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# Comments: Maryland's Fundamental Interest in a Thorough and Efficient System of Public Education: The Need for Judicial Intervention

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# COMMENTS

## MARYLAND'S FUNDAMENTAL INTEREST IN A THOROUGH AND EFFICIENT SYSTEM OF PUBLIC EDUCATION: THE NEED FOR JUDICIAL INTERVENTION

*After the 1983 Court of Appeals of Maryland decision in Hornbeck v. Somerset County Board of Education there appeared little hope for those who wished to reform disparities in public school financing through the courts. With the recent publication of the Maryland School Performance Program Reports, however, and enlightened decisions in other jurisdictions holding similar public school financing schemes unconstitutional, evidence has emerged which is capable of reviving a state constitutional challenge to Maryland's existing public school financing scheme which is based upon local wealth.*

### I. INTRODUCTION

Education is vital to the exercise of fundamental rights guaranteed through the Fourteenth Amendment of the United States Constitution<sup>1</sup> and by article XXIV of the Maryland Declaration of Rights.<sup>2</sup> The United States Supreme Court has long recognized that

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1. The due process clause of the fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Bill of Rights has been applied to the states through the fourteenth amendment on a selective basis. The concept of due process, however, is not limited to the protection of the Bill of Rights. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (fundamental rights cannot be taken away by acts of state legislatures); see generally Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777 (1985); see also, Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After Kadrmas v. Dickenson Public Schools*, 74 CORNELL L. REV. 1078 (1989), for an in-depth examination of educational opportunity in the context of fundamental rights analysis.
  2. Article XXIV of the Maryland Declaration of Rights provides: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Maryland courts have recognized that the concept of equal protection is embodied in the due process requirement of article XXIV.

"education is perhaps the most important function of state and local governments."<sup>3</sup>

In *Plyler v. Doe*, however, the Supreme Court held that, at least for the purposes of the federal Constitution's equal protection clause, education is not a fundamental right.<sup>4</sup> The Court added that, on the other hand, "neither is [education] merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."<sup>5</sup> Supreme Court decisions have repeatedly recognized public education as a unifying social force and basic tool for shaping democratic values.<sup>6</sup> An effective public school education in basic skills, available

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*Hornbeck v. Somerset Bd. of Educ.*, 295 Md. 597, 616 n.4, 458 A.2d 758, 768 n.4 (1983). The equal protection clause of the fourteenth amendment and the concept of equal protection embodied in article XXIV of the Maryland Declaration of Rights are in *pari materia* and generally apply in a like manner. *Id.* at 640, 458 A.2d at 781. However, the two provisions are independent of each other so that a violation of one is not necessarily a violation of the other. *Id.*

3. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Note that the words of the Supreme Court in *Brown* retain their relevance today:

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

*Id.* at 493; see also *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 190 (Ky. 1989) (citing *Brown* in the context of finding Kentucky's public school financing scheme unconstitutional as applied to poorer urban school districts).

4. 457 U.S. 202, 221 (1982).
5. *Id.* See also *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 36-37 (1973) (Texas public school financing system using local property taxation as a base is not violative of the fourteenth amendment guarantee of equal protection when "no charge fairly could be made that the system fails 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.").
6. See *Abington School Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J. concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948) (Frankfurter, J., concurring) (terming the public school as "the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most pervasive means for promoting our common destiny").

on a nondiscriminatory basis to all Maryland school children, would contribute immeasurably to the "social, economic, intellectual and psychological well-being of the individual"<sup>7</sup> and to the success of the state as a whole.<sup>8</sup> When education is linked with the political process, the Supreme Court and state courts of last resort have held that the right to a certain minimum of education may command constitutional protection.<sup>9</sup>

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7. *Robinson v. Cahill*, 118 N.J. Super. 223, 231, 287 A.2d 187, 191 (1972) (citing *WE HOLD THESE TRUTHS* 114-116 (S. Brown ed. 1941)). See *Plyler v. Doe*, 457 U.S. 202, 222 (1982); see also *Hobson v. Hanson*, 269 F. Supp. 401, 483 (D.D.C. 1967); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (Serrano I). In *Serrano I*, the court stated that:

[E]ducation is unmatched in the extent to which it molds the personality of the youth of society. While police and fire protection, garbage collection and street lights are essentially neutral in their effect on the individual psyche, public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents but by the state.

*Id.* at 609-10, 487 P.2d at 1259, 96 Cal. Rptr. at 619 (citing Coons, Clune & Sugarman, 57 CAL. L. REV. 305, 389); see also Biegel, *supra* note 1, at 1106-13. In addition, there is an integral relationship between self-esteem and academic achievement. See Mayer, *The Self-Esteem Movement and the Right to an Education Under California Constitutional Law*, 5 U.C.L.A. J. EDUC. 123 (1991).

8. See generally Ratner, *supra* note 1, at 781-85. Ratner identifies three fundamental functions of public school education which benefit society:

1) Political Function - Basic skills are necessary to protect free people from tyranny. Citizens must be literate to intelligently exercise their basic civic duty to vote, and to exercise their First Amendment rights in participation in our democratic political process that depends on each individual's ability to protect her own interests. *Id.* at 782-83;

2) Economic Function - In an industrialized and increasingly complex society, basic skills are necessary to equip each child to compete in the labor market. The failure to adequately educate students in basic skills is costly to society:

Functionally illiterate adults make up a disproportionately large percentage of the unemployed, depriving the country of valuable contributions to the gross national product and corresponding tax revenue. Furthermore, functional illiterates who are employed can be dangerous to themselves and to others, as well as expensive to employers. Disproportionately high percentages of this group commit crimes. Society not only suffers the direct financial, physical, and emotional losses caused by crime, but pays billions of dollars per year to imprison the criminals. In addition, disproportionately high percentages of illiterate adults need welfare and other forms of governmental assistance, for which society pays billions of dollars per year.

*Id.* at 783-84.

3) National Defense Function - The level of skills needed for effective military performance has increased because technology is more demanding. The failure to sufficiently educate people seeking to enlist is one of the most serious deficiencies in our national defense. *Id.* at 784-85.

9. The importance of public education to the political process has long been

Section one of article VIII of the Maryland Constitution requires that the General Assembly establish "a thorough and efficient"

recognized. In the words of Thomas Jefferson:

There is also an artificial aristocracy, founded on wealth and birth . . . . The artificial aristocracy is a mischievous ingredient in government, and provision should be made to prevent its ascendancy. . . . At the first session of our legislature [in Virginia] after the Declaration of Independence, we passed . . . laws, drawn by myself, [which] laid the ax to the foot of pseudo-aristocracy. And had another which I prepared been adopted by the legislature, our work would have been complete. It was a bill for the more general diffusion of learning. This proposed to divide every county into wards . . . like your townships; to establish in each ward a free school for reading, writing and common arithmetic; to provide for the annual selection of the best subjects from these schools, who might receive at the public expense, a higher degree of education at a district school . . . . Worth and genius would have thus been sought out from every condition of life and completely prepared by education for defeating the competition of wealth and birth for public trusts.

Robinson v. Cahill, 118 N.J. Super. 223, 231, 287 A.2d 187, 191 (1972) (citing WE HOLD THESE TRUTHS 114-16 (S. Brown ed. 1941)).

On the state level, a public school financing scheme which "condition[ed] full entitlement to [education] on wealth" was held to violate equal protection by the California Supreme Court in *Serrano I*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601. That court made a direct analogy between education and voting, stating "both are crucial to participation in, and the functioning of, a democracy . . . . At a minimum, education makes more meaningful the casting of a ballot . . . [and] is likely to provide the understanding of, and the interest in, public issues which are to spur involvement in other civic and political activities." *Serrano I*, 5 Cal. 3d at 608, 487 P.2d at 1258, 96 Cal. Rptr. at 618. The *Serrano I* court also noted that the Supreme Court has recognized the "sensitive interplay between education and the cherished First Amendment right of free speech." *Id.* at 608 n.25, 487 P.2d at 1258 n.25, 96 Cal. Rptr. at 618 n.25 (citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.")). See also *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'market place of ideas.' The Nation's future depends upon leaders trained through wide exposure to [a] robust exchange of ideas . . .").

The *Serrano I* court treated education as a "fundamental interest" due to the "distinctive and priceless function of education in our society." *Serrano I*, 5 Cal. 3d at 608-09, 487 P.2d at 1258, 96 Cal. Rptr. at 618. The court found support for this treatment in the stress placed upon the uniqueness of education by the Supreme Court in *Palmer v. Thompson*, 403 U.S. 217 (1971). *Id.* at 609 n.26, 487 P.2d at 1258 n.26, 96 Cal. Rptr. at 618 n.26. While upholding a city's right to close municipal swimming pools rather than operate them on an integrated basis, the *Palmer* Court distinguished its earlier refusal in *Brown v. Board of Education*, 347 U.S. 483 (1959) (*Brown I*), to allow the closing of schools to avoid desegregation, stating that *Brown I* "did not involve swimming pools but rather public schools, an enterprise we have described as 'perhaps the most important function of state and local governments.'" *Id.* (quoting *Palmer*, 403 U.S. at 221 n.6). This distinction was also made by

system of free public schools throughout the state and "provide by taxation, or otherwise, for their maintenance."<sup>10</sup> Maryland's public elementary and secondary school system is administered by the State Department of Education pursuant to the provisions of the Education Article of the Maryland Code.<sup>11</sup> The General Assembly has charged the State Board of Education, as head of the State Department of Education, with the duty of determining the educational policies of

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Justice Blackmun, who emphasized in his concurring opinion that "[t]he pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety." *Id.* (quoting *Palmer*, 403 U.S. at 229 (Blackmun, J., concurring)).

The *Serrano I* decision was subsequently reconsidered in light of the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (*Serrano II*). The *Serrano II* court adhered to the determinations of *Serrano I* based upon the California constitutional provision guaranteeing equal protection of the laws, stating that the state equal protection provisions, while "substantially the equivalent of" the guarantees of the Fourteenth Amendment, "are possessed of an independent vitality. . . ." *Id.* at 764-65, 557 P.2d at 950, 135 Cal. Rptr. at 366-67. The *Serrano II* court likewise reiterated its *Serrano I* holding that a public school financing scheme, which, by drawing distinctions on the basis of district wealth, violated the equal protection of students under state constitutional provisions. *Id.* at 766, 557 P.2d at 951, 135 Cal. Rptr. at 367. Just as the Supreme Court supported its decision in *Rodriguez* partly on the basis that the issue of financing an education raised serious considerations of federalism and deference to local decisions, the *Serrano II* court found support for its conclusion in the language of *Rodriguez*, noting that:

The high court, in passing on the validity of the Texas system under the federal equal protection clause, repeatedly emphasized its lack of "expertise" and familiarity with local problems of school financing and educational policy, which lack of expertise "counsel[s] against premature interference with informed judgments made at the state and local levels."

*Id.* (citing *Rodriguez*, 411 U.S. at 42).

The *Serrano* court also examined the indispensable role played by education in the modern industrial state:

This role, we believe, has two significant aspects: first, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life. '[T]he pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable.' Thus, education is the lifeline of both the individual and society.

*Serrano I*, 5 Cal. 3d at 605, 487 P.2d at 1255, 96 Cal. Rptr. at 615-16 (1971) (quoting Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1129 (1969)).

10. MD. CONST. art. VIII, § 1.

11. MD. EDUC. CODE ANN. (1989 & Supp. 1990).

the State.<sup>12</sup> The State Board of Education is empowered to determine and carry out policies, and to adopt bylaws, rules, and regulations for the administration of the public school system.<sup>13</sup> The State Superintendent of Schools is responsible for the administration of the Department of Education.<sup>14</sup>

Maryland's public school system consists of twenty-four school districts, one for each county and Baltimore City.<sup>15</sup> Each school district has its own school board, which, together with its local school superintendent, controls the educational matters of its district.<sup>16</sup> Although local authorities determine the educational policy within their district, the State Board of Education has the last word on any matter concerning the policy and administration of public education.<sup>17</sup> Local school boards remain subject to the applicable bylaws, rules and regulations of the State Board of Education, which have the force of law when adopted and published.<sup>18</sup> The Court of Appeals of Maryland has expressly stated that the State Board of Education plays a "paramount role in interpreting the [State's] education law."<sup>19</sup>

The State Board of Education has published reports on the performance of Maryland's public elementary and secondary schools for the 1989-90, and 1990-91 school years.<sup>20</sup> These reports show gross inequities among school districts in the quality of education available to Maryland school children.<sup>21</sup> These inequities are indisputably linked to the fact that financing for Maryland public schools is based on local wealth.<sup>22</sup>

The failure to provide an effective education in basic skills to a large number of Maryland school children not only results in pro-

12. *Clinton v. Board of Educ.*, 315 Md. 666, 678, 556 A.2d 273, 279 (1989).

13. MD. EDUC. CODE ANN. § 2-205(b) (1989).

14. *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 603, 458 A.2d 758, 762 (1983).

15. *Id.*

16. *Id.*

17. *Wilson v. Board of Educ.*, 234 Md. 561, 565, 200 A.2d 67, 69 (1964).

18. MD. EDUC. CODE ANN. § 2-205(c)(2)-(c)(3) (1989).

19. *Clinton v. Board of Educ.*, 315 Md. 666, 678, 556 A.2d 273, 279 (1989) (citations omitted).

20. MARYLAND STATE DEP'T OF EDUC., MARYLAND SCHOOL PERFORMANCE PROGRAM REPORT 1990, STATE & SCHOOL Sys. (1990) (*Foreword* by Joseph L. Shilling, State Superintendent of Schools) [hereinafter 1990 MSPP REPORT]; MARYLAND STATE DEP'T OF EDUC., MARYLAND SCHOOL PERFORMANCE PROGRAM REPORT 1991, STATE & SCHOOL Sys. (1991) (*Foreword* by Nancy S. Grasmick, State Superintendent of Schools) [hereinafter 1991 MSPP REPORT].

21. See 1990 & 1991 MSPP REPORTS, *supra* note 20; *cf.* *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 611-14, 458 A.2d 758, 766-67 (1983).

22. See *Hornbeck* at 611-16, 458 A.2d at 766-68; see also *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 198-99 (Ky. 1989); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989). See generally *Briffault, Our Localism*, 90 COLUM. L. REV. 1, 21, 27 (1990).

found injuries to these children, but produces severe political, economic, and social costs to the state.<sup>23</sup> Despite evidence of the detrimental effects of Maryland's existing public school financing scheme, the General Assembly has failed to correct these inadequacies.<sup>24</sup> Consequently, the courts must act in accordance with the

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23. Cf. Ratner, *supra* note 1, at 781-795; see also Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After Kadrmas v. Dickenson Public Schools*, 74 CORNELL L. REV. 1078, 1106-1116 (1989). The State of Maryland pays a high price for its failure to provide an adequate education to a large segment of its population, especially in the area of unemployment. In fiscal year 1991, unemployment alone cost the State \$409 million. Maryland Dep't. of Economic & Employment, Office of Labor Market Analysis & Information, *Unemployment Insurance Activity Report*, Fiscal Year 1991 at 1 (1991); cf. Biegel, *supra* note 1, at 1113-14 (discussion of the views of educators, policymakers and business on the cost of denying adequate education). Xerox Corporation Chairperson David T. Kerns has declared: "[I]f we do not restructure our schools, this nation will be out of business by the year 2000." Biegel, *supra* note 1, at 1114.

