The difference is that effective tax rates are calculated using the state's "equalized" grand list as opposed to a local taxing grand list. Since the equalized grand list for each district represents 1% of the market value of taxable property, the resulting tax rates are comparative across districts. This would not be the case when using actual tax rates as these rates are computed using grand lists that reflect varying degrees of actual market value.

*Id.* at 16 n.11.

19. VERMONT DEPT OF EDUC., SCORE—91: A SCORECARD FOR SCHOOL FINANCE 15 (1992) [hereinafter SCORE—91].

20. *Id.* at 14.

21. "Current Expenditure" is statutorily defined to include all expenditures in a school district during a given year not including those for capital debt, transportation, and special education, minus income from tuition, federal and state funds, except federal impact aid, and state general aid. VT. STAT. ANN. tit. 16, § 3441(8) (1989).

22. SCORE—91, *supra* note 19, at 6.

highest spending district was investing \$6968 per student, but the lowest spending district had increased its spending to just \$2043.<sup>23</sup> This is an annual spending disparity of close to \$100,000 per classroom of twenty students.

The Vermont Department of Education's statistical unit prepared a draft report for a legislative study committee on September 2, 1992 showing that the top spending 5% of school districts spent twice as much per student on salaries and benefits to support instruction and administration as the bottom 5%.<sup>24</sup> Yet the tax effort of the two groups is approximately the same.<sup>25</sup>

Despite the growth in state spending, the gap between high and low spending districts in Vermont has grown to proportions at least as large as those found in some states which have already been forced to restructure their education finance systems by judicial decree.<sup>26</sup> Furthermore, the state share of education spending in Vermont has actually decreased. In 1992, less than 28% of the funds required to operate local schools in Vermont came from state sources.<sup>27</sup> As recently as 1987, the state share in Vermont was over 33% (still low by national standards), and the 1982 level of 35% has not been matched in a decade.<sup>28</sup>

### 3. Political Constraints on Increasing State Aid

Continued political support for increasing the state funding share for education has been difficult to obtain in the present recessionary period. As the total amount of money available for state aid to education has leveled and then been reduced, fewer school districts have received formula aid. In 1992-93, only ninety-one of the 254 school districts eligible to receive state aid

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23. *Id.*

24. Vermont Dep't of Educ., *Criteria for a Vermont Finance System* (1992) (unpublished draft for discussion purposes only, on file with the author) (hereinafter *Finance Criteria*) (statistical profile of all districts based on per student spending by district).

25. *Id.* The tax effort is measured in terms of effective tax rates and after-tax AGI devoted to school taxes.

26. *See, e.g., Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 143 (Tenn. 1993); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 198-99 (Ky. 1989).

27. *CONDITION 1992*, *supra* note 8, at 33.

28. *Id.* This is the proper context within which to view the increase in education spending during the 1980s. *See supra* notes 8-16 and accompanying text. Implicitly, this means that the growth in education spending during this period has been disproportionately shouldered by the local school districts.

actually received funds based on formula determined need.<sup>29</sup> Other communities either received no aid, or received aid based on counter equalizing statutory entitlements to minimum aid or maximum loss funds.<sup>30</sup> Legislative representatives of these communities have little incentive to vote increases in state aid to education unless those increases can be large enough to benefit their school districts.<sup>31</sup>

### B. The Adequacy Record in Vermont

Spending disparities in Vermont school districts raise questions of adequacy as well as equity. Theoretically, differences between low and high spending school districts might be tolerated if students in all areas of the state were receiving an education which was adequate to meet the goals of the state as a whole. However, there is a problem with defining "adequacy."

A definition of adequacy could be expressed in terms of a

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29. VERMONT DEPT OF EDUC., 93—PAYS: FY93 GENERAL STATE AID PAYMENT SCHEDULE 1-6 (1992) [hereinafter 93—PAYS]. This figure is arrived at by adding up the "gold," "maximum," and "minimum" school districts and subtracting it from the total number of school districts.

The Foundation Formula is designed to provide aid to school districts whose ability to pay for education is less than their educational needs. Theoretically, if a community's ability to pay were greater than its needs, it would receive no aid in a given year.

However, to cushion the blow to communities with changing grand lists or decreasing numbers of students, the state aid statutes provide for "minimum aid" and "maximum loss" payments. VT. STAT. ANN. tit. 16, § 3497 (1989 & Supp. 1992). Therefore, according to the formula, only those communities which have abilities to pay greater than 150% of their need are ineligible to receive aid. *See id.* § 3491. Even these communities are sheltered by maximum loss provisions which insure that they will lose no more than \$100 per student per year, as calculated by using a weighing system for secondary school students and students in sparsely settled areas. *See id.* § 3497(f).

Legislative adjustments to the foundation tax rate are made each year in order to fit the desired total state aid appropriation to the requirements of the formula. This tax rate is used to determine each community's foundation levy, or ability to pay. *Id.* §§ 3493(a), 3495.

The result has been that smaller numbers of communities have been the beneficiaries of aid determined by a foundation formula which uses an objective foundation tax rate. Larger numbers of communities have been the recipients of minimum or maximum loss funds. The poorest communities, whose formula determined needs outweigh their ability to pay, have been left to share a smaller total sum of money as total state aid allocations have declined and minimum aid and maximum loss entitlements have taken a larger percentage of the total allocation.

30. 93—PAYS, *supra* note 29, at 1-6.

31. Benjamin L. Huffman, State Aid To Education and Vermont Legislative Politics 12-13, 24-25 (Dec. 1978) (unpublished manuscript, on file with Vermont State Law and Documents Library, Montpelier, Vt.).

minimum level of proficiency in certain basic matters.<sup>32</sup> Because of the difficulty inherent in defining a concept as nebulous as adequacy in a field with imperfect measurement systems, it is necessary to evaluate various results in order to determine whether inadequacy is present anywhere in the state. Vermont has been in the forefront of efforts to provide innovative assessment programs to enable Vermont citizens to compare the results of local schools.<sup>33</sup> The Vermont process for assessing writing and math skills in grades four and eight has been followed with interest by other states, but to date little reliable data have been produced by the project.<sup>34</sup> Reliable assessment of results in Vermont schools would provide needed information on the extent to which a given adequacy standard is being met.

However, if an adequate school is defined as one which meets state standards for school approval,<sup>35</sup> Vermont schools that fail to meet such standards are providing an inadequate education.<sup>36</sup> Only fifty-four of Vermont's 359 public schools achieved full approval under the public school approval process by September 1, 1992.<sup>37</sup> Another 246 schools were given only conditional approval, meaning that completion of State Board of Education approved plans for improvement are a prerequisite to full

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32. See *infra* notes 192 & 200 and accompanying text (explaining this definition of adequacy in West Virginia and Kentucky).

33. Robert Rothman, *Large 'Faculty Meeting' Ushers In Pioneering Assessment in Vermont*, EDUC. WK., Oct. 10, 1990, at 1; Edward B. Fiske, *But Is the Child Learning? Schools Trying New Tests*, N.Y. TIMES, Jan. 31, 1990, at A1.

34. RAND INST. ON EDUC. AND TRAINING, NATIONAL CTR. FOR RESEARCH ON EVALUATION, STANDARDS, AND TRAINING, THE RELIABILITY OF SCORES FROM THE 1992 VERMONT PORTFOLIO ASSESSMENT PROGRAM 1 (1992) (Interim Report).

35. Public school approval standards govern general academic requirements, school climate, graduation requirements, subject area requirements, assessment of student performance, school leadership, staff development, facilities, health services and student records. VERMONT DEPT OF EDUC., MANUAL OF RULES AND PRACTICES, 2 CODE OF VERMONT RULES Rules 2100-2195 (1992) (adopted by Vt. Bd. of Educ. Mar. 17, 1987, effective Apr. 6, 1987) [hereinafter VT. BD. OF EDUC. RULES].

36. See, e.g., Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 735 (Idaho 1993). The court concluded in part:

Should the plaintiffs be able to prove that they cannot meet the standards established by the State Board of Education . . . with the money provided under the current funding system they will have presented an apparent prima facie case that the State has not established and maintained a system of thorough education.

*Id.*

37. Finance Criteria, *supra* note 24, at 1c.

approval.<sup>38</sup> Therefore, 305 out of 359 public schools fail to provide an adequate education to their students, according to this definition of adequacy.

If adequacy is defined as the statutorily set foundation level of spending,<sup>39</sup> many schools also fail to provide an adequate education. In 1990-91, an analysis of 206 elementary schools showed that 51% of those schools spent less than the foundation amount per student.<sup>40</sup> The same study revealed that 81% of the poorest 20% of school districts spent less than the foundation amount.<sup>41</sup> Meanwhile, only 17% of the richest 20% of school districts spent less than the foundation amount.<sup>42</sup>

Still other indicators, the dropout level and the remedial needs level, point to potential inadequacy in the Vermont school system. Many if not all of the 17.5% of Vermont nineteen year olds who dropped out of school in 1990<sup>43</sup> might argue that their educational needs have not been met adequately. Moreover, more than half of the students currently in school and determined to be eligible for remedial services through criteria established by the Federal Chapter 1 program do not receive the services for which they qualify.<sup>44</sup>

Another definition of adequacy could be derived from the measures of student achievement in relation to particular factors. While far more could be learned and understood about the relationship between spending levels and student achievement, some national studies indicate that there are correlations between student achievement and the availability of instructional materials.<sup>45</sup> As more research is conducted on the impact of teachers'

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38. *Id.*; VT. BD. OF EDUC. RULES, *supra* note 35, at Rules 2120-2128.

39. The foundation cost per student is that level of spending which "would allow a typical school district to provide each of its elementary pupils with an education meeting the requirements of the state board for approval of public schools." VT. STAT. ANN. tit. 16, § 3492 (1989).

40. SCORE—91, *supra* note 19, at 16.

41. *Id.*

42. *Id.*

43. CONDITION 1992, *supra* note 8, at 20 (year of the most recent statewide dropout study).

44. *Id.* at 8.

45. BARTON, *supra* note 13, at 30.

salaries<sup>46</sup> and other factors on student achievement, a definition of adequacy will be more accessible.<sup>47</sup>

Vermont's school funding equity and adequacy problems are not unique. The numerous challenges to state funding mechanisms in states all over the country are evidence of the breadth of these problems.<sup>48</sup> Vermont has not had such a challenge, and may not experience one in the near future. Even if Vermont is not confronted with an equity or adequacy lawsuit, the state should pay more attention to these questions.

In particular, Vermonters should face the question of adequacy. The threshold question in any state with regard to adequacy is whether the state constitution ensures a specific level of education for all students regardless of where they live. Establishing an adequacy standard that is constitutionally required will provide essential guidance in resolving questions of equity between Vermont's diverse school districts.<sup>49</sup>

### *C. The Importance of State Adequacy Standards*

#### 1. The Lack of Federal Standards

Determining whether a state has an adequacy standard with regard to education is important because no such standard has yet been articulated at the federal level. The United States Constitution, unlike the constitutions of each of the states, does

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46. In Vermont, the average teacher salary by town ranges from a high of \$43,958 in South Burlington to a low of \$21,515 in Norton. VERMONT DEPT OF EDUC. AND VT. LEGISLATIVE COUNCIL, A STUDY OF FACTORS INFLUENCING TEACHER SALARIES IN VERMONT 6 (1993). As might be expected, there is a high statistical correlation between teacher salaries and cost per pupil. *Id.* at 9, 11. The statistical correlation between teacher salaries and median income in school districts is not as strong, but the relationship still exists. *Id.*

47. See, e.g., Martha Minow, *School Finance: Does Money Matter?*, 28 HARV. J. ON LEGIS. 395 (1991); Charles S. Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401 (1991); Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991); Richard J. Murnane, *Interpreting the Evidence on "Does Money Matter?"*, 28 HARV. J. ON LEGIS. 457 (1991); Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991).