24. There has been increasing statewide attention to the problems facing our public school system. The Metropolitan Education Coalition (MEC) has been active in attempting to improve the quality of education in the Baltimore area by informing the public and legislators about education concerns, and specifically by proposing a model funding formula which became a widely supported Senate Bill. Metropolitan Education Coalition Newsletter, Spring 1991 [hereinafter Spring 1991 MEC Newsletter]; Metropolitan Education Coalition Newsletter, Special Edition, Fall 1990 [hereinafter Fall 1990 MEC Newsletter] (both on file with the *University of Baltimore Law Review*). The MEC platform includes, inter alia, the following principles:

**SCHOOL PERFORMANCE AND ACCOUNTABILITY - Principles:**

Efforts to demonstrate effectiveness and accountability in the spending of funds, through school performance programs of assessment and accountability for outcomes, are essential to building public confidence in public school systems. Such programs should measure school and school system progress compared to their baseline data so that those systems working against greater odds are not penalized. Support and incentives toward reaching standards should be emphasized to ensure success for all students regardless of background or place of residence.

**FUNDING EQUALIZATION - Principles:** The primary responsibility for funding public education lies with the state. Therefore, state funding must be improved and distributed so as to promote equity. The local and federal governments also share responsibility for meeting fundamental education requirements. These responsibilities must be carried out in a flexible and fair manner in order to meet the differing needs of students around the state.

Fall 1990 MEC Newsletter, at 3.

Other education promoters echo the MEC's position that none of their specific concerns can be addressed until public school financing is made more equitable. Miller, *Funding Reform Top Priority of Metro Education Coalition*, Fall 1990 MEC Newsletter at 2-3. In July 1990, at State Board of Education hearings held to consider opinions on proposals for reform submitted by

Maryland Constitution to ensure that public school financing is

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Superintendent of Schools, Joseph Schilling, MEC's testimony on equitable financing drew support from "average" districts, such as Dorchester County, and from the highest spending district, Montgomery County, in addition to the poorer counties. *Id.* Dr. Robert C. Dubel, then Superintendent of Baltimore County schools was "fully supportive" of [MEC], stating, "I'm not saying the county doesn't have funding needs too, but I certainly think it is good and proper for Baltimore City to get a bigger share of the pie." *Id.*

Lawmakers also recognize that Maryland public schools are failing under the existing financing scheme. In 1991, for example, Senators Young, Piccinini, Miedusiewski, Lawlah, Hughes, Pica and Blount introduced Senate Bill No. 494, for the purpose of creating an Aid for Needy Schools fund. The bill's preamble explains the premises upon which the proposal was based:

WHEREAS, It is the intent of the General Assembly to provide the best educational opportunities for all elementary and secondary school age children in the State through a general system of free public schools; and

WHEREAS, The majority of the funding for the public school system comes from the taxing of assessable real property by each of the subdivisions of the State; and

WHEREAS, It is becoming increasingly apparent that this funding scheme is falling short of providing adequate and consistent amounts of revenue throughout the State; and

WHEREAS, The inequities in the funding levels are so significant as to preclude the delivery of quality educational opportunities to all elementary and secondary public schools in the State; and

WHEREAS, The federal, State, and local governments are severely limited in improving this deficit due to ever-growing and competing priorities; and

WHEREAS, The people of the State, who each stand to benefit from a public school system that provides quality education to all students, should be given the opportunity to volunteer to assist directly in alleviating the funding gaps in the public school system; and

WHEREAS, The financial institutions where the people of the State conduct their financial transactions are best equipped to facilitate the voluntary donations that citizens may want to make in order to help the schools that are in need of additional funding . . . .

The Aid for Needy Schools fund seemed to be intended to facilitate the opportunity to make "charitable" donations to needy public schools by establishing check book contribution plans with local banks to be administered by the State Board of Education. S.B. 494 (introduced Feb. 1, 1991).

However, the 1991 legislative session ended with no action taken by the General Assembly to improve public school financing, though several other bills which addressed the public school financing problem were introduced. Each of these bills either did not make it out of the committee to which they were assigned, or were assigned to interim study. *See* S.B. 839 (introduced March 4, 1991) (repealing Maryland's existing public school financing scheme); S.B. 764 (introduced Feb. 11, 1991) (the Tax Fairness Act of 1991) (implementing the recommendation of the Governor's Commission on State Taxes and Tax Structure (Linowes)); S.B. 550 (introduced Feb. 1, 1991) (the Governor's New Action Plan for Educational Excellence (APEX)); S.B. 494 (introduced Feb. 1, 1991) (Education-Aid for Needy School Funds); S.B. 321

sufficient to provide the means for an adequate education to all school children throughout the state.<sup>25</sup>

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(introduced Jan. 30, 1991) (Public Education - Cost of Education Index, adding to Section 5-202(g) of the Maryland Education Code); H.B. 203 (introduced Jan. 24, 1991) (State Aid for Public Education - Schools for Success); H.B. 677 (introduced Feb. 1, 1991) (allowing income tax deductions for contributions to local districts); S.B. 757 (introduced Feb. 11, 1991) (requiring local districts to pay for social security and retirement increases beyond fiscal year 1991 level). In addition, the House Ways and Means Committee issued an unfavorable report on H.B. 886, (Maryland School Performance Accountability Reports), which would enact the *Maryland School Performance* system as accountability reporting requirements.

Past efforts of the General Assembly have not achieved the constitutionally-mandated level of education under a public school financing scheme based upon local wealth. In 1979, the General Assembly enacted Chapter 243, which increased the foundation amount from \$624 to \$784, and required State and local governments to share the new money on a 50/50 basis and continue to share the old money (\$624) on a 55/45 basis. That same year, the Task Force to Study State-Local Fiscal Relationships (Scanlan Task Force), a commission appointed in 1979, first looked at the concept of relating state aid for current expenses to actual education expenditures. The Scanlan Task Force recommended improvements to the financing formula, such as a substantial increase in the minimum amount that a district may spend on current basic expenses per pupil. In response, the 1980 General Assembly passed legislation which, in theory, tied the per pupil foundation amount to actual per student spending. See 1980 Md. Laws, ch. 531. Chapter 531 increased the foundation amount to \$924. The foundation amount was to equal 75% of the statewide three year average of per pupil expenditures for basic current expenses. However, the overall financing level was never based on actual spending because yearly increases in the foundation amount were capped at the lesser of eight percent or the annual increase in the consumer price index. This cap never permitted aid levels to be on par with spending levels. See DEPARTMENT OF FISCAL SERVS., VOL. VII LEGISLATIVE HANDBOOK SERIES, MARYLAND LOCAL GOVERNMENT-REVENUES AND TAXES 98 (1990) [hereinafter MLGRT].

In 1983, the Task Force to Study the Funding of Public Education (Civiletti Task Force) reaffirmed the concept of using a 75% expenditure target to determine the per pupil foundation amount. Although the Civiletti Task Force wanted to reach 75% of a two-year average of per pupil expenditures for basic current expenses by fiscal year 1989, the General Assembly enacted a less costly recommendation. See 1984 Md. Laws, ch. 85. The General Assembly set flat dollar amounts for the foundation amount through fiscal year 1989, and thereafter the three year average spending level was to be used with the eight percent cap remaining. The Civiletti legislation also established an Accountability Task force to ensure that new monies were used for instruction and for teacher's salaries. In 1988, the Accountability Task Force was terminated and responsibility for review of accountability reports was transferred to the State Department of Education. See MLGRT, *supra*, at 101.

In 1987, The Action Plan for Educational Excellence (APEX Plan) was enacted. See 1987 Md. Laws, ch. 277. The APEX Plan modified the basic current expense formula, basing the per pupil financing levels after fiscal year 1992 on two-year average expenditure figures. The flat dollar rate remains in effect through fiscal year 1992. In fiscal year 1993, the two-year average

In advocating judicial intervention in the area of public school financing based on local wealth, this Comment first explains the General Assembly's affirmative obligation under article VIII of the Maryland Constitution to provide an adequate public education to all Maryland school children. The Comment then examines the evidence necessary to raise a constitutional challenge to Maryland's existing public school financing scheme, on the ground that it violates article VIII. In support of the soundness of judicial intervention into the area of public school financing based on local wealth, the experience of jurisdictions with similar constitutional requirements and public school financing schemes, in particular New Jersey, is examined. The experience of these jurisdictions reveals that deference to the legislature in the area of public school financing based on local wealth results in protracted legal battles which prolong the injuries to affected school children. Ultimately, judicial intervention is required to uphold constitutional mandates to provide adequate education.

The State of Maryland is constitutionally mandated to spend its money to provide an adequate public school education. Thus far, however, the General Assembly's efforts to provide such an education have failed under the existing public school financing scheme. For this reason, this Comment concludes that immediate judicial intervention is warranted. The General Assembly should be ordered to fulfill its affirmative obligation to provide school children with an education constitutionally mandated to be "thorough and efficient."

## II. THE GENERAL ASSEMBLY'S AFFIRMATIVE OBLIGATION TO PROVIDE FOR ADEQUATE EDUCATION

### A. *The State Constitution Mandates that the General Assembly Establish a System of Free Public Schools*

Under the Maryland Constitution, the General Assembly has an affirmative obligation to provide a "thorough and efficient" system

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spending level will determine the foundation amount. The distinction between this plan and previous enactments is that annual increases are not automatically capped. See *MLGRT, supra*, at 99. Total state aid for education, however, has never exceeded 30 percent of general fund revenues. If state aid for education in any one year exceeds 31.5 percent of total general fund revenues, the foundation amount for that year may not be implemented unless the General Assembly affirms by joint resolution that the state has the fiscal resources for the aid required. *Id.* at 101. If a joint resolution is not enacted, basic current expense is capped at eight percent over the prior year's amount. *Id.*

25. See *Hornbeck*, 295 Md. at 632, 639, 458 A.2d at 776-77, 780.

of public school education.<sup>26</sup> In 1983, the Court of Appeals of Maryland, in *Hornbeck v. Somerset County Board of Education*,<sup>27</sup> recognized the General Assembly's duty to establish a statewide public school system which "provide[s] the State's youth with a basic public school education" that is "effective in all districts."<sup>28</sup> The court stated that compliance with this duty would result in compliance with article VIII of the Maryland Constitution which provides:

The General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.<sup>29</sup>

The *Hornbeck* court recognized that under article VIII, the public school financing fund "shall be kept inviolate, and appropriated only to the purposes of Education."<sup>30</sup> The court also noted three important aspects of article III of the Maryland Constitution: one, that the State budget shall "include an 'estimate of all appropriations . . . in conformity with Art. VIII;'"<sup>31</sup> two, that the General Assembly is prohibited from amending the Budget Bill so as to affect the provisions made by the laws of the State for the establishment and maintenance of a system of public schools;<sup>32</sup> and three, that the Governor shall include the estimates for financing public schools in the budget "without revision."<sup>33</sup>

These constitutional provisions evince the fundamental principle that State responsibility for the effectiveness of public education<sup>34</sup> is "vital to the history and traditions of the people of this State."<sup>35</sup> The *Hornbeck* court acknowledged that education plays a central role in one's chances for economic and social success, and influences one's development as a good citizen and participant in political and community life.<sup>36</sup> Although the right to education is explicit in the Maryland Constitution, the *Hornbeck* court agreed with the Supreme Court's decision in *San Antonio Independent School District v.*

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26. MD. CONST. art. VIII, § 1.

27. 295 Md. 597, 458 A.2d 758 (1983).

28. *Id.* at 632, 458 A.2d at 776.

29. MD. CONST. art. VIII, § 1.

30. *Hornbeck*, 295 Md. at 608 n.3, 458 A.2d at 764 n.3.

31. *Id.* at 646, 458 A.2d at 784 (citing MD. CONST. art. III, § 52(4)).

32. *Id.* (citing MD. CONST. art. III, § 52(6)).

33. *Id.* (citing MD. CONST. art. III, § 52(11)).

34. *Id.* at 668, 458 A.2d at 795. (Cole, J., dissenting) ("it is the State's responsibility to provide for the maintenance of the school system") (emphasis in original).

35. Attorney General v. Waldron, 289 Md. 683, 715, 426 A.2d 929, 947 (1981).

36. *Hornbeck*, 295 Md. at 649-50, 458 A.2d at 786.

*Rodriguez*,<sup>37</sup> and held that, under both the Maryland Constitution<sup>38</sup> and the United States Constitution, education is not a fundamental right.<sup>39</sup> Consequently, the *Hornbeck* court explained that the public school financing scheme chosen by the General Assembly is subject to careful examination by the courts only if a significant deprivation of the right to adequate education occurs.<sup>40</sup>

### B. *The Maryland Public School Financing Scheme*

The financing scheme chosen by the Maryland legislature places responsibility for public school financing largely on the individual counties. Because the Maryland Constitution obligates the State — not the counties — to provide financing for public education, the State has abdicated its constitutional responsibility.

Maryland's public school financing scheme, codified in section 5-202(b) of the Education Article of the Maryland Code, is patently dependent upon local wealth.<sup>41</sup> Called the "Lee-Maurer formula,"<sup>42</sup> the financing scheme pays for "basic current expenses"<sup>43</sup> with both state and county revenues.<sup>44</sup> The State, however, pays for only a percentage of the minimum amount that must be spent on each child, with local revenues paying for the rest.<sup>45</sup> Those districts with less wealth have less to contribute to their local education.

The financing scheme works as follows. The General Assembly first establishes a "foundation" amount, which is the minimum

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37. 411 U.S. 1 (1973).

38. *Hornbeck*, 295 Md. at 642, 458 A.2d at 782.

39. *Id.* at 650, 458 A.2d at 786; see *supra* note 1 and accompanying text.

40. *Id.* at 652, 458 A.2d at 787.

41. See *id.* at 605, 458 A.2d at 762; MD. EDUC. CODE ANN. § 5-202(b) (1989 & Supp. 1991).

42. MD. EDUC. CODE ANN. § 5-202(b) (1989 & Supp. 1991).

43. "Basic current expenses" are the expenditures made by a county from State and county revenue for public elementary and secondary schools (with the exception of payment for debt service, capital outlay, transportation, and state aid for handicapped children, driver education and food services). MD. EDUC. CODE ANN. § 5-202(a)(3) (1989); see also *Hornbeck*, 295 Md. at 604, 458 A.2d at 762.

44. See *Hornbeck*, 295 Md. at 604-05, 458 A.2d at 762-63. Federal aid is minimal, accounting for approximately eight percent of total aid. See *id.* n.1; see also *Abbott v. Burke*, 119 N.J. 287, 331, 575 A.2d 359, 381 (1990). For the 1986-87 fiscal year, federal revenues provided 6.4 percent of the average state public school financing budget. See NATIONAL CENTER FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., DIGEST OF EDUC. STATISTICS 1989, at 149. In any event, federal aid should not be a factor in determining the state's obligation. The *Abbott* court found that even the mere consideration of federal aid in determining the need for or amount of state aid would violate federal law. *Abbott*, 119 N.J. at 331, 575 A.2d at 381.

45. See *Hornbeck*, 295 Md. at 605, 458 A.2d at 762-63.

amount each district must spend annually on basic current expenses for each child enrolled.<sup>46</sup> The State then contributes financial assistance only as a percentage of this predetermined foundation amount set by the General Assembly.<sup>47</sup> The rest of the foundation amount

46. *Id.*

47. *Id.* The *Hornbeck* court observed that the General Assembly intended this scheme to equalize for differences in local wealth by providing a larger contribution of state aid to the school districts with lesser wealth per student, in order for each district to meet its foundation amount. *See id.* Under § 5-202(a), a district's wealth is determined by the sum of the assessed valuation of real property, public utility operating property, and net taxable income. MD. EDUC. CODE ANN. § 5-202(a)(8) (1989). Section 5-202(b)(3) provides that, to be eligible to receive the state's share of basic current expenses, the district's governing body "shall levy an annual tax sufficient to provide an amount of revenue for elementary and secondary public education purposes equal to the product of the wealth of the county and a local contribution rate determined for each fiscal year."

Wealth per pupil in dollars by district for the 1989-90 school year was:

1. Allegany	\$ 104,895
2. Anne Arundel	164,782
3. Baltimore City	101,246
4. Baltimore County	219,877
5. Calvert	183,315
6. Caroline	89,048
7. Carroll	125,797
8. Cecil	102,234
9. Charles	124,109
10. Dorchester	115,981
11. Frederick	126,188
12. Garrett	97,297
13. Harford	120,988
14. Howard	195,827
15. Kent	167,188
16. Montgomery	283,757
17. Prince George's	149,818
18. Queen Anne's	159,842
19. St. Mary's	114,069
20. Somerset	87,347
21. Talbot	277,195
22. Washington	121,375
23. Wicomico	117,568
24. Worcester	358,708

1990 MSPP REPORT, *supra* note 20.

Section 5-202(b)(2) specifies that the shared basic current expense amount is to be calculated based upon a statewide aggregate of expenditures for basic current expenses during the third and fourth preceding fiscal years, divided by full-time students. To determine the counties' share of this amount, section 5-202(b)(4) provides that the sum of the basic current expenses to be shared by all the counties shall be multiplied by 0.45 for the first \$624. The amount exceeding \$624 is then multiplied by 0.50, and the two products are added. *Id.* The resulting sum is divided by the sum of wealth of all the counties. *Id.* The resulting quotient, rounded to

is paid for by local school districts as a group.<sup>48</sup> The actual percentage that each district must contribute each year toward its share of the foundation amount varies based upon the district's taxable wealth.<sup>49</sup> The greater a district's taxable wealth, the greater its required contribution to the foundation amount.<sup>50</sup>

Although the foundation amount is the only contribution to public school financing mandated by the General Assembly,<sup>51</sup> it represents only a small fraction of the actual cost needed to educate an individual child. Because the State contributes only a percentage of the foundation amount,<sup>52</sup> the State, in essence, is contributing very little towards the overall amount needed to educate each child. Every district has found it necessary to spend considerably more per student each year than the foundation amount,<sup>53</sup> and it must do so at its own expense. For example, in 1989-90, the General Assembly set the foundation amount at \$1999 per pupil.<sup>54</sup> The minimum amount actually spent that year by a district was \$4,049 per student; the highest amount spent per student was \$6,629.<sup>55</sup> Thus, under Maryland's existing public school financing scheme, a district's public school financing is largely dependent upon its ability to raise local taxes.<sup>56</sup> State aid contributes very little. The dependence of public

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seven decimal places, and expressed as a percentage with five decimal places, is the local contribution rate. *Id.* The state's share of basic current expenses for each county is the difference between the county share as calculated above and the total basic current expenses.

48. See *Hornbeck*, 295 Md. at 605, 458 A.2d at 762-63.

49. See *id.*

50. See *id.*

51. See *id.* at 606, 458 A.2d at 763.

52. See *id.* at 604, 458 A.2d at 762-63.

53. See *id.* at 606-07, 458 A.2d 763-64. The *Hornbeck* court observed that:

[T]he State share of basic current expenses in fiscal year 1980 amounted to \$331,880,120, or 54 percent of the total; the local school districts appropriated \$283,281,866, or 46 percent of the total basic current expenses. . . .

In addition to these educational expenditures, each local subdivision spends substantial sums of money for the support of its local schools. Because of differences in assessed property valuations among the subdivisions, the amounts raised through local taxation and spent per pupil vary from district to district, depending upon the district's tax wealth and/or inclination to spend money to enhance the educational resources and opportunities available to its students. These discretionary local expenditures result in substantial spending imbalances between the districts — imbalances which are only partially offset by the State's equalization and other aid.

*Id.*

54. MD. EDUC. CODE ANN. § 5-202(b)(2)3(ii) (1989).

55. See 1990 MSPP REPORT, *supra* note 20.

56. *Hornbeck*, 295 Md. at 606-07, 458 A.2d at 763-64.

school financing on local wealth results in disparities in the amount school districts can spend per student. For example, in 1987-88, \$2,350 per student separated the lowest and highest spending districts, which equates to a difference of over \$70,000 per classroom of thirty.<sup>57</sup> By 1990-91, this gap increased to \$2,599 per student, or \$77,970 per classroom of thirty.<sup>58</sup>

Under Maryland's existing public school financing scheme, this disparity between wealthy and poor school districts is growing. From the 1988-89 school year to the 1989-90 school year, the average of the bottom five counties fell \$106 per pupil below the average of the top five counties.<sup>59</sup> In 1979-80, the poorest school district was able to spend only 61.3 percent as much as the wealthiest;<sup>60</sup> in 1991, this figure dropped to only 59.4 percent.<sup>61</sup>

It is clear that poorer school districts suffer under a public school financing scheme dependent upon local wealth<sup>62</sup> because they have a limited tax base from which to raise revenues for education.<sup>63</sup> Additionally, many urban districts are affected by "municipal overburden," a condition in which the cost of local government, such as fire fighters, police officers, garbage collection and road maintenance, is so high that the district is either unwilling or unable to raise taxes further to support education.<sup>64</sup> In general, poorer urban districts not only have greater school tax rates than wealthier districts, but total property tax rates usually exceed those in wealthier districts.<sup>65</sup>

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57. Miller, *Funding Reform Top Priority of Metro Education Coalition*, Fall 1990 MEC Newsletter, *supra* note 24, at 1.

58. *Report Card Gives Schools Credit For Trying Harder*, The Baltimore Sun, Nov. 3, 1991 at A1, col.2 (reporting on the 1991 Maryland School Performance Program Report) (Baltimore City spends \$4,614 per student, while Montgomery County spends \$7,213).

59. Spring 1991 MEC Newsletter, *supra* note 24, at 12.

60. *Id.*

61. *Id.*

62. See *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 608-14, 458 A.2d 758, 764-67 (1983); *Abbott v. Burke*, 119 N.J. 287, 324-34, 575 A.2d 359, 378-82 (1990); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). See generally Ratner, *supra* note 1.

63. See *Hornbeck*, 295 Md. at 611-12, 458 A.2d at 766; *Edgewood*, 777 S.W.2d at 393; see also Briffault, *supra* note 22, at 20-21.

64. See *Abbott*, 119 N.J. at 355-57, 575 A.2d at 393-94; see also *Hornbeck*, 295 Md. at 609, 458 A.2d at 765; Briffault, *supra* note 22, at 20-21.

65. See *Hornbeck*, 295 Md. at 613-14, 458 A.2d at 767. At trial in the Circuit Court for Baltimore City, Judge Ross stated that Baltimore City has less local revenue available for school financing because it must devote a greater share of its tax base and locally raised revenues to nonschool services. Although Judge Ross recognized the problem of municipal overburden, because he found the entire financing scheme unconstitutional, he did not address this issue. *Id.* See generally Briffault, *supra* note 22, at 19-20.

This condition is exemplified by Baltimore City. The total property tax rate in Baltimore City is more than double that of any other county in the state.<sup>66</sup> Although Baltimore City levies at a rate higher than any other district, it provides below average financing to its public schools.<sup>67</sup> Thus the system of local financing is disproportionately burdensome for the Baltimore City School District.

Article VIII of the Maryland Constitution obligates the State, not the counties or Baltimore City, to provide financing for thorough and efficient schools.<sup>68</sup> Because section 5-202(b) provides state financial assistance for only a portion of the legislatively required foundation amount, and each district annually spends at least twice the foundation amount per pupil,<sup>69</sup> the General Assembly has, in effect, abdicated its constitutional obligation to provide by taxation or otherwise for the maintenance of a thorough and efficient system of public schools.<sup>70</sup>

*Hornbeck v. Somerset County Board of Education* was the first challenge to the constitutionality of section 5-202(b). In *Hornbeck*, the boards of education of Somerset, Caroline, and St. Mary's counties, and the school commissioners of Baltimore City, together with taxpayers, students, parents, public officials, and school superintendents, claimed that Maryland's public school financing scheme violated the equal protection clause of the fourteenth amendment, the equal protection guarantee of article XXIV of the Maryland

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66. MARYLAND ASS'N OF COUNTIES, PROPERTY TAX RATES IN MARYLAND'S SUBDIVISIONS, 1987-1991 (1991).

67. *Id.*; see *Hornbeck*, 295 Md. at 610, 458 A.2d at 765. From fiscal year 1986-87 to fiscal year 1990-91, Baltimore City increased its general fund contribution to schools by 47.8 percent, far more than the 23.3 percent increase in the city's total budget. Spring 1991 MEC Newsletter, *supra* note 24, at 12. In contrast during the same four year period, the state increased its aid to schools by only 30.7 percent, while it increased the state's total general fund budget by 38.8 percent. *Id.*

68. See *Hornbeck*, 295 Md. at 631 nn. 11 & 12, 458 A.2d at 776 nn. 11 & 12; see also Briffault, *supra* note 22, at 23 (noting that where local government is accountable to the state, the state is more vulnerable to legal attack).

69. See *Hornbeck*, 295 Md. at 606-07, 609, 458 A.2d at 763-65; 1990 & 1991 MSPP REPORTS, *supra* note 20.

70. In practical terms, the state contribution to basic current educational expenses accounts for less than half the amount spent per student. See *Hornbeck*, 295 Md. at 606, 458 A.2d at 763. Maryland, "the eighth richest state in the nation," is "42nd in its monetary contribution to public education." Miller, *Funding Reform Top Priority of Metro Education Coalition*, Fall 1990 MEC Newsletter, *supra* note 24, at 1. The average state public school financing scheme relied on state revenues to provide 49.8 percent of its budget for the 1986-87 fiscal year. See NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 1989, at 149.

Declaration of Rights, and section one of article VIII of the Maryland Constitution.<sup>71</sup>

The plaintiffs alleged that Maryland's public school financing scheme resulted in discriminatory, unequal and inadequate financing that left the plaintiff school boards unable to meet the constitutionally mandated level of adequate education.<sup>72</sup> As evidence that Maryland's public school financing scheme was unconstitutional as applied to students in poorer districts, to poor students throughout the State, and in particular to students in Baltimore City, the plaintiffs pointed to wide disparities in the taxable wealth among the various school districts, and the effect of those differences upon the ability of the poorer school districts to provide their students with educational offerings and resources comparable to those of the wealthier school districts.<sup>73</sup>

At trial in the Circuit Court of Baltimore City,<sup>74</sup> the Honorable David Ross found from the evidence that:

[T]he present financing scheme significantly underfunds the plaintiffs' schools whose requirements are at least as great as any in the State, while it permits virtually unlimited spending in other subdivisions. As a result the quality of the schools in plaintiffs' subdivisions is inferior to those in the wealthier subdivisions with respect to the buildings, equipment, materials and staff.<sup>75</sup>

Judge Ross found that the General Assembly had failed to set qualitative standards for public school education, and held that article VIII required the public school system to be "full, complete and effective by contemporary standards throughout the State."<sup>76</sup> Because Judge Ross found that section 5-202(b) did not provide the means to achieve the constitutionally mandated standard of education, he held that Maryland's public school financing scheme did not comply with the thorough and efficient clause of article VIII of the Maryland Constitution.<sup>77</sup>

Judge Ross further held that, under article XXIV of the Maryland Constitution, mathematical equality among pupils with respect to public school financing was required.<sup>78</sup> Because he found that

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71. *Hornbeck*, 295 Md. at 607, 458 A.2d at 764.

72. *Id.* at 608, 458 A.2d at 764.

73. *Id.* at 603, 458 A.2d at 761-62.

74. *See id.* at 611-19, 458 A.2d at 766-70.

75. *Id.* at 616, 458 A.2d at 768.

76. *Id.* Judge Ross found the words "thorough and efficient" unambiguous, and stated that the standard must be established and maintained in every district.  
*Id.* at 615, 458 A.2d at 768.

77. *Id.* at 616, 458 A.2d at 768.

78. *Id.* at 618-19, 458 A.2d at 769-70.

section 5-202(b) did not provide adequate and equal financing for each pupil in the state,<sup>79</sup> Judge Ross held that the entire public school financing scheme violated the equal protection guarantee of the Maryland Declaration of Rights.<sup>80</sup>

Responding to the State's petition for certiorari,<sup>81</sup> the Court of Appeals of Maryland recognized that Maryland's public school financing scheme is dependent on local revenues and spending choices, which results in undeniable demographic and environmental disadvantages to children who reside in poorer school districts.<sup>82</sup> The court held, however, that inequities in Maryland's public school financing scheme did not violate the equal protection guarantees of either the fourteenth amendment<sup>83</sup> or article XXIV of the Maryland Declaration of Rights.<sup>84</sup> The court determined that, in the absence of a suspect classification<sup>85</sup>

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79. *Id.*

80. *Id.*

81. The court of appeals granted certiorari prior to a decision in the case by the court of special appeals. *Id.* at 601, 458 A.2d at 758.

82. *Id.* at 639, 458 A.2d at 780.

83. *Id.* at 642, 458 A.2d at 782.

84. *Id.* at 650, 458 A.2d at 786.

85. *Id.* at 652, 458 A.2d at 787 (noting that the Supreme Court has yet to hold that financial status alone creates a suspect class).

In *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), the Supreme Court of California recognized that no direct authority existed for the proposition that education is a fundamental interest which may not be conditioned on wealth. *Id.* at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615. The court noted that wealth classifications have been invalidated only in conjunction with the rights of criminal defendants and voting rights. *Id.* The *Serrano* court did, however find persuasive the Supreme Court's decision in *Shapiro v. Thompson*, 395 U.S. 618 (1969). *Id.* at 604 n.22, 487 P.2d at 1255 n.22, 96 Cal. Rptr. at 615 n.22. The *Serrano* court indicated in dictum that certain wealth discrimination in the area of education would be unconstitutional:

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from school.