48. See *supra* notes 2-3 and accompanying text.

49. As one recent commentator explained: "[A]n equal funding rule would only be justified where the poorly-financed schools are clearly inadequate. So, ironically, an equal funding rule would not allow a decisionmaker to avoid evaluating the educational adequacy of a school system." Stark, *supra* note 2, at 615.

not contain an education clause. Early challenges to school funding inequities which were brought pursuant to federal constitutional claims were therefore based on equal protection theories.<sup>50</sup>

*San Antonio Independent School District v. Rodriguez* held that the Equal Protection Clause of the Fourteenth Amendment does not establish a federal constitutional right to equal school funding.<sup>51</sup> The *Rodriguez* Court implied that an adequacy standard might be found in the Federal Constitution, but it did not define that standard. Instead, it noted that it had not been shown by the plaintiffs that the Texas school finance system "fail[ed] to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."<sup>52</sup> This statement has been interpreted by constitutional scholars as an implicit definition of education as "adequate education."<sup>53</sup> Still, no federal court has yet attempted to define minimally adequate education under the Federal Constitution.<sup>54</sup>

## 2. The Role of State Constitutional Adequacy Standards

State constitutions do contain education provisions, and state legislatures and supreme courts have begun to define minimally adequate educational standards. When the definition of adequacy is made the cornerstone of a legal opinion on school funding or a legislative reform package, the policy implications are profound. Reliance on adequacy standards as guides to reform serves three important purposes.

First, adequacy standards allow states to target the neediest students, regardless of where they live. In contrast, an equality

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50. 2 WILLIAM D. VALENTE, *EDUCATION LAW: PUBLIC AND PRIVATE* § 20.22 (1985).

51. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973).

52. *Id.* at 37.

53. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 831 (1985); *see also*, *Skeen v. Minnesota*, No. C5-92-677, C7-92-678, slip op. at 4 (Minn. Aug. 20, 1993) (The court found a fundamental right to education under the Minnesota Constitution, but rejecting a challenge to the state school funding mechanism, in part because "unlike many cases in the other states, this case never involved a challenge to the adequacy of education in Minnesota. In fact, the parties conceded that all plaintiff districts met or exceeded the education requirements of the state.").

54. Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 327 n.88 (1991).

standard alone does not answer the question of how to allocate funds within districts. Second, adequacy standards allow policy makers to avoid a common response to equality claims—that of leveling down. In order to meet an equality standard, for example, a state might simply find ways to cap spending in high spending districts in order to bring them closer to spending levels in low spending districts. However, when this happens, nothing has been achieved for the neediest districts. Third, adequacy standards are more readily definable in outcomes terms. While input measures only guarantee minimum funding, regardless of the quality of education purchased by that minimum level of funding, using outputs as measures guarantees certain levels of education.<sup>55</sup>

The search for adequacy standards also has been growing for strategic reasons. It has been hard for litigants to prevail in cases involving equity claims in part because courts have been reluctant to apply equal protection analysis. Equal protection analysis requires a finding that education funding is discriminatory on the basis of wealth. As the *Rodriguez* Court said in its own equal protection analysis:

[I]f local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds.<sup>56</sup>

This logical extension of equal protection analysis has made state supreme courts, as well as the United State Supreme Court, reluctant to apply it to education finance systems.<sup>57</sup>

#### *D. The Emerging Trend Toward State Adequacy Claims*

By June 1992, a discernable trend toward adequacy as a basis for school finance reform was apparent. On June 17, 1992, *Education Week* reported on this trend, noting

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55. *Id.* at 329; Stark, *supra* note 2, at 665-69.

56. *Rodriguez*, 411 U.S. at 54.

57. McUsic, *supra* note 54, at 312-14.

a shift from a drive for "equity"—reducing the spending disparities between schools in wealthy and poor areas—to "adequacy"—ensuring that the schools can provide each child with an opportunity for success in life.

Put another way, the adequacy movement demands that states provide schools the resources needed to meet the education standards the states themselves have set.<sup>58</sup>

Among school finance reform advocates, this trend has been controversial. Two leading proponents of greater financial equity are skeptical about adequacy approaches. Kern Alexander, a professor at Virginia Polytechnic and State University, has testified as an expert witness in several school finance reform cases,<sup>59</sup> and has advised Vermont legislative and education leaders on the need for reform in the Vermont system.<sup>60</sup> He warns against using adequacy as the primary basis of analysis. Speaking of states in general, and adequacy as a litigation theory, Alexander says: "You would do well to stifle the issues of adequacy and go for disparities, because that's the pre-eminent issue. . . . Adequacy is in the eye of the beholder. It's an issue you want to stay away from unless you have a poor state."<sup>61</sup>

Jonathan Kozol, author of *Savage Inequalities*, argues that "equality is the only proper standard."<sup>62</sup> Kozol believes that to separate equality from adequacy as a litigation strategy is

a terrible retreat.

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To a large degree, what is said to be adequate for the poor is determined by the rich. It's decided usually in accord with our opinion of what their usefulness is to us. It's much like the arguments you hear from business leaders who say the success of education is in providing the workers they need, not the future managers that

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58. Lonnie Harp, *School Finance Suits Look Beyond Money to Issues of Quality*, EDUC. WK., June 17, 1992, at 1, 28.

59. *Id.* at 28.

60. Kern Alexander, *School Financing as Prescribed by the Fundamental Law of Vermont (1992)* (unpublished manuscript, on file with author).

61. Harp, *supra* note 58, at 28.

62. *Id.*

would compete with their kids.

By accepting adequacy as a standard, you are accepting a caste system.<sup>63</sup>

However, other reform advocates argue the merits of an adequacy approach.<sup>64</sup> The emerging trend in states that are experiencing challenges to education finance systems is to stress this question over the question of equal funding on a per student basis.<sup>65</sup> Summarizing the trend toward more reliance on adequacy measures in the emerging era of school finance reform, researcher Allan Odden says:

[T]he new equity issues of the 1990s are likely to be disparities in student outcomes. To help the policy community deal with this equity issue, education policy analysts will need to find ways to restructure the . . . uses of fiscal resources, and the level of funding to produce less disparity in the level of what students know and are able to do. The issue may be less the variation in dollars per student and more the degree to which those dollars help districts and states meet new and ambitious national and state education goals.<sup>66</sup>

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63. *Id.*

64. McUsic, *supra* note 54, at 339-40; Stark, *supra* note 2, at 665-69; Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55 (1987); cf. Patricia F. First & Louis F. Miron, *The Social Construction of Adequacy*, 20 J.L. & EDUC. 421 (1991) (arguing for a definition of adequacy that is grounded in community values).

65. The Massachusetts Supreme Judicial Court refused to elevate "adequacy" to the level of a legal term of art. Recognizing the growing use of the adequacy term in school funding litigation, it nevertheless

decline[d] to enter into this aspect of the debate. To us the words "adequate" and "education" can be viewed as redundant as well as contradictory. . . .

The word "adequate" does not appear in the constitutional language and the struggle of the parties reveals, with good faith on all sides, necessary biases as to meaning. Thus, we strive to ascertain, as we should, the intention of the drafters of the constitutional language and to provide a frame of reference for the implementation of that intent in a modern society.

McDuffy v. Secretary of Executive Office of Educ., 615 N.E.2d 516, 519 n.8. (Mass. 1993).

66. Allan Odden, *School Finance in the 1990s*, 1992 PHI DELTA KAPPAN 455, 457.

### E. The Need to Define Adequacy in Vermont

While research has been conducted to determine whether adequacy standards exist in various states,<sup>67</sup> Vermont has not received specific attention by researchers. In general, Vermont's constitutional statement on education has been seen as among the weakest in the country, whether analyzed from the perspective of equity or adequacy.<sup>68</sup>

This contention is disputed by Alexander, who has argued that Vermont's constitutional standard is not weak because of the specific intent that can be imputed to key phrases in the Education Clause as a result of court or legislative interpretation.<sup>69</sup> Hubsch agrees with this assessment because of the "strong republican influence" animating the required establishment of elementary and secondary schools in each town.<sup>70</sup> Furthermore, one analysis of the equal protection provisions of the Vermont Constitution, completed before the enactment of the present aid formula, concluded that an equal protection challenge to the state's funding mechanism might succeed.<sup>71</sup>

Vermont's adequacy standard has not been the subject of specific research. Nor has the statutory and regulatory framework in Vermont been analyzed to determine whether it, when

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67. McUsic, *supra* note 54, at 333-38; Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93 (1989); James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349 (1990); see also Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072 (1991) (discussing school finance inequity and state court decisions).

68. Several journal articles have analyzed state constitutional statements on education from either an equity or adequacy perspective, and some of these have developed categories of constitutional commitment to education. The most common categorization places state constitutions into four categories. Category I education clauses place only minimal educational obligations on the state, category II clauses place a slightly higher duty requiring a certain minimum amount of equity or adequacy, category III clauses contain stronger educational language, and category IV constitutions impose the highest level of state obligation. Ratner, *supra* note 53, at 814-16; see also Thro, *supra* note 2, at 1661-68; see McUsic, *supra* note 54, at 334-39 (providing an example of categorization of constitutional statements on educational adequacy). McUsic includes Vermont's constitutional statements on education as among the weakest of the state constitutions. *Id.* at 339 n.147.

69. Alexander, *supra* note 60, at 1-2.

70. Hubsch, *supra* note 67, at 101 & n.35.

71. Shari M. Jankowski, Note, *Vermont's Public School Finance System: A Constitutional Analysis*, 12 VT. L. REV. 239, 280 (1987); see also Linda D. Duva, Note, *Taxing Vermonters For Education: Reform of the Property Tax*, 15 VT. L. REV. 479 (1991).

viewed in the context of the constitutional requirement, creates an obligation on the part of the state to ensure educational adequacy.<sup>72</sup> While the Vermont Supreme Court has made strong pronouncements about the role of education as an essential state function,<sup>73</sup> it has not been given an opportunity to define an adequacy standard.

If Vermont is going to make progress toward greater equity for students, a determination as to whether there is an adequacy standard in the basic law of the state is a necessary step in the process. The purpose of this article is to establish the viability of the Vermont Constitution's Education Clause as a standard for educational adequacy so that policy makers can assess fiscal or programmatic reform proposals in light of the state's obligations to all students.

The specific question raised by this inquiry is: Must the state of Vermont create an educational system which insures a level of adequacy for all students, regardless of where they live within the state?

## II. VERMONT'S CONSTITUTIONAL STANDARD FOR ADEQUACY

In order to determine how strong Vermont's constitutional commitment to educational adequacy actually is, the analytical approach suggested by the Vermont Supreme Court should be used.<sup>74</sup> In *State v. Jewett*, the court recommended using textual analysis,<sup>75</sup> historical materials,<sup>76</sup> sibling state case analysis,<sup>77</sup>

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72. Cf. Chambers, *supra* note 64, at 64-67 (explaining the interpretation of West Virginia's constitutional education clauses).

73. See *State v. DeLaBruere*, 154 Vt. 237, 253, 577 A.2d 254, 263 (1990); *Palmer v. Bennington Sch. Dist.*, 3 Vt. L. Wk. 221, 222, 615 A.2d 498, 502 (1992); see *infra* notes 122-34 and accompanying text.