*Id.* (quoting *Shapiro* at 633). Although the *Shapiro* decision referred to actual exclusion from school, the *Serrano* court found the same constitutional principle applies to discrimination in expenditures for education. *Id.* In support of this conclusion, the *Serrano* court pointed to the Supreme Court's decision in *Reynolds v. Sims*, 377 U.S. 533, 562-63 (1964), in which the Court asserted that the right to vote is impaired not only when the qualified individual is barred from voting, but also when the impact of his ballot is diminished by unequal electoral apportionment. *Id.* at 607 n.24, 487 P.2d 1257 n.24, 96 Cal. Rptr. 617 n.24. Furthermore, the *Serrano* court noted that in *Hargrove v. Kirk*, 313 F. Supp. 944 (1970) (on remand from the Fifth Circuit), a three judge panel held a Florida statute, which limited the local property tax rate

or impingement upon a fundamental right,<sup>86</sup> the constitutionality of Maryland's public school financing scheme was presumed.<sup>87</sup> Finding that the financing scheme neither impinged upon a fundamental right nor utilized a suspect classification, the court applied the rational basis test, which invalidates a statutory classification only if the statute uses a classification which is wholly irrelevant to the achievement of a legitimate state purpose.<sup>88</sup> The *Hornbeck* court found that Maryland's public school financing scheme, though patently dependent upon local wealth, reasonably furthered the legitimate state purpose of effectuating the tradition of local control over the operation of schools.<sup>89</sup>

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which a county could levy in raising school revenue, unconstitutional under traditional equal protection analysis because there was no rational basis for its discriminatory effect on poor counties. The *Hargrove* court therefore declined to determine whether education was a fundamental interest. On appeal, the Supreme Court vacated the opinion on other grounds but indicated that on remand the court should fully explore the equal protection issue. *Serrano* at 604 n.22, 487 P.2d at 1255 n.22, 96 Cal. Rptr. at 615 n.22. Recognizing that these cases had precedential value only in the context of racial segregation or total exclusion from school, the *Serrano* court nonetheless found them relevant in considering the importance of education. *Id.* at 605 n.23, 487 P.2d at 1256 n.23, 96 Cal. Rptr. at 617 n.23.

Furthermore, the *Serrano* court found a comparison of the importance of the right to education with the rights of defendants in criminal cases helpful in reaching its constitutional conclusion. *Id.* at 607, 487 P.2d at 1257-58, 96 Cal. Rptr. at 617-18. The court recognized that:

[E]ducation may have a far greater social significance than a free transcript or a court appointed lawyer. '[E]ducation not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which - to the state - have an enormous and much more varied significance. Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of democratic society-participation, communication, and social mobility, to name but a few.'

*Id.* (quoting Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305, 362-63 (1969)).

In reaching the conclusion that education must be treated as a fundamental interest, the *Serrano* court also recognized the pervasive impact of education. The court noted that, unlike other government services, every person benefits from education, and few other services involve such sustained contact with the recipient. *Id.* at 609, 487 P.2d 1259, 96 Cal. Rptr. 619. Indeed, "a child of the poor assigned willy-nilly to an inferior state school takes on the complexion of a prisoner, complete with a minimum sentence of 12 years." *Id.* at 610, 487 P.2d 1259, 96 Cal. Rptr. 619 (quoting Coon et al., *supra*, at 388).

86. *Hornbeck*, 295 Md. at 645, 458 A.2d at 783; *cf. supra* note 1.

87. *Hornbeck*, 295 Md. at 642, 458 A.2d at 782.

88. *Id.*

89. *Id.* at 654, 458 A.2d at 788. *But cf.* *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989). The *Edgewood* court stated:

Some have argued that reform in school finance will eliminate local

The court of appeals also flatly rejected the proposition that article VIII mandates exact equality of per pupil financing as the required means of establishing a thorough and efficient statewide system of public schools.<sup>90</sup> The issue in *Hornbeck*, as framed by the court of appeals, was not "whether there are great disparities in educational opportunities among the State's school districts," but rather, whether the same mathematically precise amount of money was required to be spent on each child's education, or whether any county was prohibited from spending more.<sup>91</sup> The court of appeals found that no such requirement existed under either the federal or state constitution, and thus held that no constitutional violation had occurred.<sup>92</sup> The court stated that, in light of historical evidence, the words "thorough and efficient" found in article VIII are not the equivalent of "uniform."<sup>93</sup> The court concluded that any equality component of the "thorough and efficient" language of article VIII is limited to requiring the General Assembly to provide a basic or adequate education to the State's children.<sup>94</sup>

In addition to recognizing the General Assembly's affirmative obligation under article VIII to provide a basic or adequate public education, the court further explained that it was the responsibility of the General Assembly, not the courts, to determine the quantity and quality of educational opportunities available to Maryland school children.<sup>95</sup> The court found that the General Assembly had established such statewide qualitative standards pursuant to the Education Article of the Maryland Code and the state regulatory scheme.<sup>96</sup> The *Hornbeck* court noted that the General Assembly was making continuous efforts

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control, but this argument has no merit. An efficient system does not preclude the ability of communities to exercise local control over the education of their children. It requires only that the funds available for education be distributed equitably and evenly. An efficient system will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives that are not now available to them. Only if alternatives are indeed available can a community exercise the control of making choices.

*Id.* The *Hornbeck* court recognized this argument but found it unpersuasive under the rational basis test. *See Hornbeck*, 295 Md. at 656, 485 A.2d 789-90. At least one commentator argues that local autonomy is actually central to preventing greater equality. *See Briffault, supra* note 22, at 5, 23-39 (discussing the history of public school financing cases and the interest of local autonomy).

90. *Hornbeck*, 295 Md. at 639, 458 A.2d at 780.

91. *Id.* at 658, 458 A.2d at 790.

92. *Id.* at 640-57, 458 A.2d at 780-90.

93. *Id.* at 631, 458 A.2d at 776.

94. *Id.* at 631-32, 458 A.2d at 776-77.

95. *Id.* at 658-59, 458 A.2d at 790.

96. *Id.* at 639, 458 A.2d at 780 (citing the Education Article of the Maryland Code and COMAR Title 13A).

to provide school children with a thorough and efficient education,<sup>97</sup> and made clear that it would not interfere with the General Assembly's methods of solving educational problems so long as constitutional mandates were met.<sup>98</sup>

The *Hornbeck* court found that the plaintiffs had failed even to allege that statewide qualitative standards of education were not being met.<sup>99</sup> Thus, while there was abundant evidence to support the proposition that Maryland's public school financing scheme fostered unequal educational opportunities among children throughout the state,<sup>100</sup> the court found that, under the facts presented, no child in the state was significantly deprived of the right to an adequate education as prescribed by article VIII of the Maryland Constitution.<sup>101</sup> Under this rationale, when there is no demonstration that the General Assembly has failed to fulfill its obligation under article VIII to provide for an adequate education, a constitutional challenge to Maryland's public school financing scheme cannot be maintained simply by showing that the educational resources available in poorer school districts are inferior to those in the wealthier districts.<sup>102</sup>

The *Hornbeck* court established that, in order to sustain an article VIII constitutional challenge to the State's public school financing scheme, the very least that is required is an evidentiary showing that schools in any district fail to provide an adequate education, as measured by contemporary educational standards.<sup>103</sup> The court further indicated that, should the qualitative educational standards established by the General Assembly<sup>104</sup> not be met, or should the State's public school financing scheme fail to provide each school district with the means essential to provide the basic education contemplated by the thorough and efficient clause of article VIII of the Maryland Constitution, the possibility exists that Maryland's existing public school financing scheme could be found unconstitutional.<sup>105</sup>

### III. NEW EVIDENCE OF INADEQUATE EDUCATION SERVES TO REVIVE A STATE CONSTITUTIONAL CHALLENGE TO MARYLAND'S PUBLIC SCHOOL FINANCING SCHEME BASED ON LOCAL WEALTH

In the nine years since *Hornbeck*, it has become increasingly apparent that public school financing schemes that are dependent

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97. *Id.* at 639, 458 A.2d at 780.

98. *Id.* at 658-59, 458 A.2d at 790.

99. *Id.* at 639, 458 A.2d at 780.

100. *Id.* at 611-16, 458 A.2d at 766-68.

101. *Id.* at 639, 458 A.2d at 780.

102. *Id.* *But cf.* Biegel, *supra* note 1 (discussing heightened review of equal education opportunity).

103. *See Hornbeck*, 295 Md. at 639, 458 A.2d at 780.

104. *Id.* *See generally* 1990 & 1991 MSPP REPORTS, *supra* note 20.

105. *Hornbeck*, 295 Md. at 639, 458 A.2d at 780.

upon local wealth do not provide poorer school districts with the means to provide adequate education.<sup>106</sup> The discriminatory effect of public school financing schemes based on local wealth has been well documented.<sup>107</sup> Moreover, disparity in educational opportunity has been recognized in several jurisdictions as evidence that public school financing schemes dependent upon local wealth fail to provide students in poorer school districts with a thorough and efficient public education, that is, an effective education in the basic skills necessary to compete in the job market and participate responsibly in the democratic process.<sup>108</sup>

In 1989, primarily due to concern on the part of Maryland Governor William Donald Schaefer that the structure and procedures

106. See *supra* note 21. For examples of successful court challenges prior to *Hornbeck*, see *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) and *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978) (en banc). Both courts defined the constitutional duty in terms of *results*, i.e., the school must provide education which enables students to adequately participate in the democratic and economic system.

107. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 196-99 (Ky. 1989); *Abbott v. Burke*, 119 N.J. 287, 295, 575 A.2d 359, 363 (1990); *Robinson v. Cahill*, 118 N.J. Super. 223, 236-256, 287 A.2d 187, 194-204, *aff'd on rehearing*, 119 N.J. Super. 40, 289 A.2d 569 (1972), *modified*, 62 N.J. 473, 303 A.2d 273 (*Robinson I*), *aff'd on rehearing*, 63 N.J. 196, 306 A.2d 65 (*Robinson II*), *cert. denied*, 414 U.S. 976 (1973); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989); see also Briffault, *supra* note 22, at 19-21.

Studies also show that public schools with predominantly minority students particularly suffer from lower quality education, due to the relative indifference of school boards to these schools. See *Board of Educ. of Oklahoma City v. Dowell*, 111 S. Ct. 630, 643 n.5 (1991) (Marshall, J., dissenting). As Justice Marshall points out in the context of desegregation, the poor quality of a school system may be so severe that substantial reform is required. *Id.* (citing *Jenkins v. Missouri*, 855 F.2d 1295, 1301-1307 (8th Cir. 1988), *aff'd in part and rev'd in part on other grounds*, 495 U.S. 33 (1990)).

*Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), held that higher per pupil expenditures in schools predominantly serving white students than in schools with black students deprived the District of Columbia's black and poor public school children of their right to equal educational opportunity with the district's more affluent white children. The court stated:

If the situation were one involving racial imbalance but in some facility other than public schools, or unequal educational opportunity but without [racial] or poverty aspects (e.g. unequal schools all within an economically homogeneous white suburb), it might be pardonable to uphold the practice on a minimal showing of rational basis. But the fusion of these two elements in *de facto* segregation in public schools irresistibly calls for additional justification. What supports this case is . . . the degree to which the poor and [minorities] must rely on the public schools in rescuing themselves from their depressed culture and economic condition.

*Id.* at 508.

108. See *supra* note 1 and accompanying text; see also Ratner, *supra* note 1, at 787-794.

of the Maryland public school system were inefficient, the state's Department of Education created the Maryland School Performance Program (*MSPP*) to evaluate public school performance.<sup>109</sup> The State Board of Education initiated the *MSPP* with the goal of achieving an effective system of public education by the year 1995.<sup>110</sup> The purpose of the *MSPP* is to provide each student with the opportunity to graduate from Maryland public schools with the information and skills necessary to participate in a world economy, function as a responsible citizen in a democratic society, and achieve a personally satisfying and fulfilling life.<sup>111</sup>

As a first step toward improving the way Maryland educates its children, the State Board of Education approved standards by which to measure the performance of public schools.<sup>112</sup> Under the *MSPP*, school performance is evaluated by measuring the results of the education process, i.e., actual student performance, rather than focusing on the efforts made to educate.<sup>113</sup> Excellent school performance is defined as "a highly challenging and clearly exemplary level of achievement, indicating outstanding accomplishment in meeting the needs of students."<sup>114</sup> Satisfactory performance is defined as "a realistic and rigorous level of achievement indicating proficiency in meeting the needs of students."<sup>115</sup> School performance is measured by the percentage of a district's students who meet certain basic levels of achievement in eight specific areas of performance.<sup>116</sup> The State Board of Education approved these specific areas of student

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109. See The Baltimore Sun, Nov. 20, 1990, at A1, col. 1. The Governor and the General Assembly complained that the school districts "constantly ask for money without offering evidence that appropriated funds are used wisely." *Id.*

110. 1990 MSPP REPORT, *supra* note 20, at iii.

111. *Id.*

112. *Id.* The State Superintendent of Schools has expressly stated that the State Board of Education believes that "public education must ensure success for all students." *Id.* (emphasis in original). The MSPP was founded on the belief that "all children can learn," that "[a]ll children have the right to attend [public] schools in which they can progress and learn," and that "[a]ll children shall have a real opportunity to learn equally rigorous content." *Id.*

113. See *id.*; see also Ratner, *supra* note 1, at 787-94. Ratner also points to the "new catechism of urban school improvement" developed by the late Professor Ronald Edmonds of Michigan State University which has as its characteristics: (1) the principal's leadership and attention to the quality of instruction; (2) a pervasive and broadly understood instructional focus; (3) an orderly, safe climate conducive to teaching and learning; (4) teacher behaviors that convey the expectation that all students are expected to obtain at least minimum mastery; and (5) the use of measures of pupil achievement as the basis for program evaluation.

*Id.* at 801.

114. 1990 MSPP REPORT, *supra* note 20, at 5.

115. *Id.*

116. *Id.* at 2. See Ratner, *supra* note 1, at 785-94.

performance because they are "essential tools for measuring how well schools, school systems, and the State are preparing every student for higher education and successful careers, and how well they are educating every student."<sup>117</sup> The eight performance areas are separated into three categories: assessed knowledge, student attainment, and student participation. The specific standards are set forth below.

#### ASSESSED KNOWLEDGE

Measured by the percentage of 9th grade students who passed minimum competency tests in basic skills. In the areas of reading, writing, and mathematics, these tests measure skills equivalent to the eighth grade level:<sup>118</sup>

	Excellent	Satisfactory
Mathematics	90%	80%
Writing	96%	90%
Citizenship	92%	85%
Reading	97%	95% <sup>119</sup>

#### STUDENT ATTAINMENT

Measured by the percentage of students who advance to a higher grade or instructional level at the end of the year in grades 1 through 6:

Excellent	Satisfactory
98%	96% <sup>120</sup>

#### STUDENT PARTICIPATION

Measured by yearly attendance and dropout rates.  
Yearly attendance rates for grades 1 through 12:

Excellent	Satisfactory
96%	94%

Yearly dropout rates for grades 9 through 12:

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117. 1990 MSPP REPORT, *supra* note 20, at 1.