74. *State v. Jewett*, 146 Vt. 221, 225-27, 500 A.2d 233, 236-37 (1985); see Peter Racette, Note, *The Principle Problem: State v. Jewett and The New Judicial Federalism*, 10 VT. L. REV. 437 (1985); see also Frank G. Mahady, *Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts*, 13 VT. L. REV. 145 (1988).

75. *Jewett*, 146 Vt. at 226, 500 A.2d at 236.

76. *Id.* at 225-26, 500 A.2d at 236. School finance cases in Connecticut and Massachusetts, for example, have relied extensively on historical analyses to support conclusions holding the state responsible for basic levels of educational adequacy. See *Horton v. Meskill*, 376 A.2d 359, 373-74 (Conn. 1977); *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 528-33 (Mass. 1993).

77. *Jewett*, 146 Vt. at 227, 500 A.2d at 237.

and economic and sociological materials<sup>78</sup> to discern the meaning of the constitutional provisions.

This approach is substantially the same as that recommended generally by commentators,<sup>79</sup> and is consistent with the brief discussion of methodology found in *San Antonio Independent School District v. Rodriguez*.<sup>80</sup>

Historical and textual analyses should carry the most weight in determining what a constitutional provision means in the modern context.<sup>81</sup> Judicial precedent from the state in question, or from states with similar constitutional provisions, should guide the textual analysis.<sup>82</sup> Sociological and economic materials are less useful for the purpose of determining constitutional meaning, but they can be extremely important when attempting to determine whether a given constitutional standard has been met.<sup>83</sup>

This article now outlines the history of state concern for education in order to show how state responsibility for education has been interpreted by generations of Vermonters.

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78. *Id.*

79. See Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Note, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635 (1987).

80. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

81. Thro, *supra* note 3, at 31 (“[C]ourts should always begin with an historical analysis and/or an examination of prior judicial interpretations of the provision. . . . [L]anguage should be a decisive factor . . . whenever history and precedent are inconclusive.”).

82. *Id.*

83. John Dayton, *An Anatomy of School Funding Litigation*, 77 Educ. L. Rep. (West) 627 (1992). Dayton discusses the impact of “evidence of harm to children” in school finance cases, and concludes that the “four most recent opinions overturning school funding systems all addressed the educational harm to children resulting from funding inequities.” *Id.* at 636-37 (citing Montana, Kentucky, Texas, and New Jersey decisions).

Most recently, the Massachusetts Supreme Judicial Court noted at length the stipulations of the parties and the testimony of plaintiff school districts before concluding that the state’s obligation to educate all children was not being met. “The bleak portrait of the plaintiffs’ schools and those they typify . . . leads us to conclude that the Commonwealth has failed to fulfil its obligation.” *McDuffy*, 615 N.E.2d at 553-54.

*A. Historical Analysis*

## 1. Vermont's Constitutional Concern for Education

The Education Clause of the Vermont Constitution has its origins in the first constitution adopted by the Vermont Republic in 1777. Two parts of the 1777 constitution contained provisions relevant to education. The first provision stated:

A school or schools shall be established in each town, by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town, making proper use of school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this State, ought to be established by direction of the General Assembly.<sup>84</sup>

The second section reads in part: "Laws for the encouragement of virtue and prevention of vice and immorality, shall be made and constantly kept in force . . ."<sup>85</sup>

In 1786, these constitutional provisions were combined into one statement:

Laws for the encouragement of virtue, and prevention of vice and immorality, ought to be constantly kept in force, and duly executed: and a competent number of schools ought to be maintained in each town, for the convenient instruction of youth; and one or more grammar schools be incorporated, and properly supported, in each county in this state.<sup>86</sup>

Occasional amendments have been made since 1786, but the substance of the Education Clause in the Vermont Constitution remains unchanged in today's state charter. It reads in part:

Laws for the encouragement of virtue and prevention of vice and immorality, ought to be constantly kept in

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84. VT. CONST. of 1777, ch. II, § 40.

85. *Id.* § 41.

86. VT. CONST. of 1786, ch. II, § 38.

force, and duly executed; and 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.<sup>87</sup>

The General Assembly added the clause "unless the general assembly permits other provisions for the convenient instruction of youth" in 1964,<sup>88</sup> to accommodate towns which provide for education by tuitioning students to neighboring districts.<sup>89</sup>

## 2. Legislative Concern for Education

Vermont's commitment to education came before comparable commitments were made by most of the colonial states.<sup>90</sup> Although the 1786 Constitution contains a more modest education statement than the earlier provision, actions of the legislature beginning in 1797 show that education was a priority in the minds of the state's founders. In 1797, the legislature enacted a law requiring each town to "keep and support a school or schools for the instruction of youth, *in English reading, writing and arithmetic . . .*"<sup>91</sup> The inclusion of a reference to the substance of the educational program ("English reading, writing and arithmetic") can only be seen as a commitment to an adequacy standard.

While the earliest education laws did not offer state funds to support their mandates, the legislature did authorize towns to raise money for schools, first through authorization of the

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87. VT. CONST. ch. II, § 68. Commenting on this section in answer to a constitutional challenge to a statute intended to provide for construction and financing of public and private educational facilities, the Vermont Supreme Court said: "This provision of our Constitution *imposes on the General Assembly a duty in regard to education* that is universally accepted as a proper public purpose." Vermont Educ. Bldgs. Fin. Agency v. Mann, 127 Vt. 262, 266, 247 A.2d 68, 71 (1968) (emphasis added).

88. Act of Jun. 20, 1963, No. 152, § 1, 1963 Vt. Laws 131 (proposing to amend VT. CONST. ch. II, § 64).

89. Each school district is required to maintain one or more schools for the elementary and high school students residing in the district. VT. STAT. ANN. tit. 16, §§ 821(a), 822(a) (1989). In the alternative, the voters in a district may authorize the payment of tuition to public elementary schools in other Vermont school districts, *id.* § 821(a)(1), or to public or independent secondary schools in Vermont or in another state. *Id.* § 822(a)(1). Allowable tuition charges are set by statute. *Id.* §§ 824, 825, 832.

90. State v. DeLaBruere, 154 Vt. 237, 254, 577 A.2d 254, 263-64 (1990).

91. Act of Oct. 30, 1797, ch. 54, § 1, 1797 Vt. Laws 493 (emphasis added).

voters<sup>92</sup> and then by assessment by the selectmen of a one cent tax on each dollar of grand list value in each town.<sup>93</sup> The rate was increased to two cents in 1824<sup>94</sup> and three cents in 1826.<sup>95</sup> Admittedly, the legislature took a step backward in 1833 when families of children not attending school were exempted from paying the school tax.<sup>96</sup> This exemption remained in effect until 1864.<sup>97</sup>

State supervision of schools began in 1827, with the legislative designation of the Secretary of State as the ex officio State Superintendent of Education.<sup>98</sup> The same law<sup>99</sup> established a Board of Common School Commissioners, elected by the legislature,<sup>100</sup> and local "superintending committees" with the obligation to "visit each of the district schools in said town, for the purpose of making a careful examination thereof—of seeing that the scholars thereof are properly supplied with books, of inquiring into the regulations and discipline of such schools, and of the habits and proficiency of the scholars therein."<sup>101</sup>

By establishing state standards for curriculum and instruction,<sup>102</sup> the 1827 Act demonstrated the state's concern for educational adequacy. The local committees, as well as the state Board of Common School Commissioners, were abolished in 1833 for reasons which remain unclear;<sup>103</sup> but in 1845, the legislature required that each town elect up to three town superintendents to review the moral character of candidates for teaching positions and visit the schools at least once a year to inspect curriculum and facilities.<sup>104</sup>

92. *Id.* § 3.

93. Act of Nov. 3, 1810, ch. 107, § 1, 1810 Vt. Laws 153-54.

94. Act of Nov. 9, 1824, ch. 89, No. 9, § 1, 1824 Vt. Laws 589, 597.

95. Act of Nov. 15, 1826, ch. 89, No. 43, § 1, 1826 Vt. Laws 22.

96. Act of Nov. 6, 1833, ch. 89, No. 19, § 2, 1833 Vt. Laws 14, 15.

97. Act of Nov. 15, 1864, No. 61, § 1, 1864 Vt. Laws 69.

98. Act of Nov. 9, 1827, ch. 89, No. 23, § 5, 1827 Vt. Laws 19, 20; JOHN C. HUDEN, STATE SCHOOL ADMINISTRATION IN VERMONT 142 (1944).

99. Act of Nov. 9, 1827, ch. 89, No. 23, § 16, 1827 Vt. Laws 19.

100. *Id.*; HUDEN, *supra* note 98, at 142.

101. Act of Nov. 9, 1827, ch. 89, No. 23, § 3, 1827 Vt. Laws 19.

102. *Id.* § 1. The Act required each town to "keep and support a school or schools, provided with a teacher or teachers, of good morals, for the instruction of youth in orthography, reading, writing, English grammar, geography, arithmetic, history of the United States, and good behavior." *Id.*

103. Act of Nov. 6, 1833, ch. 89, No. 19, § 1, 1833 Vt. Laws 14.

104. Act of Nov. 5, 1845, No. 37, §§ 1, 4, 1845 Vt. Laws 25, 26.

After eliminating the school tax exemption for families without school children, the state passed its first mandatory attendance law in 1867.<sup>106</sup> Children between the ages of eight and fourteen were required to be in school for at least three months a year.<sup>106</sup>

In 1876, the mandated curriculum included reading, writing, spelling, English grammar, geography, arithmetic, free-hand drawing, history and the Constitution of the United States, and good behavior.<sup>107</sup> Instruction was also required in the history and Constitution of the State of Vermont.<sup>108</sup> Once again, the state was addressing the adequacy of local schools.

In response to the influential Carnegie Report,<sup>109</sup> the state overhauled its education system.<sup>110</sup> The report stressed the importance of subjugating town distinctions if necessary to provide an adequate education for all Vermont students.<sup>111</sup>

In urging the assumption of responsibility by the state for the provision of junior high school education in each town and

105. Act of Nov. 21, 1867, No. 35, 1867 Vt. Laws 47.

106. *Id.* § 1.

107. Act of Nov. 28, 1876, No. 48, 1876 Vt. Laws 132.

108. *Id.*

109. CARNEGIE COMM'N, REPORT OF THE COMMISSION TO INVESTIGATE THE EDUCATIONAL SYSTEM AND CONDITIONS OF VERMONT (1914) [hereinafter CARNEGIE REP.]. The Carnegie Education Commission was created by the legislature at the suggestion of Governor Allen M. Fletcher, who urged in 1912 the establishment of a study of school reorganization to "promote the ends of economy, harmony and unity." HUDEN, *supra* note 98, at 193 (citing Legislative Journals of November 19, 1912). A similar report, published in Massachusetts in 1919, was extensively relied upon by the Massachusetts Supreme Judicial Court in its 1993 analysis of that state's education clause because of its "pertinence to the precise issues in this case." *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 545 (Mass. 1993).

110. Act of Apr. 1, 1915, No. 64, 1915 Vt. Laws 124.

111. With regard to elementary schools, the Report urged:

It should seem that the due observance of this right, and indeed the general welfare of the people, demand that by statute the elementary schools be sufficient in number, and of such quality, and severally so located in the towns, as to furnish adequate and reasonably convenient opportunity for the children to receive such instruction in the fundamental branches as shall qualify them for entrance in the secondary schools, if study therein be contemplated, or together with subsequent vocational training . . . shall give them to some appreciable degree a practical fit for their intended lives' work and for the proper performance, in the true sense, of the ordinary duties of American citizenship. And the furnishing of educational facilities being of state concern, the statute may well provide that in thus locating schools, town lines shall be deemed of secondary importance.

CARNEGIE REP., *supra* note 109, at 15 (emphasis added).

“central and readily accessible senior high schools”<sup>112</sup> throughout the state, the Carnegie Commission argued that:

The expense of public schools should, however, more than ever before, be borne by the state at large, rather than by the several municipalities in which the schools are located. . . .

. . . *It is not a question of how much Vermont is expending per capita. It is a question of developing a school system equal to the needs of its people.*<sup>113</sup>

When advocating administrative reform, the Carnegie Commission revisited its central premise that a basic level of education has historically been seen as a state responsibility.<sup>114</sup>

The Carnegie Report was persuasive. In 1915, a state property tax of 10% was levied and aid to towns for salaries, secondary school tuition, high school vocational courses, transportation, and general aid to junior and senior high schools was distributed on a per pupil basis.<sup>115</sup> The state also prescribed minimum courses of study for junior and senior high schools and vocational education.<sup>116</sup>

Aid formulas were revised during the first half of the twentieth century. In 1933, the state began distributing state aid

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112. *Id.* at 29.

113. *Id.* at 30 (emphasis added).

114. *Id.*

Throughout its whole history, Vermont has definitely committed itself to the suitable education of its children and youth for independent and responsible citizenship. From the start it recognized public education as a “fundamental social policy” and sovereign duty. . . . (T)he real educational unit is the state, and the subject of the maintenance and support of common schools is one which the state in its sovereign character is bound to sustain.

. . . .  
The state is vitally concerned with the proper enlightenment of its children. Its integrity and progress can be insured only by a system of free public education that will reach all and train them to a knowledge of life, conditions, and opportunities within the state. . . . This brings us back to the *fundamental right of every child to be adequately educated for life . . . and the inherent responsibility of the state to make sure provision for the due and proper education of all its children.*

*Id.* at 50-51 (emphasis added).

115. Act of Apr. 1, 1915, No. 64, §§ 44, 61, 72, 104, 167, 1915 Vt. Laws 124; Act of Apr. 2, 1915, No. 69, §§ 4, 7, 9, 10, 1915 Vt. Laws 157; see Clyde G. Fussell, *The Emergence of Public Education as a Function of the State in Vermont*, 29 VT. HIST. 13, 36 (1961).

116. Act of Apr. 2, 1915, No. 69, 1915 Vt. Laws 157.

to local communities by means of a formula which presumed that each school cost the same to run, whether in a large or small, rural or more urban school system.<sup>117</sup> In 1949, a system of incentives for school districts to spend minimal amounts for school programs was instituted, replacing the 1933 allocation system.<sup>118</sup>

In 1964, an aid bill was passed by the legislature which had the express purpose of "easing the more excessive burdens of the property tax."<sup>119</sup> Between 1964 and 1987, when the Foundation Formula was adopted, the legislature attempted to balance local needs and tax capacity through a variety of funding mechanisms.<sup>120</sup> All of this legislative activity is evidence of the state's constant awareness that education is fundamentally a state, as opposed to a local, concern.<sup>121</sup>

### 3. Judicial Concern for Education

The Vermont judicial branch also recognized the importance of education as a state concern early in the state's history. In 1860, the supreme court, discussing the development of school districts, asserted that:

From the earliest period in this State, the proper education of *all the 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.

*The constitution of the State especially enjoins upon the legislature* the duty of passing laws to carry out this object, and declares that a competent number of schools ought to be maintained in each town, for the convenient instruction of youth.

The legislature . . . [has] provided . . . for the support

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117. Fussell, *supra* note 115, at 36.

118. Act of Apr. 29, 1949, No. 104, § 2, 1949 Vt. Laws 101, 102.

119. Act of Mar. 13, 1964, No. 40, 1964 Vt. Laws 445.

120. See Bluhm, *supra* note 1, at 4.

121. See Fussell, *supra* note 115, at 37 ("With the formation of a central government, public education emerged as a state function with some controls left with the people locally. From that time on, whatever the local units of school government did, they did by sufferance of the state government under regulations passed by the state legislature." (emphasis omitted)).

of schools at the public expense, and it has always been understood to be one of the first and highest duties of the government.

Without making further reference to the almost numberless acts of the legislature, exhibiting the most active watchfulness and fostering care, for the cause of popular education, enough has already been stated to show that the *whole subject of the maintenance . . . of common schools* has ever been regarded . . . as one . . . of *public necessity*, and one which the State in its sovereign character was bound to sustain.<sup>122</sup>

At every opportunity since the *Williams* decision, the supreme court has reiterated its view that education is a primary state function.<sup>123</sup> In its two most recent statements on education, the court has assumed that adequacy is part of the state's responsibility. In 1990, the court emphasized the state's constitutional promise to provide "for the education of all,—an education graded, progressive and complete" when addressing the power of the state to enforce compulsory attendance laws.<sup>124</sup> The court recognized the state's interest in self-preservation, tracing that interest to its historical roots:

### The overriding importance of education in Vermont

122. *Williams v. School Dist. No. 6*, 33 Vt. 271, 274-75 (1860) (emphasis added).

123. See *Town of Barre v. School Dist. No. 13*, 67 Vt. 108, 112, 30 A. 807, 808 (1894). ("It is still the *policy of the state to educate all its youth*. They are still its beneficiaries." (emphasis added)); see also *Buttolph v. Osborn*, 119 Vt. 116, 119 A.2d 686 (1956). In upholding the power of school boards to employ teachers regardless of a vote of the school district, the court said:

The several statutes constituting our *common school system* are to be read together, and liberally construed to effectuate the general public good proposed in their enactment . . . A review of them will show that the *legislature, having full power over the subject*, has not entrusted the destiny of the system to the uncertain disposal of the "fierce democracie" of the districts themselves, but has clothed officials with ample authority to keep the schools in motion in any event.

*Id.* at 119, 119 A.2d at 688 (quoting *Chittenden v. School Dist. No. 1*, 56 Vt. 551, 554 (1884)) (emphasis added). "A reading of the statutes from early times . . . shows that . . . *education is a function of the state as distinguished from local government.*" *Id.* (emphasis added).

124. *State v. DeLaBruere*, 154 Vt. 237, 254, 577 A.2d 254, 264 (1990) (quoting A.D. Barber, address, *Vermont as a Leader in Educational Progress*, in *ESSAYS IN THE SOCIAL AND ECONOMIC HISTORY OF VERMONT* 303 (1943)).

has never been in doubt. As of July, 1777, ten of the colonial states had adopted new constitutions, and of these only three had included provision for education:

"Vermont, however, had framed into her fundamental law provision for the *education of all . . .*"

[In this case, the testimony] supported the State's argument that *it has a compelling interest in the minimum course of study, which is designed to require the minimum education necessary "[s]o the state in a sense can sustain itself,"* and see that *each child receives the skills necessary to function as an adult; so that "no child comes out in society without having those skills, those tools so that they can survive from day-to-day," . . .*

*the State has a . . . legitimate and compelling interest in assuring that all children in Vermont are taught a minimum course of study to insure that every child receives the minimum education necessary . . . in the work place and the community, to provide the means for making choices and/or the State to maintain self-government.*<sup>125</sup>

In a school finance case this should only be construed as a strong adequacy statement.

These sentiments were reiterated in 1992, when the court ruled on issues related to the dismissal of a school principal.<sup>126</sup> Referring to its decision in *DeLaBruere*,<sup>127</sup> as well as the United States Supreme Court desegregation decision, *Brown v. Board of Education*,<sup>128</sup> the court held that the state "*has a compelling interest in assuring [that] Vermont children receive [the] minimum education necessary to function as adults and citizens.*"<sup>129</sup>

In the most recent judicial interpretation of Vermont's obligation to distribute state aid to education equitably, the Chittenden County Superior Court recognized adequacy as part

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125. *Id.* at 254, 577 A.2d at 263-64 (quoting Barber, *supra* note 124, at 303; other citations omitted in the original) (emphasis added).

126. *Palmer v. Bennington Sch. Dist.*, 3 Vt. L. Wk. 221, 615 A.2d 498 (1992).

127. *DeLaBruere*, 154 Vt. 237, 577 A.2d 254.

128. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

129. *Palmer*, 3 Vt. L. Wk. at 222, 615 A.2d at 502 (emphasis added).

of the state's "basic legislative policy."<sup>130</sup> Without citing a specific provision of the state aid to education statute, the court simply concluded that "[t]he clearly stated legislative goal in the state aid to education formula is to provide educational resources to the various districts in Vermont so that every child in the state has an equal quality education."<sup>131</sup>

Some reasonably argue that the evolution of state statutes and regulations designed to accomplish the goal of a uniform system of education throughout a state results in enforceable duties on the part of schools.<sup>132</sup> Vermont is not alone in having adopted regulations for the approval of public schools and mandatory attendance laws which could be construed to create rights to some minimal level of educational adequacy.<sup>133</sup>

Courts in some jurisdictions have begun to acknowledge the potential of this argument. One federal and one state court have recently ruled that minimum competency testing programs in states create an "educational due process" property interest in a high school diploma.<sup>134</sup>

#### 4. Administrative Concern for Education

Vermont recently adopted minimum curriculum standards and school improvement processes through its Public School Approval Regulations. Vermont is also heavily involved in

130. *Burlington v. Wilson*, No. 1121-92CnC, slip op. at 22 (Chittenden Super. Ct. Aug. 26, 1992).

131. *Id.* (emphasis added).

132. *Chambers*, *supra* note 64, at 64-65.

133. ALLAN R. ODDEN & LAWRENCE O. PICUS, *SCHOOL FINANCE: A POLICY PERSPECTIVE* 48 (1992); see also *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (Idaho 1993) (discussing how failure to meet state standards with the money provided under the existing funding system creates a *prima facie* case that the state has failed to establish and maintain a thorough educational system).

134. *Debra P. v. Turlington*, 474 F. Supp. 244, 266 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. Unit B Sept. 1981); *Board of Educ. v. Ambach*, 457 N.E.2d 775 (N.Y. 1983), *cert. denied*, 465 U.S. 1101 (1984); see also *Board of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 204 (1982) (holding that the adequacy standard in special education (a free and appropriate public education) does not require a school to provide a child with opportunities to achieve his or her full potential, but must provide a program "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade"). Since the court emphasized the role of the statutory definition of adequacy and the legislative history of that definition in reaching its conclusion, *Rowley* leads to the conclusion that state standards expressed in state statute or regulation could be binding on a state as an expression of minimal adequacy. *Id.* at 179-84, 203-04.

statewide assessment. The Public School Approval Regulations adopted by the State Board of Education in 1987 state the goals of school approval.<sup>135</sup> When the legislature reformed the special education system in 1990, it began with a statement of policy.<sup>136</sup> The technical education statutes were revised in 1991; the new provisions began with a statement of purpose.<sup>137</sup>

The legislature undoubtedly did not intend to establish enforceable rights when it created these policy statements. The State Board of Education specifically stated its intent that public school approval regulations not be construed to create private rights of action, and included that statement in the regulations themselves.<sup>138</sup> Taken in its entirety, however, the history of state involvement in education in Vermont supports the proposition that some level of adequacy has been assumed by the state to be part of its responsibility to all citizens.<sup>139</sup>

Self-preservation has been the driving force behind the state's concern for a minimum level of education for all. When the State Board of Education adopted its current goals statement for schools in Vermont, it specifically included in its first goal the charge that Vermont has a duty to educate "every child," so that every child can become "a competent, caring, productive, responsible individual and citizen."<sup>140</sup>

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135. VT. BD. OF EDUC. RULES, *supra* note 35, at Rule 2100 ("The purpose of public school approval is to assure acceptable educational opportunities for all Vermont students regardless of where they live and to set in motion a mechanism for school improvement statewide.").