118. *See School Grading May Revive Funding Suit*, The Baltimore Sun, Nov. 20, 1990, at A12, col. 4.

119. 1990 MSPP REPORT, *supra* note 20, at 5.

120. *Id.*

Excellent  
1.25%

Satisfactory  
3%<sup>121</sup>

Applying these performance standards, the State Board of Education issued Maryland's first outcome-based report on the performance of public schools in November of 1990.<sup>122</sup> This report was based on school performance for the 1989-90 school year and presents data on student performance, for which schools, school systems, and the State are held responsible.<sup>123</sup> In addition to evidence of wide disparities in spending and educational opportunity, the *1990 MSPP Report* gives children in the Baltimore City School District what the plaintiffs in *Hornbeck* did not have - evidence that Maryland's existing public school financing scheme fails to provide an adequate education to school children in all districts, as measured by contemporary statewide qualitative standards.<sup>124</sup>

According to the *1990 MSPP Report*, none of the Maryland school districts met satisfactory standards in all the performance areas measured.<sup>125</sup> Statewide, the public school system passed in only two performance areas: Student Participation as measured by the yearly attendance rate in grades 1-6, and Student Attainment as measured by the number of students promoted from one grade to the next, for grades 1-6.<sup>126</sup> The Maryland public schools failed to meet satisfactory performance in any area of Assessed Knowledge.<sup>127</sup>

The State Board of Education released its second school performance report on November 12, 1991.<sup>128</sup> The *1991 MSPP Report*, based on the 1990-91 school year, shows that the performance among students taking minimum competency tests in Assessed Knowledge is not improving.<sup>129</sup> Statewide, standards again were not met in any

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121. *Id.*

122. *Id.*

123. *Id.* at iii.

124. *See School Grading May Revive Funding Suit*, The Baltimore Sun, Nov. 20, 1990, at A12, col. 4.

125. *See Md. Issues 'Report Card' on Schools*, The Baltimore Sun, Nov. 20, 1990, at A1, col. 1.

126. 1990 MSPP REPORT, *supra* note 20, at 8. Maryland's students' satisfactory participation and advancement in the early years, contrasted with their failure to achieve basic competency levels in the ninth grade seems to indicate that there is little correlation between student advancement and achievement of basic competency. Because students' performance worsens the longer they stay in school, it seems that the Maryland public school system is failing to meet the needs of its students.

127. *Id.*

128. 1991 MSPP REPORT, *supra* note 20.

129. *Id.* at 10.

area of Assessed Knowledge.<sup>130</sup> Ninety-eight percent of elementary school students, however, were promoted from one grade to the next, resulting in an excellent promotion rate for the State.<sup>131</sup> Yet, as measured by 9th and 10th graders taking minimum competency tests in Assessed Knowledge for the first time, only the Cecil County district met minimum standards in Reading, Writing and Math.<sup>132</sup>

The *1991 MSPP Report* also indicates that, for the second year in a row, 11th graders in eight districts failed to meet state minimum competency standards in Assessed Knowledge as measured at about the eighth grade level.<sup>133</sup> The districts failing minimum competency standards in Assessed Knowledge for second time test-takers were: Baltimore City, and Prince George's, Caroline, St. Mary's, Somerset, Talbot, and Garrett counties.<sup>134</sup> In 1983, four of these districts were among the plaintiffs in *Hornbeck*.<sup>135</sup> Ironically, with the exception of Baltimore City, all of the districts failing minimum competency standards in Assessed Knowledge at the high school level had excellent or satisfactory promotion from one grade to the next at the elementary school level.<sup>136</sup>

The *1990 MSPP Report* evidences that, in school districts where more money is available, students are likely to perform better.<sup>137</sup> The

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130. *Id.*

131. *Id.*

132. *Id.* at 26.

133. *Id.*

134. *Id.* at 16, 22-52.

135. See *Hornbeck*, 295 Md. 597, 458 A.2d 758 (Somerset, Caroline, and St. Mary's counties, and the School Commissioners of Baltimore City).

136. 1991 MSPP REPORT, *supra* note 20, at 22, 28, 34, 44, 48, 50, 52.

137. See *School 'Grading' Only a First Step*, *The Baltimore Evening Sun*, Nov. 20, 1990, at D1, col. 4 (quoting State School Superintendent Shilling as stating that issuing the performance data means that "we're going to be in a position to show how money makes a difference, and be able to show improved student achievement").

While there is no simple correlation between dollars spent and achievement, educational experts answer the question of whether money *can* make a difference in the affirmative. Robert E. Slavin, Center for Research on Effective Schooling for Disadvantaged Students, Johns Hopkins University, states that many programs and practices, which cost money to implement, have been shown to have positive effects on student achievement. Spring 1991 MEC Newsletter, *supra* note 24, at 3-4. Slavin points out that some of the best researched and proven programs and practices which translate increased financing into effective education for children include: (1) Early Education - good quality preschool and extended day kindergarten programs are known to "markedly increase" the chances of students' success by providing the language and school skills necessary so that disadvantaged children do not fall behind in early grades; for example, Maryland's own *Success for All* program, also used in other states, which uses preschool, extended-day kindergarten, one-to-one tutoring, family support services, and staff development, has been found

Anne Arundel County School District, for example, spent \$4,889 per student in 1989-90 and passed in only two performance areas.<sup>138</sup> The Baltimore County School District spent \$5,722 per student and passed in four performance areas.<sup>139</sup> The Howard County School District spent \$5,549 per student, and passed in seven out of the eight performance areas.<sup>140</sup>

When compared to wealthier school districts, the performance of Baltimore City schools is especially inadequate. The poorer urban Baltimore City School District, which was able to spend only \$4,255 per student in 1989-90,<sup>141</sup> and \$4,614 per student in 1990-91,<sup>142</sup> failed in every area of Assessed Knowledge measured by the 1990 MSPP. Therefore, students in Baltimore City as a whole have not achieved the basic competency in mathematics, writing, citizenship and reading required for graduation from high school in Maryland.<sup>143</sup>

In examining the failure of the Maryland public school system to provide adequate education to children throughout the state, it is important to recognize the disparity in the degree of inadequacies

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to ensure that virtually all children, regardless of home background, achieve success in reading; (2) Staff Development and Curriculum - increasing the effectiveness of today's teachers in the classroom has the most impact in the near term; (3) Improving Teacher Quality - over the long term, underfunded school districts will never employ the best teachers unless they have the funds to attract and retain them; (4) Improving Library Services - research shows that children learn to read by reading what is interesting to them; extracurricular reading is essential to an effective reading program and children must have access to extensive libraries with trained librarians who are able to coordinate students and teachers with an adequate number, variety and quality of reading material; (5) Improving Family Support Services - because many family problems impact on a child's educational success, someone at the school must make sure that students attend school, have eyeglasses and other health care, and to involve parents in support of their children's success; (6) Improving Access to Advanced Coursework - in a concern for students at risk, disadvantaged school districts often are unable to provide advanced placement courses for students who need them; (7) Improving Vocational and Technical Education - vocational and technical education in underfunded districts is inadequate to prepare students for today's job market; in order for the money spent on such programs to be worthwhile, higher quality technical and vocational education, including providing all high school students with some degree of computer literacy is imperative. *Id.* Slavin concludes that Baltimore City is clearly deficient in a broad range of services to students and states that "if students in poorer districts are to have any chance to meet the high and comprehensive performance standards established by the State of Maryland, there is no question but that major additional funds will be needed." *Id.* at 4.

138. 1990 MSPP REPORT, *supra* note 20, at 12-13.

139. *Id.* at 16-17.

140. *Id.* at 36-37.

141. *Id.* at 14-15.

142. 1991 MSPP REPORT, *supra* note 20, at 17.

143. See 1990 MSPP REPORT, *supra* note 20, at 2.

among the districts.<sup>144</sup> For the 1989-90 school year, in the Baltimore City School District only 43.3% of students passed mathematics, 67.3% passed writing, 61.4% passed citizenship, and 85% passed reading.<sup>145</sup> While the Anne Arundel County School District achieved satisfactory performance in student participation for attendance in grades 1-6, and excellent performance for the number of students promoted to the next grade level, it was also very close to meeting satisfactory performance.<sup>146</sup> The Anne Arundel School District missed yearly attendance in grades 7-12 by only 1.6%, reading by 1.1%, mathematics by 8.3%, writing by 4% and citizenship by 14.6%.<sup>147</sup> The dropout rate for Anne Arundel high school students, however, was an unsatisfactory 5.9%.<sup>148</sup> Similarly, the Baltimore County School District passed reading, writing, and student participation in grades 1-6, and achieved excellent performance in the promotion rate for grades 1-6.<sup>149</sup> The district barely missed satisfactory performance in other areas: attendance in grades 7-12 by only 1.3%, mathematics by 2.8%, and citizenship by 4.5%.<sup>150</sup> Although the dropout rate in Baltimore County was over one and one-half times higher than satisfactory, at 4.8%, this rate is more than 20% lower than the dropout rate in Anne Arundel County, and 75% lower than the dropout rate in Baltimore City.<sup>151</sup> In Howard County, the only performance standard not met was attendance in grades 7-12, which was missed by only 1%.<sup>152</sup>

The disparity in the degree of inadequacies is particularly striking when the Baltimore City and Montgomery County school districts are compared. As the wealthiest district, Montgomery County was able to spend \$6,629 per student in 1989-90, and obtained satisfactory achievement in all the basic skills tested:<sup>153</sup> 80.3% of the students in that district passed mathematics, 92.2% passed writing and 95.3%

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144. See Ratner, *supra* note 1.

145. 1990 MSPP REPORT, *supra* note 20, at 40. In 1990-91, Baltimore City's performance remained unsatisfactory, with a decline of about 5 points in Writing and Citizenship, and only slight improvement in mathematics and reading: 44.3 percent of students passed mathematics, 62.4 percent passed writing, 57.1 percent passed citizenship, and 86.1 percent passed reading. 1991 MSPP REPORT, *supra* note 20, at 16.

146. 1990 MSPP REPORT, *supra* note 20, at 12.

147. *Id.*

148. *Id.*

149. *Id.* at 16.

150. *Id.*

151. *Id.* at 12, 14, 16.

152. *Id.* at 36.

153. *Id.* at 40-41. Montgomery County students were not tested on citizenship because the students in that district would not have been first time test takers on that subject. *Id.* at 40.

passed reading.<sup>154</sup> The only performance standard not met by the Montgomery County School District was attendance in grades 7-12.<sup>155</sup> Scoring 92.1%, the district missed satisfactory performance in this area by only 1.9%.<sup>156</sup> In comparison, the Baltimore City School District also failed attendance in grades 7-12, but missed satisfactory performance by a significant 14.6%.<sup>157</sup> In addition, the dropout rate in the Montgomery County School District was a mere 2.9%;<sup>158</sup> in Baltimore City the dropout rate was more than six times as great at 18.8%.<sup>159</sup>

The 1991 MSPP Report shows that "Baltimore City continues to exist in a category all its own."<sup>160</sup> According to the 1991 MSPP Report, Baltimore City was the only district to fail all four areas of Assessed Knowledge and elementary promotion.<sup>161</sup> The Anne Arundel and Somerset districts also failed all four areas of Assessed Knowledge; however, they both achieved excellent and satisfactory elementary promotion rates.<sup>162</sup> Although the 1991 MSPP Report indicates that Baltimore City's dropout rate declined from 18.8% to 10.3%, city officials believe the actual figure should be 14.6%.<sup>163</sup>

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154. *Id.* at 40. In 1990-91, Montgomery County showed slight improvement in mathematics and reading, but fell below satisfactory by 2 percent in writing: 81.1 percent of the students passed mathematics, 88.0 percent passed writing, 85.0 percent passed citizenship and 96.0 percent passed reading. 1991 MSPP REPORT, *supra* note 20, at 42.

155. 1990 MSPP REPORT, *supra* note 20, at 40.

156. *Id.* In 1990-91 attendance in grades 7-12 was slightly improved in Montgomery County at 92.5 percent. 1991 MSPP REPORT, *supra* note 20, at 42.

157. 1990 MSPP REPORT, *supra* note 20, at 14. In 1990-91, Baltimore City had a 79.4 percent attendance rate in grades 7-12. 1991 MSPP REPORT, *supra* note 20, at 16.

158. 1990 MSPP REPORT, *supra* note 20, at 40. In 1990-91, Montgomery County's dropout rate improved to 2.1 percent. 1991 MSPP REPORT, *supra* note 20, at 42.

159. 1990 MSPP REPORT, *supra* note 20, at 14. Baltimore City's highest score, 91.1% was in the promotion rate of children in grades 1-6. *Id.* at 40. The drastic change in student participation between elementary school and high school may be attributed to a failure of the system. See *Robinson v. Cahill*, 118 N.J. Super. 223, 251-52, 287 A.2d 187, 202, *aff'd on rehearing*, 119 N.J. Super. 40, 289 A.2d 569 (1972), *modified*, 62 N.J. 473, 303 A.2d 273 (*Robinson I*), *aff'd on rehearing*, 63 N.J. 196, 306 A.2d 65 (*Robinson II*), *cert. denied*, 414 U.S. 976 (1973). In 1990-91, Baltimore City's dropout rate showed improvement at 10.3%, 1991 MSPP REPORT, *supra* note 20, at 16, although city officials believe that figure should be higher. *Report Card Gives Schools Credit For Trying Harder*, The Baltimore Sun, Nov. 3, 1991, at 1A, col. 2.

160. *Report Card Gives Schools Credit For Trying Harder*, The Baltimore Sun, Nov. 3, 1991, at A1, col. 2.

161. *Id.*

162. *Id.*

163. *Id.*

The Baltimore City School District's continued unsatisfactory performance can be explained, in part, by its demographics and by the lesser amount of money it spends per student compared with wealthier districts such as Montgomery County.<sup>164</sup> In 1990-91, Baltimore City was able to spend only \$4,614 per student, while Montgomery County spent over \$7,000 per student.<sup>165</sup> Of Baltimore City's 108,000 students, over half live in poverty.<sup>166</sup>

The performance of Baltimore City, particularly as compared to the wealthier districts, shows that the General Assembly has failed to meet its constitutional obligation to provide an adequate statewide public education. The *Hornbeck* court held that the constitutional obligation to provide an adequate education does not require the General Assembly to finance and operate the public school system uniformly in every district.<sup>167</sup> However, where the General Assembly has failed to finance a public school system sufficient for students in *all* districts to meet even the State's own qualitative standards of basic education,<sup>168</sup> there can be little doubt that compliance with the "thorough and efficient" clause of article VIII has not been met.