136. VT. STAT. ANN. tit. 16, § 2901(a) (1989 & Supp. 1992).

It is the policy of the state that each local school district design and implement, in consultation with parents, a comprehensive system of education services that will result, to the maximum extent possible, in all students succeeding in the regular classroom. . . . A range of effective education services supported with local, state, and federal funds should be available to all students who are failing or at risk of failing academically.

*Id.*

137. *Id.* § 1521. "It is the policy of the state of Vermont that all Vermonters should receive educational services that enable them to master the skills essential for further education and training or for successful entry into or advancement in the workplace." *Id.*

138. VT. BD. OF EDUC. RULES, *supra* note 35, at Rule 2100.

139. *Cf. McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 550 (Mass. 1993). "As this brief sketch of the statutes demonstrates, the Legislature has recognized its constitutional duty to provide for the education of the populace. Whether what the Legislature has done is sufficient to fulfil that constitutional duty is, of course, another matter." *Id.*

140. CONDITION 1992, *supra* note 8, at 4.

## 5. Political Concern for Education

An examination of inaugural addresses of Vermont governors shows that this primarily philosophical commitment to education for citizenship grows out of a long tradition.<sup>141</sup> Since 1802, when Governor Isaac Tichenor urged his listeners to build an education system so that progress in "knowledge, virtue, and religion" could be ongoing,<sup>142</sup> Vermont's governors have assumed that education was a state function. In 1810, Jonas Galusha warned that "wherever ignorance has prevailed, the people have been soon crushed by the power of despotism, and have become the sport of tyrants."<sup>143</sup> Again, in 1813, Martin Chittenden spoke of the accepted wisdom that "[t]he preservation of all free governments principally depend[s] on the virtue and intelligence of the great body of the people."<sup>144</sup>

At the onset of the Civil War, Governor Erastus Fairbanks noted in his inaugural address:

The education of youth has been justly regarded by political economists of all civilized nations, as one of the most important elements of national security and prosperity; and in all representative and liberal governments, provision for a proper system of instruction is recognized as one of the first duties of the state. . . . [I]t is only as the youth of the country shall be properly instructed morally and intellectually for the duties of citizens, that our free institutions, in the hands of the coming and future generations, are to be preserved intact.<sup>145</sup>

Nearly every Vermont governor has spoken at least briefly on the importance of education as a state function.<sup>146</sup> Republican concepts of "virtue," and "education for the common good" are

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141. Nanette E. Krueger, *Tracing Vermont's Educational Philosophy Through the Governor's Eyes: 1791-1991* (June 1991) (unpublished manuscript, on file with Vermont State Archives); cf. *McDuffy*, 615 N.E.2d 516. The Massachusetts court relied extensively on the statements of former governors in its analysis of the historical commitment of that state to education. *Id.* at 538-40.

142. Krueger, *supra* note 141, at app. I.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

themes repeated in governors' remarks throughout the state's history. Among our most recent governors, Richard Snelling spoke in 1979 of the "article of faith in Vermont since the days of the Constitutions that a uniform quality of education for all young Vermonters is the foundation of future opportunity, as well as future liberty,"<sup>147</sup> and Madeleine Kunin distinguished her second inaugural in 1987 by devoting the entire address to a single subject—education.<sup>148</sup>

### B. Textual Analysis of Vermont's Constitution

Since Vermont became one of the first states to place education at the level of a constitutional concern in 1777, the assumption among Vermont legislators and governors has been that the words of the constitution have meaning. An analysis of the meaning of those words is the second part of the process encouraged by the *Jewett* court and commentators such as Linde.<sup>149</sup>

#### 1. Structural Support for an Adequacy Standard

The Vermont Constitution consists of two chapters. Chapter I, *A Declaration of the Rights of the Inhabitants of the State of*

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147. *Id.*

148. 2 JOURNAL OF THE SENATE OF THE STATE OF VERMONT, 1987 BIENNIAL 967 (1987). In part, Governor Kunin told the legislature about two Vermont schools, one in Essex Junction and one in Charleston:

In Charleston, the science textbooks are worn and out-of-date. Not every child has one. They must be shared with another class.

The library is sparse, reference works and computers are non-existent, as are recent maps and globes. The arts, health education and physical education are not offered by teachers certified in those fields. There is neither a librarian nor full time principal.

At the Hiawatha School, there is an abundance of instructional material. Each child has not only his own textbook, but computers are readily available. There is a computer club.

The library is rich in materials. Art and music instruction are provided weekly in rooms especially designed for that purpose. The list could continue.

.....  
In Vermont, we have said "Yes" in theory, but "No" in practice to the principle of equal educational opportunity. In fact, through a combination of ignorance, market forces, and allegiance to localism, we are fostering a dangerous policy of greater inequality of educational opportunity.

*Id.* at 968-70 (citation omitted).

149. See *supra* notes 74-79 and accompanying text.

Vermont, secures basic freedoms enumerated in twenty-one articles.<sup>150</sup> Chapter II, *Plan or Frame of Government*, contains seventy-five sections outlining the duties and powers of the departments of government, the qualifications for office holding, the election process and a number of general provisions.<sup>151</sup> Among these provisions is Section 68, entitled *Laws to Encourage Virtue and Prevent Vice; Schools; Religious Activities*.<sup>152</sup>

An argument that educational adequacy is a duty of the state or a right of its citizens, might be attacked on the ground that placement of the Education Clause in the *Frame of Government* shows an intent not to give education the status accorded the articles in the *Declaration*. If education was meant to be a right, the argument goes, the founders would have placed it alongside the abolishment of slavery, the rights to free speech and religion, and the rights to bear arms and to a jury trial. The Massachusetts Supreme Judicial Court, discussing a constitution with a similar organizational structure to the Vermont Constitution, rejected this argument.<sup>153</sup>

## 2. "Virtue" & Education: Philosophical Support for an Adequacy Standard

By prefacing the state's commitment to education with a clause acknowledging the importance of the "encouragement of virtue and prevention of vice and immorality,"<sup>154</sup> the founders of this state were aligning themselves with a central tenet of republicanism: no democracy can survive without a virtuous

150. VT. CONST. ch. I.

151. VT. CONST. ch. II.

152. VT. CONST. ch. II, § 68.

153. *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 527 n.23 (Mass. 1993).

[T]his argument is unpersuasive; we believe that the placement of the education provisions in Part II, The Frame of Government, is a forceful statement that education is both a duty of and a prerequisite for republican government. And, if "legislatures and magistrates" have a constitutional duty to educate, then members of the Commonwealth have a correlative constitutional right to be educated.

*Id.*

154. VT. CONST. ch. II, § 68.

citizenry.<sup>155</sup>

The concept of civic virtue can be traced to Aristotle, who believed that civic virtue was "not a matter of chance but the result of knowledge and purpose."<sup>156</sup> In order to preserve itself Aristotle believed that the state should engage in the education of youth. "[T]hat education should be regulated by law and should be an affair of state is not to be denied . . . ."<sup>157</sup>

Aristotle's view of civic virtue as a learned habit was rediscovered during the Enlightenment and actively pursued by eighteenth century political philosophers such as Montesquieu. America's founders accepted Montesquieu's belief that "[e]very thing therefore depends on establishing this love [of the public interest] in a republic, and to inspire it ought to be the principal

155. J.G.A. POCKOCK, *Virtues, Rights and Manners: A Model for Historians of Political Thought*, in *VIRTUE, COMMERCE, AND HISTORY* 37, 37-50 (1986).

"Virtue" is a word with a long history and great many meanings. . . . As developed in the republican vocabulary, it seems to have borne several further emphases. It could signify a devotion to the public good; it could signify the practice, or the preconditions of the practice, of relations of equality between citizens engaged in ruling and being ruled; and lastly, since citizenship was above all a mode of action and of practicing the active life, it could signify that active ruling quality—practiced in republics by citizens equal with one another and devoted to the public good.

*Id.* at 41.

In Virginia, Jefferson's *Bill for the More General Diffusion of Knowledge* called for: [P]romoting the public happiness that those persons, whom nature hath endowed with genius and virtue, should be rendered by liberal education worthy to receive, and able to regard the sacred deposits of the rights and liberties of their fellow citizens, and that *they should be called to that charge without regard to wealth, birth, or other accidental condition or circumstance*; but the indigence of the greater number disabling them from so educating, at their own expense, those of their children whom nature hath fitly formed and disposed to become useful instruments for the public, *it is better that such should be sought for, and educated at the common expense of all, than that the happiness of all should be confined to the weak or wicked.*

THOMAS JEFFERSON, *Preamble of "A Bill for the More General Diffusion of Knowledge,"* in *THOMAS JEFFERSON AND EDUCATION IN A REPUBLIC* 80, 81-82 (Charles F. Arrowood ed., 1930) (emphasis added).

In Arkansas, the constitution states that "[i]ntelligence and virtue being the safeguards of liberty . . . the State shall ever maintain a general, suitable and efficient system of free public schools . . ." ARK. CONST. art. 14, § 1.

The link between virtue and education, then, was assumed in states as diverse as Arkansas and Virginia.

156. ARISTOTLE'S *POLITICS* 305 (Benjamin Jowett trans., 1943).

157. *Id.* at 321. Aristotle also acknowledges the dilemma of educational content in which "mankind are by no means agreed about the things to be taught. . . . Neither is it clear whether education is more concerned with intellectual or with moral virtue." *Id.*

business of education."<sup>158</sup> Before the American Revolutionary War began, the men who would later influence the American Constitution were preaching a doctrine of civic virtue. John Adams wrote that "liberty, can no more exist without virtue and independence than the body can live and move without a soul."<sup>159</sup> Adams believed that it was the decline of civic virtue in Great Britain which made it impossible to remain aligned with that empire, and he compared that decline to the fall of Rome, where the "decay of virtue" had destroyed the constitution.<sup>160</sup>

Searching for examples of republican experiments which had survived, Adams, Jefferson, Madison, and the other founders determined that "[t]he few peoples that had managed to retain their liberties in the face of all efforts of would-be tyrants propelled by the lust for power had been doughty folk whose vigilance had never relaxed and whose virtue had remained uncontaminated."<sup>161</sup>

After the Revolution, the founding generation placed virtue at the center of its concerns as it built new governments. In a democracy, virtue among all citizens would be essential. "[T]hey wanted *virtue* in both leaders and citizens. By virtue they meant at the least good character and civic concern . . . ."<sup>162</sup> Since mankind was not naturally inclined toward virtue, the founders, such as Adams, saw education as the state's tool to insure self-preservation.<sup>163</sup>

By the first half of the nineteenth century, schools were seen by many as "Temples of Freedom," because, "as a matter of republican principle, *'the education of the whole becomes the first interest of all.'*"<sup>164</sup> The notion that the "protection of these faculties [of reason] is the first object of government" had been stated by James Madison in his defense of the new Constitu-

158. C. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, bk. IV, ch. 5, ¶ 5, *quoted in* Hubsch, *supra* note 67, at 95 n.1.

159. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 135 (1992) (quoting John Adams).

160. *Id.* at 136.

161. *Id.* at 65.

162. JAMES M. BURNS, *THE VINEYARD OF LIBERTY* 62 (1982).

163. *Id.* at 109. Burns, when discussing this aspect of the founding generation's philosophy, says, "Two things were necessary to create the republic of virtue, one of them obvious at the time, the other less clear. The first was education." *Id.* at 144.

164. *Id.* at 502, 501.

tion,<sup>165</sup> and it survived well beyond the period of constitution making in Vermont. Given the overwhelming evidence of its importance to the founding generation in America, the use of the term "virtue" in the Vermont constitutional provision on education could not have been a coincidence, and its meaning must have been political.<sup>166</sup>

Vermont's first legal scholar was Nathaniel Chipman, who served both as a United States Senator from Vermont and as a member of the Vermont Supreme Court.<sup>167</sup> The Carnegie Commission referred to him as "[t]hat great lawyer . . . who was prominently active in public affairs during the formative period of the Constitution, and must have been imbued with its spirit and meaning."<sup>168</sup> Chipman wrote two major works on legal philosophy, and both show a consistent belief in the classical importance of civic virtue.<sup>169</sup> Chipman praised the U.S. Constitution in *Sketches*, and he specifically discussed and endorsed the ideas of the ancient Greeks, Montesquieu, and the Enlightenment philosophers concluding that virtue is an essential political, as well as moral, attribute.<sup>170</sup>

### 3. The "Plain Meaning" Support for an Adequacy Standard

#### a. "And"

The concept of virtue was linked to the Education Clause of the Vermont Constitution in 1786<sup>171</sup> by the use of the conjunction *and*. The use of a conjunction indicates that the two clauses

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165. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

166. See GARY WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT (1984) (discussing the founders' beliefs in the need for "Hero Factories" to instill a love of virtue in each generation).

167. Chipman was also U.S. District Court judge for the District of Vermont.

168. CARNEGIE REP., *supra* note 109, at 11.

169. Nathaniel Chipman, *Dissertations on the Statute Adopting the Common Law of England, the Statute of Conveyances, the Statute of Offsets, and on the Negotiability of Notes*, N. CHIP. 113 (1791), reprinted in 1789-91 Vt., pt. 2, at 21 (1888); NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT (Rutland, Press of J. Lyon 1793).

170. SKETCHES OF THE PRINCIPLES OF GOVERNMENT, *supra* note 169, at preface, 13-19, 95-98, 251-52, 281-94.

171. See *supra* note 86 and accompanying text.

were to be taken together,<sup>172</sup> and is further support for the premise that education was seen as vital to the promotion of civic virtue.

### b. "Ought"

The Education Clause of the Vermont Constitution states that "a competent number of schools *ought* to be maintained in each town."<sup>173</sup> To the modern reader, the word "ought" is not strong. However, it is used twenty-nine times in the Vermont Constitution: seventeen in the Declaration of Rights and six in the General Provisions. It must be taken as a mandate. This is the view of Hubsch,<sup>174</sup> and is clearly the assumption of the Vermont Supreme Court in cases as early as *Williams v. School District No. 6*,<sup>175</sup> and as recent as *State v. DeLaBruere*<sup>176</sup> and *Palmer v. Bennington School District, Inc.*<sup>177</sup> Legal lexicons generally define "ought" as synonymous with "should" when used in constitutions or statutes.<sup>178</sup>

### c. "Common"

One of the terms which is absent from the Vermont Constitution, although often found in other state constitutions, is the word "common," as in "a system of common schools."<sup>179</sup> The notion of

172. BALLENTINE'S LAW DICTIONARY 73 (3d ed. 1969) ("A conjunction which, taken by itself, calls for the things or matters conjoined to be considered jointly."); see also BLACK'S LAW DICTIONARY 86 (6th ed. 1990) ("A conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first."); 3 WORDS AND PHRASES 569 (1953); *Town of Washington v. Town of Corinth*, 55 Vt. 468, 470 (1883) (requiring the holding of ratable property and continuous residence to gain settlement under 1817 pauper law) ("The word 'and,' as it occurs in the statute, should be construed conjunctively.")

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

174. Hubsch, *supra* note 67, at 96-97.

175. *Williams v. School Dist. No. 6*, 33 Vt. 271, 274-75 (1860).

176. *State v. DeLaBruere*, 154 Vt. 237, 254, 557 A.2d 254, 263-64 (1990).

177. *Palmer v. Bennington School Dist.*, 3 Vt. L. Wk. 221, 222-23, 615 A.2d 498, 501-02 (1992).

178. 30A WORDS AND PHRASES 268 (1972) ("Ought' and 'should' are synonymous and they express obligation." (citing *Hannon v. Myrick*, 118 Vt. 428, 432, 111 A.2d 729, 731 (1955)); see also 3 STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES (3d ed. 1953) at 2042-43; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1599 (1965) ("used to express moral obligation, duty, or necessity").

179. See e.g., IND. CONST. art. VIII, § 1; KY. CONST., § 183.

the common school implies a "system" designed to provide some minimum level of adequacy,<sup>180</sup> and the term "common schools" has been frequently used to describe that system.<sup>181</sup> Therefore, its absence from the Vermont charter could be significant.

However, the omission appears not to have been significant to the Vermont legislature or supreme court. In 1825, the legislature set aside money from the "late Vermont State Bank" for "the benefit of *common schools*, and to no other use."<sup>182</sup> In 1845, an "Act Relating to Common Schools" was passed, which had the effect of creating a system of state controlled supervision.<sup>183</sup> The supreme court relied heavily on the earlier case of *Chittenden v. School District No. 1*<sup>184</sup> when, in 1956, it stated that "[t]he several statutes constituting our *common school system* are to be read together, and liberally construed to effectuate the general public good proposed in their enactment."<sup>185</sup>

A textual analysis of the Education Clause of the Vermont Constitution indicates that the key concept of "virtue" was important to the state's founders. They combined two sections of the first constitution into one; the effect of this combination was to bring the concepts of virtue and education closer together. The generally accepted role of education in instilling virtuous habits, held by political philosophers of the founding era, was too wide and deep to have been lost on the founders of Vermont. They must have believed with their contemporaries that a minimal level of adequacy was required if their educational system was to accomplish its mission of preparing citizens for the one vocation which all would one day hold—the vocation of governing.

180. LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607-1783*, at 171-95 (1970).

181. Mary Jane Guy, *The American Common Schools: An Institution at Risk*, 21 J.L. & EDUC. 569 (1992).

We know the term "common schools" best . . . from Horace Mann and other founders who envisioned an educational system in contrast to that provided by private schools, churches, or pauper schools that catered to factions and special interest groups—a system of schools which all the children of a community attended. The "common school agenda" was a conscious desire to create a homogeneous society—a nation with common attitudes, loyalties, and values under central direction by the state.

*Id.* at 583.

182. CARNEGIE REP., *supra* note 109, at 13.

183. Act of Nov. 5, 1845, No. 37, 1845 Vt. Laws 25.

184. *Chittenden v. School Dist. No. 1*, 56 Vt. 551 (1882).

185. *Buttolph v. Osborn*, 119 Vt. 116, 119, 119 A.2d 686, 688 (1956) (citing *Chittenden*, 56 Vt. at 554) (emphasis added).

### C. Sibling State Case Analysis

Today, a state supreme court looking for decisions of other state supreme courts in the area of educational adequacy would not have to search far. However, if the Vermont Supreme Court were to look, it would not find a state with a constitutional provision identical to Vermont's. The states with the strongest adequacy decisions (West Virginia, Kentucky, and New Jersey) have education clauses in their state constitutions which call for "efficient" or "thorough and efficient" systems of public education to be established and maintained by the state legislatures.<sup>186</sup>

Should the Vermont Supreme Court conclude that this state's constitutional mandate is substantially the same as the "thorough and efficient" requirement, it could draw upon the forceful analysis of the three leading states' decisions. The Vermont Supreme Court might conclude that the Vermont standard is comparable to the "thorough and efficient" standard by comparing this state's educational history to that of states which have that standard, and by accepting the analyses of courts in those states which have led to the articulation of adequacy requirements.<sup>187</sup>

#### 1. West Virginia

The first adequacy decision by a state supreme court, *Pauley v. Kelly*, was rendered by the West Virginia Supreme Court in 1979.<sup>188</sup> The West Virginia court traced the origins of the "thorough and efficient" standard, determining that Ohio was the first state to write a "thorough and efficient" standard into its constitution, that fifteen of the states now have a "thorough and efficient" standard, and that appellate courts in all fifteen have concluded that education is a mandatory function of the legislature.<sup>189</sup>

The West Virginia court reviewed extensively the history of

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186. See Hubsch, *supra* note 67, at 134-40 (citing references to all state constitutional provisions on education).

187. This is what the Massachusetts Supreme Judicial Court did most recently when it concluded that "[t]he guidelines set forth by the Supreme Court of Kentucky fairly reflect our view of the matter" and adopted Kentucky's judicially determined seven point adequacy standard as its own. *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993).

188. *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979).

189. *Id.* at 866, 869.

judicial opinions and constitutional debates in states with "thorough" or "thorough and efficient" standards and concluded:

There is a paucity of definitions by courts of "thorough" and "efficient," and most are circumbendibus, defining by rulings that such-and-such acts or proceedings further or fail to further thorough or efficient school systems, or identifi[y] objectives the words were intended to obtain and thus allow oblique definitions.<sup>190</sup>

The *Pauley* court chose to synthesize the "oblique" guidance provided by this analysis, and to render its own definition of "thorough and efficient" by concluding that a system meeting this standard "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."<sup>191</sup> The court then delineated "[I]legally recognized elements in this definition."<sup>192</sup>

In summary, the court defended its definition by saying, "there are undeniable legal basis [sic] for all our conclusions, including the elements specifically distilled from the debates and cases that are the specifications of what a thorough and efficient school system should have, and should do."<sup>193</sup>

## 2. Kentucky

In *Rose v. Council for Better Educ.*, calling *Pauley* a "landmark case,"<sup>194</sup> the Kentucky Supreme Court recommended

190. *Id.* at 874.

191. *Id.* at 877.

192. *Id.* The court held the state's schools responsible for the development in *every child* to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work—to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts . . . ; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

*Id.* at 877 (emphasis added).

193. *Id.* at 877-78.

194. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 209 (Ky. 1989).

its analysis to "those who are interested in the historical background of similar constitutional provisions. We are persuaded that the history and reasoning expressed in the *Pauley* case is applicable and persuasive in the decision of the case before us."<sup>195</sup>

The Kentucky decision, which extensively discussed *Pauley*, became the most sweeping of the adequacy cases:

We cite *Pauley*, and quote from it at some length to show that Courts may, should and have involved themselves in defining the standards of a constitutionally mandated educational system.

We consider foreign cases, along with our constitutional debates, Kentucky precedents and the opinion of experts in formulating the definition of "efficient" as it appears in our Constitution.<sup>196</sup>

Recalling with favor the testimony of Kern Alexander, the Kentucky court stressed that "an efficient system is one which is unitary. It is one in which there is uniformity throughout the state. It is one in which equality is a hallmark and one in which students must be given equal educational opportunities, regardless of economic status, or place of residence."<sup>197</sup> Summarizing Alexander's testimony, the Court said, "an efficient system is unitary, uniform, *adequate* and properly managed."<sup>198</sup>

Before defining its constitutional standard in the manner of *Pauley*, the *Rose* court held:

Each child, *every child*, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education. *This obligation cannot*

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195. *Id.* at 210 n.19.

196. *Id.* at 210.

197. *Id.* at 210-11; see Alexander, *supra* note 60 (discussing school financing under Vermont law).

198. *Rose*, 790 S.W.2d at 211 (emphasis added).

*be shifted to local counties and local school districts.*<sup>199</sup>

The Court then proceeded to offer its specified definition of "efficient," including a list of "seven capacities."<sup>200</sup>

The Kentucky decision is the most sweeping of the adequacy decisions for two reasons. First, the Kentucky definition of adequacy is more detailed than even the West Virginia definition. It leaves less for debate and disagreement than any of the other judicial opinions on educational adequacy or equity. Second, the Kentucky decision is also the only judicial opinion which specifically declares the entire state system of education to be in violation of the state's constitutional standard.<sup>201</sup>

### 3. New Jersey

The New Jersey Supreme Court, in *Abbott v. Burke*, its most recent and far-reaching school finance decision, declined to define adequacy as clearly as the courts in West Virginia and

199. *Id.* (second emphasis added).

200. *Id.* at 212. The Kentucky judicial definition of adequacy includes: (i) sufficient oral and written communication skills . . . ; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes . . . ; (iv) sufficient self-knowledge and knowledge of his or her mental and physical well-being; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

*Id.*

201. *Id.* at 215. The Kentucky court is clear on this point, stating:

Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system—all its parts and parcels. . . .

. . . As we have said, the premise of this opinion is that education is a basic, fundamental constitutional right that is available to all children within this Commonwealth. The General Assembly should begin with the same premise as it goes about its duty. The system, as we have said, must be efficient, and the criteria we have set out are binding on the General Assembly as it develops Kentucky's new system of common schools.

*Id.*

Kentucky.<sup>202</sup> It expanded the notion of adequacy to one which requires unequal spending if necessary to bring low spending, low achieving school districts up to the standards set by high spending, high achieving districts.<sup>203</sup> In part, the New Jersey Supreme Court found "that in order to provide a thorough and efficient education in these poorer urban school districts, the State must assure that their educational expenditures per pupil are substantially equivalent to those of the more affluent suburban districts, *and that, in addition, their special disadvantages must be addressed.*"<sup>204</sup>

Again emphasizing the importance of the "thorough and efficient" standard, the New Jersey court spoke frequently of the dual need for well-prepared workers and citizens:

A thorough and efficient education requires such level of education as will enable all students to function as citizens and workers in the same society, and that necessarily means that in poorer urban districts *something more must be added* to the regular education in order to achieve the command of the Constitution.<sup>205</sup>

Emphasizing its reliance on adequacy as a constitutional requirement, the New Jersey court reaffirmed its earlier decisions in the area of school finance by recalling that they had been "based on the proposition that the Constitution required a certain level of education."<sup>206</sup> Although much of the factual basis for the New Jersey decision is built on the wide spending disparities between the poorest and wealthiest districts in that state, the conclusion of the court is based on the recognition that adequacy is the fundamental defect which the state, not local school districts alone, must cure.<sup>207</sup> A pending school finance lawsuit in Illinois attempts to build on the precedent established in New

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202. *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

203. *Id.* at 402-03.

204. *Id.* at 408 (emphasis added).

205. *Id.* at 403 (emphasis added).

206. *Id.* at 368.

207. *Id.* at 403. "All of the money that supports education is public money, local money no less than state money. It is authorized and controlled, in terms of source, amount, distribution, and use, by the State . . . The State has compounded the wrong and must right it." *Id.*

Jersey on this point.<sup>208</sup> The Illinois plaintiffs allege a "fundamental right to a high quality public education," and base their argument on the *Abbott* decision.<sup>209</sup>

The actions by the high courts in West Virginia, Kentucky, and New Jersey are highly persuasive. As more states become involved in adequacy challenges, the determination that a state's constitution requires a particular level of educational adequacy will become based upon principle. Eventually, a state with wide disparities in the ability of local districts to fund education, and with some districts unable to provide an adequate preparation for citizenship and work, will face a significant dilemma. That state will escape the challenge of defining an adequacy standard only by concluding that its history of commitment to education is measurably less than that of states like Kentucky and West Virginia. It is hard to imagine that Vermonters will take such a position.

Our generation's assumption that all citizens are capable of voting and participating in civic discourse must be accompanied by a commitment to prepare all students for those responsibilities. Important policy implications arise from this obligation.

### III. POLICY IMPLICATIONS OF FINDING A CONSTITUTIONAL ADEQUACY STANDARD

There is strong historical, textual, and sibling state support for the proposition that Vermont owes a minimum level of adequacy to each of its students. It is critically important to place this requirement in the context of citizenship, because that is the context in which it was seen by the founders of this state.

The task of providing an adequate foundation for citizenship was much less daunting two hundred years ago than it is today because basic assumptions about citizenship were fundamentally different. Unlike today, when all people are assumed to be capable of exercising civic responsibility, the founding generation followed the example of earlier republicans and assumed that only a few people would be eligible to vote.<sup>210</sup>

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208. Allen Wall, *Towards the Fundamental Right and Education Quality Strategy in Illinois School Finance Litigation*, 77 Educ. L. Rep. (West) 609 (1992).

209. *Id.* at 622.

210. See BURNS, *supra* note 162, at 362.

A. *The Effect of a Judicially-Mandated Adequacy Standard on Policy in Kentucky and Texas*

An analysis of the policy implications of a well-defined adequacy standard might best begin with an examination of the results of constitutional litigation in two states: Kentucky and Texas. Kentucky is important because it is the only state where the supreme court has declared the entire educational system unconstitutional, and the only state besides West Virginia where the court has defined an adequacy standard in great detail.<sup>211</sup> Texas is important because the supreme court in that state declared the school finance system unconstitutional on grounds which failed to clearly distinguish between adequacy and equity,<sup>212</sup> leading to a confused and contentious series of attempts to arrive at an acceptable legislative response.<sup>213</sup>

1. Kentucky

The legislative response to the supreme court's order in Kentucky is heralded as the most successful of the legislative responses to a school finance suit for several reasons. First, the Kentucky court rejected at the outset any approach which merely tinkered with the funding mechanism in the state by declaring that all statutes and regulations "creating" and "implementing" the "whole gamut of the common school system in Kentucky" were constitutionally deficient.<sup>214</sup> As the attorney for the plaintiffs said at a Harvard Law School symposium in February 1991: "[W]e alleged that the whole education system was inadequate in a majority of school districts in the state. The facts, as they

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211. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212, 215 (Ky. 1989). In June of 1993, the Supreme Judicial Court of Massachusetts adopted the Kentucky definition of adequacy, saying: "The guidelines set forth by the Supreme Court of Kentucky fairly reflect our view of the matter . . ." *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993).

212. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394, 397 (Tex. 1989).

213. William P. Hobby, Jr. & Billy D. Walker, *Legislative Reform of the Texas Public School Finance System, 1973-1991*, 28 HARV. J. ON LEGIS. 379, 384, 386-88, 390-94 (1991); Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 362-66 (1991); William Celis 3d, *Texas Lawmakers Again Reject Plan to Equalize School Financing*, N.Y. TIMES, Dec. 4, 1992, at A26.

214. *Rose*, 790 S.W.2d at 215.

unfolded, showed this to be true."<sup>215</sup>

Second, the Kentucky decision goes farther than any other by determining what students must learn in an adequate system, rather than merely what a system must teach. The Kentucky adequacy definition requires funding allocations sufficient to result in an adequate education for each child in the state. An adequate education is one which develops communication skills; political, social, and economic knowledge; understanding of government and culture; and sufficient vocational skills to enable students to compete with others on an equal basis in the academic and job markets.<sup>216</sup>

Finally, the Kentucky decision places responsibility for devising an acceptable system in the lap of the legislature alone. The Kentucky court forced the legislature to depart from the general view that education is a shared responsibility between federal, state, and local entities.<sup>217</sup> It did this by stating in its definition of the "essential, and minimal, characteristics of an 'efficient' system of common schools" that the "establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly."<sup>218</sup>

The combination of these features in Kentucky forced a bold response from the legislature.<sup>219</sup> According to Kern Alexander:

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215. Bert T. Combs, Remarks at Harvard Law School Symposium (Feb. 9, 1991) (author's notes on file with author).

216. *Rose*, 790 S.W.2d at 212.

217. *Id.* at 216.

218. *Id.* at 212.

219. The Kentucky Education Reform Act of 1990 ("KERA") completely restructured education in Kentucky. Most significantly, it includes provisions for an outcome-based education system with strong state-wide interdisciplinary performance assessments; a reward and sanction system whereby successful schools will receive financial rewards and unsuccessful schools will be required to make acceptable plans for improvement or become classified as "schools in crisis" (subjecting the staff in those schools to state supervision, probationary status and possible dismissal); a system of local control through school-based management councils made up of parents, teachers, and administrators which report to local school boards; mandatory staff development for all professional staff members of at least four days a year; mandatory pre-school programs for at risk four year olds; family and youth service centers in or near any school with twenty percent or more low income children; and the establishment of the Kentucky Educational Technology System which will ultimately provide a technological network of schools, parents, teachers, and administrators. Kentucky Education Reform Act of 1990, ch. 476, 1990 Ky. Rev. Stat. 1530 (Michie) (codified at KY. REV. STAT. ANN. §§ 156.005-165.990 (Michie/Bobbs-Merrill 1992)).

See Patricia A. Brannan & Paul A. Minorini, *A Model for Effective School Reform: The Kentucky Education Reform Act*, INQUIRY & ANALYSIS March 1993, at 1-4 (describing Kentucky reform law generally); Alexander, *supra* note 60; Combs, *supra* note 6.

Prior to the lawsuit, Kentucky was in legislative gridlock. The power structure was vested in continuing inequality and disparity. Kentucky is an excellent study of faction. It is also a good study of the particularized interests of a few factions eventually substituting self-interest for the general interest of the people as a whole. It ultimately raises the question: can the legislature act on behalf of the common good?<sup>220</sup>

The attorney for the plaintiffs in the Kentucky case described the result in the following terms:

Legal historians will note that Kentucky's School Reform Law is a classic example of how this democracy of ours can work for progress when the heads of the three coordinate branches of government lay aside their egos and pride of turf and work together. Here, concerned citizens brought their message to the judiciary as well as the General Assembly and the Governor. All three branches of state government, to their great credit, faced up to their constitutional obligations. The result was the enactment of a school reform measure that has been acclaimed as a model for other states. The Kentucky Judiciary, the General Assembly, and the Governor deserve high praise.<sup>221</sup>

Bert Combs, a former governor of Kentucky, said, "Kentucky has now decided to become educated and has embarked on a crusade to accomplish that objective. Do not be surprised if we develop, within the next decade, a first-class, world-wide educational system."<sup>222</sup>

## 2. Texas

In contrast to Kentucky, the Texas court's failure to be clear about the distinction between adequacy and equity has resulted

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220. Kern Alexander, Remarks at Harvard Law School Symposium (Feb. 9, 1991) (author's notes on file with author).