### III. COMPARISON OF MARYLAND'S CONSTITUTIONAL STANDARD OF ADEQUATE EDUCATION WITH OTHER JURISDICTIONS INDICATES THAT PUBLIC SCHOOL FINANCING BASED ON LOCAL WEALTH IS INSUFFICIENT TO MEET THE CONSTITUTIONALLY MANDATED LEVEL OF EDUCATION.

Recent decisions in other jurisdictions confirm that public school financing schemes based on local wealth fail to provide an adequate public education throughout the state. The *Hornbeck* court considered cases from other jurisdictions with state constitutions containing a "thorough and efficient" education clause or like provision.<sup>169</sup> The

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164. *See id.*

165. *See id.*

166. *See id.*

167. *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 631-39, 458 A.2d 758, 776-80 (1983).

168. *Cf. id.*

169. *Id.* at 632-39, 458 A.2d at 776-80. Forty-nine state constitutions contain some type of education clause mandating that the state maintain a free public education. Note, *To Render them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1662 n.102 (1989) (citing Ratner, *A New Legal Duty For Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814 n.138 (1985)). State education clauses can be divided into four different categories. *Id.* at 1662-70. In contrast to the last three categories, the first category of state education clauses provide only for a free system of public schools, without

court correctly read these cases as supporting its holding that a

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any mention of standard of quality whatsoever. *Id.* at 1662 n.107. Challenges to public school financing under Category I education clauses have, for varying reasons, been rejected by state courts. *Id.* Under Category I education clauses, apparently, the state mandate is met so long as the state establishes some system of free public schools. *Id.*

In *Board of Education v. Nyquist*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 359 (1982), *appeal dismissed for want of a substantial federal question*, 459 U.S. 1138 (1983), the New York Court of Appeals interpreted a Category I education clause. It held that the education article of the New York Constitution, which requires that the legislature "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated," was satisfied, as there existed a "system of free schools" which offered a "sound basic education" to the state's children. *Id.* at 47-49, 439 N.E.2d 368-69, 453 N.Y.S.2d 643. The court found no support in either the language of the constitution or the historical documentation of the 1894 New York Constitutional Convention to support the contention that the education article required equality of education throughout the state. *Id.*

Maryland's education clause falls under the second category of state education clauses. Note, *To Render Them Safe*, *supra*, at 1663 n.110. Category II clauses mandate that the system of public schools meet a certain minimum standard of quality, such as "thorough and efficient." *Id.* at 1663. Nineteen states have Category II education clauses. *Id.* at 1663 n.110. In addition to Maryland, five states have "thorough and efficient" clauses: Minnesota, New Jersey, Ohio, Pennsylvania, and West Virginia; three states require "thorough" systems: Colorado, Idaho, and Montana; and five states require "efficient" systems: Arkansas, Delaware, Illinois, Kentucky, and Texas. *Id.* at n.111. Five other Category II states do not have language specifically using either "thorough" or "efficient": Florida, Oregon, Tennessee, Virginia, and Wisconsin. *Id.* Virginia, for example, calls for "an educational program of high quality." *Id.*

In 1979, the West Virginia Supreme Court set the benchmark for a thorough and efficient public school system in *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979). It held that education is a fundamental right under the state equality provisions, and stated that a thorough and efficient public school system "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." *Id.* at 705, 255 S.E.2d at 877. According to the *Pauley* court, a thorough and efficient education is one that encompasses the development of: (1) literacy; (2) basic math skills; (3) the ability to make informed political choices; (4) the ability to understand the life choices available; (5) vocational training; (6) knowledge of recreational pursuits; (7) knowledge of the creative arts such as music, literature, and theater; and (8) social ethics. *Id.* at 707, 255 S.E.2d at 878.

In *Hornbeck*, the Court of Appeals of Maryland distinguished *Pauley* on the ground that, at the time the case was decided, West Virginia, like New Jersey, had not "established comprehensive statewide qualitative standards governing all facets of the educational process in the State's public elementary and secondary schools," by legislation, regulations and bylaws adopted by the State Board of Education. *Hornbeck*, 295 Md. at 639, 458 A.2d at 780. See *infra* notes 201-254 and accompanying text for a discussion of education

thorough and efficient system of schools does not require uniform

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financing in New Jersey.

Eight states have Category III education clauses. Note, *To Render Them Safe, supra*, at 1666 n.118. Category III education clauses appear to impose greater obligations on the state than Category II clauses. *Id.* at 1667. But because these clauses have yet to be interpreted by state courts in the context of public school financing, it is difficult to draw conclusions about the legal implications of their different language. *Id.* For instance, although involving a Category III education clause, the California Supreme Court ruling in *Serrano v. Priest* that unequal public school financing violated the California Constitution, discussed *supra* note 9, was ultimately decided under state equal protection guarantees.

The remaining states fall into Category IV. *Id.* at 1667 n.123. Category IV education clauses are said to impose the greatest obligation on states, typically providing that education is fundamental, primary or paramount. *Id.* at 1667-68. Category IV clauses have not been subject to much litigation. *Id.* at n.124.

The two cases considering Category IV clauses, *Seattle School District No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978), and *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981) have reached differing conclusions. Note, *To Render Them Safe, supra*, at 1667-68 n.124. In *McDaniel*, the Supreme Court of Georgia held that Georgia Constitution art. VIII § 1, which states that "[t]he provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia," does not "require the state to equalize educational opportunities." 248 Ga. 635, 643, 285 S.E.2d 156, 164. On the other hand, the Supreme Court of Washington found that Washington Constitution art. IX § 1, which provides that it is "the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex," imposes a duty on the state, and concluded that the state system of school financing during the school year 1975-76 did not comply with the constitutional mandate to provide ample provision for education. *Seattle School District No. 1*, 90 Wash. 2d at 511-14, 585 P.2d at 91-92.

Interestingly, the decision of the Supreme Court of Washington in *Seattle School District No. 1* expressly overruled its earlier decision in *Northshore School District No. 417 v. Kinnear*, 84 Wash. 2d 685, 727-31, 530 P.2d 178, 201-03 (1974), in which the court held that the public school financing scheme did not violate either the state equality or education clauses. Using reasoning similar to that of the *Hornbeck* court, 295 Md. at 639, 458 A.2d at 780, the *Kinnear* court stated that "[t]here was no evidence that any child had been deprived of accreditation, promotion or admission to other schools because his district failed to meet state standards or that any student . . . had been forced to bring suit to compel his district to provide classes that met state standards." 84 Wash. 2d at 694-95, 530 P.2d at 184. One commentator has suggested that had the *Kinnear* plaintiffs been able to demonstrate that such a suit had been filed, they would have prevailed. Note, *To Render Them Safe, supra*, at 1669 n.135 (citation omitted).

While not discussing *Seattle School District No. 1*, the *Hornbeck* court did consider *McDaniel*. 295 Md. at 637, 458 A.2d at 779. The *Hornbeck* court noted that "the [*McDaniel*] court concluded from the evidence that a direct relationship existed between a district's level of funding and the educational opportunities which a school district was able to provide its children." *Id.*

spending.<sup>170</sup> Since *Hornbeck*, however, several states which have considered public school financing schemes dependent upon local wealth, in light of state constitutional mandates to provide thorough and/or efficient public education, have held such financing schemes unconstitutional.<sup>171</sup>

In 1984, the superintendent of San Antonio's impoverished Edgewood School District persuaded activists to challenge the public school financing scheme under the Texas Constitution.<sup>172</sup> In 1989, sixteen years after the Supreme Court's decision in *San Antonio v. Rodriguez*,<sup>173</sup> a unanimous Supreme Court of Texas held in *Edgewood*

(citation omitted). The *Hornbeck* court stated that, nonetheless, under *McDaniel*, local districts are not restricted from "doing what they can to improve educational opportunities within the district," nor does the Georgia education clause "require the state to equalize educational opportunities." *Id.* (citations omitted). The *Hornbeck* court further noted that the *McDaniel* court found that the Georgia Legislature had not disregarded its obligation to provide an "adequate" education. *Id.* (citations omitted).

In the context of public school financing, the ultimate question is the same whether the state education clause falls into Category II, III, or IV. The court must ask whether the standard of quality imposed by the state constitution mandates public school financing reform. See Note, *To Render Them Safe*, *supra*, at 1663 n.111, 1667 n.121, 1668 n.124. In determining whether that constitutional standard of quality has been met, however, it is logical for a court to place greater reliance on cases interpreting the exact same constitutional language than on cases interpreting language which is clearly different. *Id.* Within the last few years, four Category II states have found their public school financing schemes unconstitutional under state constitutions using language virtually the same as that in the Maryland education clause: New Jersey (thorough and efficient); Montana (thorough); Texas and Kentucky (efficient).

170. See *supra* note 162.

171. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) (courts may and should involve themselves in defining the standards of constitutionally mandated thorough and efficient system of education) (citing the landmark case of *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979)); *Helena Elementary School Dist. No. 1 v. State*, 236 Mont. 44, 769 P.2d 684 (1989), *opinion amended*, 236 Mont. 44, 784 P.2d 412 (1990); *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (1990); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989).

Twenty-four states have considered state constitutional challenges to public school financing schemes based on local wealth. See *Abbott*, 119 N.J. at 314-15, 575 A.2d at 373. Nine states have held such a financing scheme invalid under their state education article. *Id.*; see also Note, *Unfulfilled Promises*, *infra* note 190, at 1072. Three of these states have also determined that such a scheme also violated equal protection guarantees. *Abbott*, 119 N.J. at 314-15, 575 A.2d at 373. A tenth state, California, held that such a scheme violated only state equal protection guarantees. *Id.* Fourteen states, including Maryland, have thus far rejected both constitutional claims. *Id.* See generally Briffault, *supra* note 22, at 24-39.

172. NAT'L L.J., Jan. 14, 1991, at 30-31.

173. 411 U.S. 1 (1973).

*Independent School District v. Kirby*<sup>174</sup> that the Texas public school financing scheme violated a provision of the Texas Constitution requiring the maintenance of an "efficient" system of public schools so as to achieve "general diffusion of knowledge."<sup>175</sup> The *Edgewood* court found that "efficient" conveyed the meaning of "effective" or "productive of results,"<sup>176</sup> and that evidence of the disparity in financial and educational resources among school districts clearly indicated that the legislature's good faith efforts were insufficient to meet the constitutionally mandated level of education<sup>177</sup> under a public school financing scheme dependent upon local wealth.<sup>178</sup> The court held that the legislature must provide a public school financing scheme in which the districts would have "substantially equal access to similar revenues per pupil at similar levels of tax effort."<sup>179</sup> The *Edgewood* court reasoned that, under the Texas Constitution, the state legislature, not local government, is obligated to provide for an efficient system of public education.<sup>180</sup> The court stated: "Whether the legislature acts directly or enlists local government to help meet its obligation, the end product must still be what the constitution commands, i.e., an efficient system of public free schools throughout the state."<sup>181</sup>

Unfortunately, two legislative attempts to cure the defective financing scheme have also been rejected as unconstitutional. In a continuation of the *Kirby* case, the Supreme Court of Texas found that, as the first modification to the state education financing scheme preserved reliance on local property taxes as the primary source of funds, the new system also violated the efficiency requirement of the education clause.<sup>182</sup> After four special legislative sessions, a new education funding law was passed only four days before a special master would have taken control of the state's public school financing system under the initial *Kirby* decision.<sup>183</sup> The new system equalized funding; however, because this was accomplished by creating special taxing districts whose property tax rates were controlled by the state legislature, the act was struck down as an unconstitutional state ad valorem tax.<sup>184</sup>

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174. 777 S.W.2d 391 (Tex. 1989), *aff'd*, 804 S.W.2d 491 (Tex. 1991).

175. *Edgewood*, 777 S.W.2d at 397.

176. *Id.* at 395.

177. *Id.* at 397.

178. *Id.*

179. *Id.*

180. *Id.* at 397-98.

181. *Id.* at 398.

182. *Edgewood Indep. School Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991).

183. Sherman, *supra* note 22, at 1.

184. *Carrollton-Farmers Branch Ind. School Dist. v. Edgewood Ind. School Dist.*, 826 S.W.2d 489 (Tex. 1992).

Contemporaneous with the initial *Edgewood* decision, the Supreme Court of Kentucky, in *Rose v. Council for Better Education, Inc.*,<sup>185</sup> found that the Kentucky General Assembly's efforts to provide an "efficient system of common schools," as mandated by the Kentucky Constitution, had failed under a financing scheme based on local wealth.<sup>186</sup> The *Rose* court held that Kentucky's entire system of public schools, including the method of financing, was unconstitutional.<sup>187</sup> The *Rose* court held that the General Assembly must adequately finance public schools in a manner which assures that the ultimate control over efficient education remains with the legislature.<sup>188</sup> The *Rose* court reasoned that no other decision was possible due to the overall inadequacy of Kentucky's public school system, the great disparity in educational opportunity throughout the state,

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185. 790 S.W.2d 186 (Ky. 1989).

186. *Id.* at 194-99, 213. After reviewing the landmark case of *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979), in which the Supreme Court of West Virginia adopted a definition of "thorough and efficient" after extensive historical analysis involving a thorough examination of other state education clauses, the *Rose* court explained its interpretation of "efficient:"

In defining 'efficient,' we use all the tools made available to us. In spite of protestations to the contrary, we do not engage in judicial legislating. We do not make policy. We do not substitute our judgment for that of the General Assembly. We simply take the plain directive of the constitution, and armed with its purpose, we decide what our General Assembly must achieve in complying with its solemn constitutional duty.

Any system of common schools must be created and maintained with the premise that education is absolutely vital to the present and future of our Commonwealth. . . .

The sole responsibility for providing the system of common schools is that of our General Assembly. . . .

The General Assembly must not only establish the system, but it must monitor it on a continuing basis so that it will always be maintained in a constitutional manner. The state must carefully supervise it, so that there is no waste, no duplication, no mismanagement, at any level.

*The system of common schools must be adequately funded to achieve its goals* (emphasis added). The system of common schools must be substantially uniform throughout the state. Each child, *every child*, in this Commonwealth must be provided with an equal opportunity to have an adequate education (emphasis in original). 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 be shifted to local counties and local school districts.

*Rose*, 790 S.W.2d at 2110.

187. *Id.* at 215.