221. Combs, *supra* note 6, at 376.

222. Combs, *supra* note 215.

in little real progress in either direction.<sup>223</sup> As one commentator recently stated:

The failure of the court to separate the ideas of adequacy and equality resulted in confusion and may generate further unnecessary litigation as citizens, school districts, and the legislature try to determine how to structure a substantially equal finance system that nonetheless allows for local control and local supplementation of school budgets. The court's confusion also tends to perpetuate legislative fixation on equalization programs.<sup>224</sup>

The result in Texas has been a succession of attempts by the legislature to produce a funding package acceptable to the state's supreme court. Each attempt has failed. The frustration has caused one member of the Texas Senate to remark that he "wanted to 'surrender' to the Court but he did not know where to 'turn himself in.'"<sup>225</sup>

The lesson of the Kentucky and Texas experience seems clear. A well-defined adequacy standard helps shape educational policy. Senator Michael Maloney, Chair of Kentucky's Senate Education Committee, told the Harvard Symposium that the legislature "used the Supreme Court decision to tailor legislation."<sup>226</sup> However, this does not completely resolve the question of how that standard should be developed.

The Kentucky experience with a court-developed standard appears to have been a positive one, but none of the commenta-

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223. The Texas decision relied on the Texas Constitution's requirements that the state education system be "suitable," "efficient," and designed to result in a "general diffusion of knowledge." *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989). The court ruled that "districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort." *Id.* at 397. This emphasis caused confusion in the Texas legislature and the court has rejected attempts by the legislature to correct the funding deficiencies. See Yudof, *supra* note 7, at 585 (1991); Celis, *supra* note 213, at A26.

224. Stark, *supra* note 2, at 643.

225. William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 754 (1992); see also William Celis 3d, *School Tax Still Bedevils Lawmakers: Texas Again Trying for Equitable Plan*, N.Y. TIMES, Nov. 18, 1992, at B7; Celis, *supra* note 213, at A26; Sam H. Verhoek, *Legislature in Texas Sends School-Aid Plan to Voters*, N.Y. TIMES, Feb. 16, 1993, at A12; Yudof, *supra* note 7.

226. Sen. Michael Maloney, Remarks at Harvard Law School Symposium (Feb. 9, 1991) (author's notes on file with author).

tors are able to explain exactly why. Certainly, the judicial definition of adequacy and sweeping declaration of unconstitutionality in Kentucky left less room for political posturing when the legislature convened to frame a policy response.<sup>227</sup>

### *B. Recent Non-Judicial Reform Efforts in Vermont*

Some scholars and practitioners assert that courts are the best instruments for bringing about policy reform, especially when the cause being advanced is an unpopular one.<sup>228</sup> This may be particularly true in education because the educational system is notably reluctant to recognize outcome-based accountability.<sup>229</sup>

Most would agree, however, that policy reforms that are not forced by judicial decree are generally preferable to those that are. In Vermont, a more clearly stated educational adequacy standard could take the form of either a constitutional amendment or a legislative determination of adequacy. In the alternative, the State Board of Education could promulgate rules that would define adequacy in terms of student outcomes rather than programmatic inputs. In fact, some movement in these directions has already occurred.

An amendment to the Education Clause of the Vermont Constitution, Proposal 13, was sponsored in 1991 by State Senators Jeb Spaulding and David Wolk.<sup>230</sup> The proposed amendment called for the adoption of the "thorough and efficient" standard in this state. The amendment would change section 68 of the Vermont Constitution to read:

Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed. . . . The general assembly shall ensure a thorough, efficient and equitable system of free public education sufficient to give each child an equal opportunity to acquire the essential knowledge and skills

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227. See Combs, *supra* note 6, at 370-78 (discussing the strategies employed by the plaintiffs to secure a favorable legislative response in the event they won the lawsuit).

228. Kern Alexander, *Educational Fiscal Policy and Judicial Deference*, 18 EDUC. ADMIN. Q. 131 (1982); see generally ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1981).

229. Clune, *supra* note 225, at 743.

230. Proposal 13, 61st Leg. Biennial, Vermont Senate (1991).

required for full participation in society.<sup>231</sup>

Proposal 13 was supported by the Vermont School Boards Association, the Vermont NEA, the Vermont Superintendents and Headmasters Associations, and all of the other members of the Vermont Education Coalition. However, none of the supporting groups felt that the proposed amendment was a top priority; therefore, the Senate Education Committee was unwilling to recommend the proposal to the Senate as a whole.

If an education amendment is to be adopted, the supporting groups must do a much more effective job of educating their own members and the public at large as to its importance. Any legislative action intended to support or define an adequacy standard for the state as a whole will only succeed if preceded by a civic discussion among Vermonters about the importance of local control of education and the relationship between local control and student equity.<sup>232</sup>

Under our system of government, that discussion should take place in the political arena. The State Board of Education points with pride to the number of people who have been involved in focus forums to discuss the Common Core of Learning.<sup>233</sup> The proposed Common Core could serve as the heart of a constitutionally supported adequacy standard. However, without the force of a political statement, it will lack the sense of ownership necessary to bring it to the fore.<sup>234</sup>

As Lauren Resnick, one of the leaders of the movement for national school standards, recently wrote about the lack of content

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231. *Id.*

232. See, e.g., *Minority Report*, in EDUCATION FIN. COMM'N, VERMONT EDUCATION FINANCE: FINDINGS AND RECOMMENDATIONS 5 (1993) ("[T]he current nature of the problem really necessitates the need for constitutional amendments to clearly and distinctly reinvigorate Vermont's understanding of its responsibilities to children and children's needs to become independent people and responsible adults.").

233. Vermont Dep't of Educ., *The Vermont Common Core of Learning 4* (1992) (draft on file with author) ("[T]housands of teachers, parents, neighbors, school administrators, students and business people . . . have gathered in small groups to answer this question: What knowledge, skills and qualities will learners need to succeed in the 21st Century?").

234. See *Minority Report*, *supra* note 232.

The Governor of Vermont needs to lead a thorough State-wide discussion of the current organizational structure and system of accountability of Vermont's educational system to find a social mandate to propose a Constitutional Amendment to redefine and establish the State's Twenty-first Century responsibility for the education of youth.

*Id.* at 5.

standards in most school districts: "We *did* have an emergent set of ideas about what the content should be . . . . But we never had the *discussion*: unlike nearly every other country, we never had a passionate yet reasoned discussion about what was worth teaching and what students ought to know."<sup>235</sup> There are few signs that today's Vermonters see the state's role in setting standards as central, even though the constitution makes it so.

### C. A Proposed Legislative Reform Package

One researcher has suggested a bold reform package which could be enacted by a legislature or required by a judicial decision on educational adequacy. William H. Clune's "Three Part Remedy" is distilled from the experiences of Kentucky, New Jersey, and Texas.<sup>236</sup> Clune's policy recommendations include a base program of "substantial equalization" of spending, a compensatory aid program of at least \$1000 for each student classified as "at risk" distributed regardless of the wealth of the student's home school district, and a set of performance oriented policies designed to improve the probability that increased spending will result in increased learning outcomes for students.<sup>237</sup>

In Vermont, an emphasis on compensatory programs would help school districts which have large numbers of students who need compensatory help but do not qualify for large amounts of equalization aid. More importantly, directing compensatory funds to students based on need addresses adequacy directly. In Vermont, there are no state compensatory education funds, and approximately 10,000 of the students eligible for Federal Chapter 1 services are not served.<sup>238</sup> Chapter 1 funds are distributed on the basis of community income, not on the basis of compensatory needs.

An emphasis on performance-oriented policies is important as well because researchers who have studied the relationship between educational spending and student outcomes generally

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235. John O'Neil, *On the New Standards Project: A Conversation with Lauren Resnick and Warren Simmons*, EDUC. LEADERSHIP, Feb. 1993, at 20.

236. Clune, *supra* note 225, at 722.

237. Clune, *supra* note 225, at 722, 733-34.

238. CONDITION 1992, *supra* note 8, at 3, 8; see U.S. DEPT OF EDUC., STATE PERFORMANCE REPORT (1991-92).

caution that spending more does not insure better schools. In some school districts spending more money will not change outcomes, and increased allocations should therefore go to those who plan for reform and to those who measure results.<sup>239</sup>

A bill is currently pending in the Vermont Senate which would obligate school districts to articulate certain standards at certain grade levels, and would give the State Board of Education the power to approve local standards.<sup>240</sup>

#### IV. CONCLUSIONS AND RECOMMENDATIONS

Vermont's constitution contains a statement on education which obligates the state to ensure an adequate education for all Vermont children regardless of the wealth of their local communities. The founders of this state meant to equip future citizens with attitudes and skills they would need to participate in the political process as virtuous citizens. They strongly believed that the state could not sustain itself unless it fulfilled this responsibility.

Vermont's commitment to education, with its historic devotion to virtue is analogous to the aspirations of citizens in states with "thorough and efficient" constitutional standards. This makes reference to standards imposed in Kentucky and West Virginia applicable to Vermont.

Much has changed since the Education Clause was placed in the Vermont Constitution. Among the most important changes has been the expansion of the franchise to literally all citizens over the age of eighteen. An educational system which instills citizenship values and skills in only a percentage of those who

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239. Ferguson, *supra* note 47; see also Clune, *supra* note 225, at 724-26 (reviewing studies on relationship between how money is spent and student achievement.)

Outcomes standards have become the focus of a new debate between those who demand more accountability and those who fear that more accurate measurement of what students have learned (rather than what they have been taught) will result in school districts or states monitoring and rewarding the inculcation of values such as self-respect, tolerance and caring citizenship, which are stated—though rarely measured—goals of many school systems. See, e.g., Chris Pipho, *Gridlock on the Road To Reform*, 1993 PHU DELTA KAPPAN 750; Peter West, *Debate Over 'Outcomes' System in Kansas To Get Airing*, EDUC. WK., Feb. 10, 1993, at 21; Robert R. Spillane, *Student Achievement Standards: Why We Need Them, Why We Don't Have Them, and How to Get Them*, EDUC. WK., June 2, 1993, at 36.

240. S. 106, 62d Leg. Biennial (1993). Another pending bill would have the performance standards created and monitored at the supervisory union level, though still approved by the state board of education. S. 255, 62d Leg. Biennial (1993).

will be expected to participate as citizens is clearly not adequate to meet the self-preservation objectives of the state.

Those objectives have not been clearly articulated since early in this century when the Carnegie Commission forced a renewal of the state's commitment to educational goals. As a consequence, we have allowed the quality of our children's education to become too much a product of local will and local ability to pay.

Educational policy makers should not wait for a school funding lawsuit. An adequacy standard should be developed through a political process which makes the state its guarantor. Specific measures of adequacy should be developed on a statewide basis, and the state should invest now to improve methods of assessing and reporting results.

The adequacy standard must be fully secured by a funding mechanism developed by the state.<sup>241</sup> At a minimum, the funding mechanism should allow local school districts to provide an adequate education to all students while maintaining substantially similar local tax efforts. Research must be conducted in Vermont to determine how spending relates to the ability of school districts to meet the state adequacy standards.

Indeed, the whole notion of "state aid" must be re-evaluated. An emphasis on compensatory funds, for example, would represent a departure from the view that state aid to education is disbursed to school districts for use in a variety of ways. It makes "at risk" students a target of state support and thereby, on a philosophical basis at least, changes the unit of responsibility for their education from the school district to the state itself.

If the existence of an adequacy standard is formally recognized by the Vermont Supreme Court or Vermont Legislature, more attention will be paid to developing and implementing a state-wide definition of adequacy. This would provide Vermont with a reliable means of gauging its success in meeting that standard and providing the resources required to effect change as needed.

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241. See, e.g., *Idaho Schs. for Equal Educ. v. Evans*, 850 P.2d 724, 735 (Idaho 1993).