188. *Id.* at 216.

and the great disparity and inadequacy of local financial effort throughout the state.<sup>189</sup>

The *Rose* court did not tell the General Assembly how to provide adequate financing for the public school system, only that it must do so efficiently, based on the court's interpretation of the Kentucky Constitution. The court did state, however, that if ad valorem taxes on real and personal property were implemented, the General Assembly would have the obligation to ensure that taxed property was assessed at "100% of its market fair value," and that tax rates would be uniform.<sup>190</sup>

The *Rose* court viewed its decision as an opportunity for the General Assembly to "launch the Commonwealth into a new era of educational opportunity which will insure a strong economic, cultural, and political future." Unlike other state legislatures which appear uncooperative in response to court orders for improved public school financing,<sup>191</sup> the Kentucky General Assembly complied with the *Rose* court's order without resistance.<sup>192</sup> Kentucky taxpayers agreed, without protest, to provide an additional 2.5 billion dollars to the public school system.<sup>193</sup> In the words of former Kentucky Governor Bert Coombs, "there was a feeling among the people . . . that the time had come when they had to do something about their school system or . . . we would always remain a mediocre state."<sup>194</sup>

Also in 1989, the Supreme Court of Montana unanimously ruled, in *Helena Elementary School District No. 1 v. State*,<sup>195</sup> that the Montana constitutional provision that "[e]quality of education opportunity is guaranteed to each person of the state," is to be construed according to the plain meaning of its words.<sup>196</sup> Because the court found that "spending disparities among the State's school districts translate into a denial of equality of educational opportu-

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189. *Id.* at 213. In contrast to Texas, the Kentucky Legislature cooperated with the court order to increase financing for economically disadvantaged children. According to Bert Coombs, lead plaintiff's counsel and former Governor of Kentucky, "the legislature faced up to the mandate and did enact what has been called the most enlightened and revolutionary change in schools in this country." Sherman, *supra* note 182, at 1.

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

191. Sherman, *supra* note 182, at 1 (discussing the apparent noncooperation of state legislatures in New Jersey, Kentucky and Montana); see generally Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072 (1991) (arguing that legislative inertia and unwarranted judicial deference to the political branches in the remedial phase hinder the plaintiff's prospects for securing a constitutional remedy).

192. Sherman, *supra* note 182, at 1.

193. *Id.*

194. *Id.*

195. 236 Mont. 44, 769 P.2d 684 (1989).

196. *Id.* at 52-53, 769 P.2d at 689.

nity," it held that "excessive reliance" on local revenues for public school financing was unconstitutional.<sup>197</sup> Ironically, in 1974 this same court had unanimously upheld the state's public school financing scheme under the rational basis test.<sup>198</sup> Fifteen years after this decision, and shortly after vetoing the legislature's initial response to the *Helena Elementary School District* decision, new state financing provisions were enacted.<sup>199</sup> As a result, Montana provided an additional 100 million dollars to its public school system, boosting state support for public schools from thirty-five percent to seventy-eight percent.<sup>200</sup>

Of particular relevance to a renewed constitutional challenge to the Maryland public school financing scheme is a change in New Jersey law which established statewide qualitative standards for New Jersey Public Schools.<sup>201</sup> The *Hornbeck* court distinguished the New Jersey Supreme Court's 1973 decision in *Robinson v. Cahill*<sup>202</sup> on the basis that New Jersey had no law establishing qualitative standards for public schools.<sup>203</sup> This change in New Jersey's law renders moot the *Hornbeck* court's efforts to distinguish *Robinson*.<sup>204</sup>

Similar to the plaintiffs in *Hornbeck*, the *Robinson* plaintiffs were children from poorer districts who raised a constitutional challenge to the state's public school financing scheme.<sup>205</sup> As in Maryland, the New Jersey public school financing scheme depended heavily on the financial resources of each local school district,<sup>206</sup> and incontrovertible evidence demonstrated that the existing financing scheme

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197. *Id.* at 54, 769 P.2d at 690.

198. *See* State ex rel. Woodahl v. Straub, 164 Mont. 141, 153, 520 P.2d 776, 783, cert. denied, 419 U.S. 845 (1974); *see also* Note, *To Render Them Safe*, *supra* note 168, at 1665 n.114 (proposing that the opposite outcomes "may be attributed to changing financial realities, the demonstrated ineffectiveness of a system that was relatively new in 1974, and the replacement of all but one of the justices on the court.").

199. Sherman, *supra* note 182, at 1.

200. *Id.*

201. *See* N.J. STAT. ANN. §§ 18A:7A-1 to 7A-52 (West 1989).

202. 118 N.J. Super. 223, 236-56, 287 A.2d 187, 194-204, *aff'd on rehearing*, 119 N.J. Super. 40, 289 A.2d 569 (1972), *modified*, 62 N.J. 473, 303 A.2d 273, (*Robinson I*), *aff'd on rehearing*, 63 N.J. 196, 306 A.2d 65 (*Robinson II*), cert. denied, 414 U.S. 976 (1973).

203. *See* *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 638-39, 458 A.2d 758, 779-80 (1983).

204. 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973).

205. *Robinson*, 118 N.J. Super. at 227-29, 287 A.2d at 189.

206. *Id.* at 229-31, 287 A.2d at 190-91 (local taxes furnished 67% of public school costs). For the 1986-87 fiscal year, the average state public school finance system relied on local revenues for 43.9 percent of its budget. *See* NATIONAL CENTER FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., DIGEST OF EDUC. STATISTICS 1989, at 149.

fostered excessive financial disparities.<sup>207</sup> Additionally, the *Robinson* court was required to interpret the New Jersey Constitution, which, much like the Maryland Constitution, provides:

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.<sup>208</sup>

As in *Hornbeck*, the trial court in *Robinson* held that, because of the resulting disparities among the various school districts with respect to their ability to finance education, the state's public school financing scheme violated equal protection guarantees.<sup>209</sup> Unlike *Hornbeck*, the trial court's decision was affirmed on appeal, but on the ground that New Jersey's public school financing scheme violated the thorough and efficient clause of the state constitution.<sup>210</sup>

The *Robinson* court found that the constitutional guarantee of a "thorough and efficient" education required equality of expenditures for the minimum mandated educational opportunity needed to equip a child for his role as a citizen and as a competitor in the labor market of contemporary society.<sup>211</sup> The court stated that "if the State chooses to assign its obligation . . . to local government, the State . . . must *compel* the local school districts to raise the money necessary to provide that educational opportunity."<sup>212</sup>

After the 1973 decision in *Robinson*, the question of the constitutionality of New Jersey's public school financing scheme continued through the New Jersey courts before it eventually became the impetus for legislative response. Initially, the *Robinson* court deferred remedial action to allow the New Jersey Legislature time to enact satisfactory financing legislation.<sup>213</sup> This time was extended in 1975.<sup>214</sup> Subsequently, however, in the absence of legislative action, the court authorized a provisional remedy to effectuate the constitutional entitlement to a thorough and efficient system of public schools.<sup>215</sup> Only then did the New Jersey Legislature take action to correct the public school financing scheme. Before the judicial remedies became

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207. *Robinson*, 118 N.J. Super. at 235-46, 287 A.2d at 193-99.

208. N.J. CONST. art. VIII, § IV, ¶ 1.

209. *Robinson*, 118 N.J. Super. at 276-80, 287 A.2d at 215-16.

210. *Robinson v. Cahill*, 62 N.J. 473, 515-19, 303 A.2d 273, 295-97 (*Robinson I*), *aff'd on rehearing*, 63 N.J. 196, 306 A.2d 65 (*Robinson II*), *cert. denied*, 414 U.S. 976.

211. *See Robinson I*, 62 N.J. at 515, 303 A.2d at 295.

212. *Id.* at 519, 303 A.2d at 297 (emphasis in original).

213. *Robinson II*, 63 N.J. at 198, 306 A.2d at 66.

214. *Robinson v. Cahill*, 67 N.J. 35, 37, 335 A.2d 6, 7 (1975) (*Robinson III*).

215. *Robinson v. Cahill*, 69 N.J. 133, 147-51, 351 A.2d 713, 718-22 (*Robinson IV*), *cert. denied*, 423 U.S. 913 (1975).

effective, the New Jersey Legislature enacted the Public School Education Act of 1975.<sup>216</sup> The *Robinson* court then found that, as a result of the incorporation of statewide qualitative standards of education, the 1975 Act was in facial compliance with the "thorough and efficient" clause.<sup>217</sup>

The statewide qualitative standards adopted by the New Jersey Legislature parallel those adopted by the Maryland State Board of Education in the Maryland School Performance Program.<sup>218</sup> The 1975 Act defines a thorough and efficient system of public schools as one which provides all children, "regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically, and socially in a democratic society."<sup>219</sup>

The *Robinson* court specifically reserved judgment on the question of whether the 1975 Act would pass constitutional muster as applied to any individual school district,<sup>220</sup> but upheld the 1975 Act as constitutional, assuming it was fully funded.<sup>221</sup> In fact, the *Robinson* court went so far as to point out that there is a significant connection between the amount of money spent and the quality of

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216. N.J. STAT. ANN. §§ 18A:7A-1 to 7A-52 (West 1989).

217. *Robinson v. Cahill*, 69 N.J. 449, 467-68, 355 A.2d 129, 139 (1976) (per curiam) (*Robinson V*).

218. In addition to defining the general goal of a thorough and efficient education, the New Jersey Legislature specifically acknowledged the major elements of the State's obligations:

- a. Establishment of educational goals at both the state and local levels;
- b. Encouragement of public involvement in the establishment of educational goals;
- c. Instruction intended to produce attainment of reasonable levels of proficiency in the basic communications and computational skills;
- d. A breadth of program offerings designed to develop the individual talents and abilities of pupils;
- e. Programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs;
- f. Adequately equipped, sanitary and secure physical facilities, and adequate materials and supplies;
- g. Qualified instructional and other personnel;
- h. Efficient administrative procedures;
- i. An adequate State program of research and development; and
- j. Evaluation and monitoring programs at both the State and local levels.

N.J. STAT. ANN. § 18A:7A-5 (West 1989).

219. *Id.* at § 18A:7A-4.

220. *Robinson V*, 69 N.J. at 455, 355 A.2d at 131-32.

221. *Id.* at 467, 355 A.2d at 139.

educational opportunity.<sup>222</sup> Perhaps it should come as no surprise then that the legal challenge spawned in *Robinson* lasted for more than a decade; in the end, the incorporation of statewide qualitative standards for thorough and efficient education was not enough to keep New Jersey's public school financing scheme from being found unconstitutional as applied to poorer urban districts when the public financing scheme continued to be dependent upon local wealth.<sup>223</sup>

By 1990, it had become abundantly clear to the New Jersey courts that, without sufficient State money, education had failed in the poorer urban school districts.<sup>224</sup> In response, the Supreme Court of New Jersey unanimously held in *Abbott v. Burke*<sup>225</sup> that, despite the acknowledged efforts of the legislature, the Public School Education Act of 1975 approved in *Robinson* had failed to accomplish the goal of a thorough and efficient education for all public school children.<sup>226</sup>

The *Abbott* court expressly stated that the thorough and efficient clause did not require an equal dollar amount to be spent per student.<sup>227</sup> To achieve the equality required by the thorough and efficient clause, however, *all* school districts must attain minimum substantive standards.<sup>228</sup> The number of dollars spent per student is relevant only if it impacts on the substantive education offered in a given district.<sup>229</sup>

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222. *Id.* at 481, 355 A.2d at 145-46.

223. See *Abbott v. Burke*, 119 N.J. 287, 295, 575 A.2d 359, 363 (1990). The *Robinson I* court recognized the great discrepancies between local needs and local fiscal capacities, noting that there was no correlation between the local tax base, and the "number of pupils to be educated, or the number of poor to be housed and clothed and fed, or the incidence of crime and juvenile delinquency, or the cost of police or fire protection, to the demands of the judicial process." *Robinson v. Cahill*, 62 N.J. 473, 501, 303 A.2d 273, 287 (*Robinson I*), *aff'd on rehearing*, 63 N.J. 196, 306 A.2d 65 (*Robinson II*), *cert. denied*, 414 U.S. 976 (1973). The court stated that there may have been some rough correlation in the past, but added that "[s]urely that is not true today in our state." *Id.* Though acknowledging the cost of local control in terms of inequality in resources and spending, the *Robinson I* court rejected the contention that the local control could be satisfied without local control of financing. *Id.* at 499-500, 303 A.2d at 286-87. *Abbott* clearly shows that treating local control of public school financing as essential to effective local government is at best illusory, and that reform is required to allow more effective control for all districts.

224. *Abbott*, 119 N.J. at 295, 575 A.2d at 363.

225. 119 N.J. 287, 575 A.2d 359 (1990).

226. *Id.* at 295, 575 A.2d at 363.

227. *Id.* at 305, 575 A.2d at 368.

228. *Id.* (stating the equality required by *Robinson* was "based on the proposition that the Constitution required a certain level of education, that which equates with thorough and efficient").

229. *Id.* at 309, 575 A.2d at 370.

In *Abbott*, school children from Camden, East Orange, Jersey City and Irvington<sup>230</sup> contended that the thorough and efficient clause of the New Jersey Constitution requires substantial equality in educational financing.<sup>231</sup> The plaintiffs claimed that the 1975 Act as applied was systematically productive of financial and educational disparities which rendered the entire Act unconstitutional,<sup>232</sup> or at least as applied to specific districts or a specific class of districts.<sup>233</sup> In support of this claim, the plaintiffs presented evidence of substantial disparity in expenditures and educational input between the poorest and richest districts.<sup>234</sup>

The State argued that statistical evidence fails to prove that a significant relationship exists between education expenditures and property wealth.<sup>235</sup> The State further argued that money is not a critical factor in the quality of education.<sup>236</sup> The State asserted that disparity in financing does not establish the failure to provide thorough and efficient education, nor does it establish any consequent disparity in substantive education.<sup>237</sup>

The *Abbott* court responded by observing that the issues involved questions of educational theory debated over the years, and that the only thing universally agreed upon was that urban schools are failing.<sup>238</sup>

The court held that, in order to meet the constitutionally mandated level of education, public school financing

cannot be allowed to depend on the ability of local school districts to tax, but had to be guaranteed and mandated by the State, and that the level of financing had to be adequate to provide for the special educational needs of poor urban

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230. *Id.* at 296, 575 A.2d at 363. In 1981, Marilyn Morheuser, Director of the Education Law Center in Newark, brought suit on behalf of the four inner-city school districts, claiming that New Jersey's complicated public school financing scheme actually increased the disparities between wealthy and poor school districts. Sherman, *supra* note 182, at 1. In August 1988, an administrative law judge agreed and rejected the State's argument that poorer district's had caused their own financial problems by inadequate management efforts. Even before the New Jersey Supreme Court ruled in *Abbott*, the newly elected Governor of New Jersey, James Florio, became the first governor in the country to declare a public school financing system based on local wealth inequitable, and promised more money for poorer school districts. *Id.*

231. *Abbott*, 119 N.J. at 301, 575 A.2d at 366.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 375, 575 A.2d at 403. *But see* Briffault, *supra* note 22, at 27.

236. *Abbott*, 119 N.J. at 376, 575 A.2d at 403.

237. *Id.* at 376, 575 A.2d at 403-04. *But see* Briffault, *supra* note 22, at 27.

238. *Abbott*, 119 N.J. at 376-77, 575 A.2d at 404.

districts in order to redress their extreme disadvantages.<sup>239</sup>

The court then held the 1975 Act unconstitutional as applied to poorer urban school districts,<sup>240</sup> and ordered the 1975 Act amended to assure financing of education in poorer districts substantially equal to that of the wealthier districts.<sup>241</sup>

Disparity in public school financing was an important factor in the *Abbott* court's conclusion that the education provided for students in poorer urban districts would not enable them to compete with their suburban colleagues or to function effectively as citizens in society.<sup>242</sup> While disparity alone did not render the 1975 Act unconstitutional, the court found disparity of financing relevant to its constitutional conclusion.<sup>243</sup> This conclusion was based not only on the court's finding of a substantive defect in the quality of education in the poorer urban districts but was based also on the significant disparity of spending between the poorer urban districts and the wealthier districts.<sup>244</sup> The *Abbott* court observed that "[w]hatever else the evidence shows, it is clear that in New Jersey today, as we assume in the United States, the greater the students' needs, the less their education"<sup>245</sup> and that "[t]heir deprivation is real, of constitutional magnitude, and not blunted in the least by the State's statistical analysis."<sup>246</sup>

*Abbott* flatly rejects the argument that the establishment of statewide qualitative standards governing the educational process<sup>247</sup> is alone sufficient to meet the constitutional mandate for a thorough and efficient system of public schools. The *Abbott* court focused on the fact that, even with qualitative standards of education under the 1975 Act, "[e]ducation has failed [in the poorer urban school districts] for both the students and the State."<sup>248</sup> The court recognized that, under a public school financing scheme dependent upon local wealth, "the evidence compels but one conclusion: the poorer the district and the greater its need, the less money available, and the

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239. *Id.* at 295, 575 A.2d at 363.

240. *Id.*

241. *Id.* The court's remedy left the expenditure disparity intact, so long as it did not interfere with the right of the poorer districts to receive a thorough and efficient education. *Id.*

242. *Id.* at 382-83, 575 A.2d at 407.

243. *Id.*

244. *Id.* at 383, 575 A.2d at 407.

245. *Id.* at 319, 575 A.2d at 375.

246. *Id.* at 347, 575 A.2d at 389.

247. *But cf.* *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 639, 458 A.2d 758, 780 (1983).

248. *Abbott*, 119 N.J. at 295, 575 A.2d at 363.

worse the education. That system is neither thorough or [sic] efficient."<sup>249</sup>

In reaching its conclusion, the *Abbott* court was aware that money alone would not achieve the constitutional mandate of a thorough and efficient education in the poorer urban districts.<sup>250</sup> The court refused to ignore the fact that the existing educational programs in poorer schools were not designed to meet, nor were they sufficiently addressing, the pervasive array of problems that inhibit the education of poorer urban children.<sup>251</sup> Regardless of how much money was spent, these schools could not provide a thorough and efficient education without educational reform.<sup>252</sup> Nonetheless, the court also refused to discount the rights of school children in poorer urban districts simply because they were disadvantaged by accident of their environment, compounded by an inadequate education.<sup>253</sup> Where the state had compounded the wrong, it must provide a remedy.<sup>254</sup> As Chief Judge Wilnetz eloquently stated:

If the claim is that additional funding will not enable the poorer urban districts to satisfy the thorough and efficient test, the constitutional answer is that they are entitled to pass or fail with at least the same amount of money as their competitors.

If the claim is that these students simply cannot make it, the constitutional answer is, give them a chance. The Constitution does not tell them that since more money will not help, we will give them less; that because their needs cannot be fully met, they will not be met at all. It does not tell them they will get the minimum, because that is all they can benefit from. Like other states, we undoubtedly have some "uneducable" students, but in New Jersey there is no such thing as an uneducable district, not under our constitution.<sup>255</sup>

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249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 375, 575 A.2d at 403.

254. *Id.*

255. *Id.* In the summer of 1990, the New Jersey Legislature appeared willing to cooperate in fulfilling Governor Florio's promise of more money for poorer school districts. Sherman, *supra* note 182, at 1. The legislature passed the Quality Education Act, which was part of Governor Florio's plan to balance the state budget by cutting deeply into state programs, raising over a billion dollars in new sales taxes, and doubling the income tax of the state's wealthiest residents. *Id.* This Act would have added 1.1 billion dollars to public schools, and would have forced local districts to pay for teachers' pensions. *Id.* Because

In 1983, the *Hornbeck* court emphasized that Maryland, in contrast to New Jersey, had established statewide qualitative standards through legislation, regulations and the bylaws adopted by the State Board of Education.<sup>256</sup> Therefore, the *Hornbeck* court properly distinguished *Robinson* because, at the time *Robinson* originally was decided in 1973, New Jersey had not yet established even minimal statewide qualitative standards for education.<sup>257</sup> *Robinson* dealt solely with the financial aspects of New Jersey's public school financing scheme because its existing law did not define "thorough and efficient" education, and the parties did not show other relevant criteria by which to measure compliance with the constitutional mandate.<sup>258</sup> The *Hornbeck* court relied on *Robinson* on the basis "that absent such standards the tax burden could not be left to local initiative with any hope that statewide equality of educational opportunity will emerge."<sup>259</sup> Additionally, the *Hornbeck* court noted that the New Jersey Legislature appeared either unwilling or unable to obey its "constitutional mandate."<sup>260</sup>

Though not addressed in *Hornbeck*, the New Jersey Legislature's actions in response to *Robinson* placed New Jersey in a substantially similar position to that of Maryland with regard to providing a thorough and efficient system of public school education. In fact, the *Robinson* court approved the 1975 public school financing scheme specifically because it incorporated statewide qualitative standards of education.<sup>261</sup> Moreover, both the *Hornbeck* and *Robinson* courts

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the wealthier districts paid higher teacher salaries, requiring the local districts to pay for teacher's pensions would have burdened the wealthier districts. *Id.* The legislature amended the Quality Education Act, however, and instead shifted the pensions back to the state and diverted a third of the new aid to property tax relief, largely to the benefit of suburban districts. *Id.* Education reformers claim that in amending the Quality Education Act, lawmakers gave in to pressure from teachers' organizations and the wealthy suburban districts. *Id.* On June 12, 1991, Marilyn Morheuser again brought suit claiming that this public school financing scheme not only fails to solve the problem of financing disparities, it continues to widen the gap between poorer and wealthier districts. *Id.*

256. See *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 639, 458 A.2d 758, 780 (1983).

257. *Id.*

258. *Robinson v. Cahill*, 62 N.J. 473, 515-16, 303 A.2d 273, 295 (*Robinson I*), *aff'd on rehearing*, 63 N.J. 196, 306 A.2d 65 (*Robinson II*), *cert. denied*, 414 U.S. 976 (1973).

259. *Hornbeck*, 295 Md. at 638, 458 A.2d at 780 (quoting *Robinson I*, 62 N.J. at 516, 303 A.2d at 295).

260. *Id.* at 638 n.13, 458 A.2d at 780 n.13.

261. The *Robinson V* court stated that the statute "at once seeks to define the constitutional promise, identify the components of which it consists, establish a procedural mechanism for its implementation and afford the financial means

recognized that, while left to the discretion of the legislature, the definition of a thorough and efficient system of education is evolving, and must be judged according to contemporary qualitative standards.<sup>262</sup> Finally, *Robinson* and *Hornbeck* each implicitly stand for the proposition that statewide qualitative standards of education can be satisfied only with sufficient financial support.<sup>263</sup>

In the wake of *Abbott*, coupled with the recent decisions in *Edgewood Independent School District v. Kirby*,<sup>264</sup> *Rose v. Council for Better Education, Inc.*,<sup>265</sup> and *Helena Elementary School District No. 1 v. State*,<sup>266</sup> a sound basis exists for judicial intervention in the area of public school financing based on local wealth.<sup>267</sup> As the *Abbott* court recognized, money that supports a thorough and efficient public school education is public money, whether it is local or state money. Under the Maryland Constitution, the source, amount, distribution, and use of money for public school financing is authorized and controlled by the State.<sup>268</sup> Under article VIII, the State

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necessary for its fulfillment." *Robinson v. Cahill*, 69 N.J. 449, 456, 355 A.2d 129, 132 (1976) (per curiam) (*Robinson V*). The court stated that it has been "constantly mindful that money is only one of a number of elements that must be studied in giving definition and content to the constitutional promise of a thorough and efficient education." *Id.* As in *Robinson IV*, the court recognized that "individual and group disadvantages, use of compensatory techniques for the disadvantaged and handicapped, variation in availability of qualified teachers in different areas, effectiveness in teaching methods and evaluation thereof, professionalism at every level of the system, meaningful curricula, exercise of authority and discipline, and adequacy of overall goals fixed at the policy level." *Id.*

262. See *Hornbeck*, 295 Md. at 639, 458 A.2d at 780; *Robinson V*, 69 N.J. at 457-58, 355 A.2d at 133.

263. *Robinson V*, 69 N.J. at 457, 355 A.2d at 133; *Hornbeck*, 295 Md. at 639, 458 A.2d at 780.

264. 777 S.W.2d 391 (Tex. 1989).

265. 790 S.W.2d 186 (Ky. 1989).

266. 769 P.2d 684 (Mont. 1989).

267. See also *Dupree v. Alma School Dist. No. 33*, 279 Ark. 340, 651 S.W.2d 90 (1983) (it is unconstitutional to base an education funding system on local property tax); *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601 (1971) (public school financing which relies on property taxes causes disparities among school districts and violates equal protection); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1979) (state financing of education based on local property tax, without regard to a town's financial ability violates equal education opportunity); *Seattle School Dist. No. 1 v. State*, 90 Wash.2d 476, 585 P.2d 71 (1978) (state has a paramount duty to make ample provision for the education of resident children); *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) (disparities among state's education financing violates equal protection guarantees); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo.) (state's school financing scheme based on local property taxes violates equal protection), *cert. denied*, 449 U.S. 824 (1980).

268. See *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 631-32, 458 A.2d 758, 776 (1983).

is obligated to spend that money to provide adequate education for all citizens.<sup>269</sup> This means that disadvantages of poorer urban districts must be taken into consideration when financing public schools, because "all students are entitled to be treated equally, to begin at the same starting line."<sup>270</sup> If used effectively, money can give all Maryland school children at least the *chance* to succeed.<sup>271</sup>

#### IV. RAISING THE CONSTITUTIONAL CHALLENGE TO MARYLAND'S PUBLIC SCHOOL FINANCING SCHEME

As with the decision in *Abbott*, a successful constitutional challenge to Maryland's public school financing scheme must be based on a well developed record, extensive offers of proof, and a thorough statistical analysis which is beyond the scope of this Comment. Fundamentally, the ability to reform the disparities and inadequacies caused by a public school financing scheme dependent upon local wealth rests on the willingness of the court to recognize that students in poorer school districts are no less citizens than students in wealthier districts.<sup>272</sup>

In *Hornbeck*, the plaintiffs offered only evidence of disparity of financing and educational inputs to show that a public school financing scheme based on local wealth violated the state constitution's thorough and efficient clause. In *Abbott*, neither the plaintiffs nor the State were able to convince the court of what was necessary for a thorough and efficient education.<sup>273</sup> Nonetheless, the *Abbott* court found that, whatever the standard was, the poorer urban school districts fell below it.<sup>274</sup> The *Abbott* court recognized evidence of

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269. *See id.* The financial burden entailed in providing a thorough and efficient system of public schools in no way lessens the constitutional duty. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 208 (Ky. 1989) (citations omitted).

In fact, a California Superior Court Judge recently ruled that the state would be failing to meet its constitutional obligation to provide students with public education "basically equivalent" to that offered elsewhere in the state, by allowing public schools in a bankrupt school district to shutdown six weeks early. *Judge Halts Plan to Close Schools in California District*, *Education Week*, May 8, 1991, at 1. Ironically, the bankrupt district was once hailed as a national model for parental choice and other school reforms. *Id.* After the judge intervened, the state stepped in with a loan to carry the district through the end of the school year. *Id.* The loan carries with it broad trustee powers to the state to oversee district finances. *Id.* The judge's decision narrowly averted the closing of 47 schools, which would have left 31,500 students without a teacher, or even a classroom. *Id.*

270. *See Abbott v. Burke*, 119 N.J. 287, 375, 575 A.2d 359, 403 (1990).

271. *See id.* at 295-96, 575 A.2d at 363.

272. *See id.* at 375, 575 A.2d at 403.

273. *See id.* at 318, 575 A.2d at 375.

274. *Id.*

inadequate education that also is evident in Baltimore City when it stated:<sup>275</sup>

Does the combination of student need, disproportionately present in poorer urban districts, inferior course offerings, dilapidated facilities, testing failures, and dropout rates leave the issue [of whether the students in these districts are provided a thorough and efficient education] in doubt?<sup>276</sup>

The *Abbott* court was unable to conclude that most districts were failing, in part because the burden was on the plaintiffs to show that a thorough and efficient education was not being delivered. The court reached its decision not only out of deference to the legislature, but also because it concluded that a constitutional violation would not be found solely on disparity of financing.<sup>277</sup> Yet, given a history of disparate funding and clear evidence of inadequate education in the poorer urban districts, the court in effect shifted the burden to the State to show that the financing scheme was constitutional as applied to the poorer urban districts. In so doing, the court stated: “[W]hile we are unable to conclude from this record that the State is clearly wrong, we would not strip all notions of equal and adequate funding from the constitutional obligation unless we were convinced that the State was clearly right.”<sup>278</sup>

Furthermore, the *Abbott* court stated that, no matter how promising plans to make urban schools more effective appeared, the fact that the State was trying to implement them was not enough to show that present expenditure levels would lead to thorough and efficient schools.<sup>279</sup> Under *Abbott*, the measurement of the constitutional requirement of thorough and efficient means “more than teaching the skills needed to compete in the labor market. . . . It means being able to fulfill one’s role as a citizen, a role that encompasses far more than merely registering to vote. It means the ability to participate fully in society. . . .”<sup>280</sup>

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275. See J. MURPHY, MARYLAND EVIDENCE HANDBOOK sec. 1000(A) (1989). While the court may not take judicial notice of facts simply because they are personally known to him, the court may consider any evidence that the legislature can consider, such as studies by educational experts showing that the inadequacy of public education is related to lack of sufficient funds caused by a public school financing scheme based on wealth. *Id.*; see, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

276. *Abbott*, 119 N.J. at 318, 575 A.2d at 375.

277. See *id.* at 393, 575 A.2d at 412.

278. *Id.* at 377, 575 A.2d at 404.

279. *Id.* at 378, 575 A.2d at 405; see also *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989).

280. *Abbott*, 119 N.J. at 363, 575 A.2d at 397; see also *Rose v. Council for Better Educ. Inc.*, 709 S.W.2d 186, 215-16 (Ky. 1989).

The *Hornbeck* court, while recognizing disparity with regard to financing and educational opportunity among Maryland school districts, prudentially deferred to the General Assembly to define and provide adequate education under the thorough and efficient clause of the Maryland Constitution. The *Abbott* court also recognized that, because educational sufficiency ultimately must be the responsibility of the legislature, there is a limit to the court's powers in this area.<sup>281</sup> In order to resolve the issue of whether statewide qualitative standards of education are met, however, Maryland courts need only turn to the appropriate state agency: the State Board of Education.<sup>282</sup>

Maryland school children now have the evidence which was lacking in *Hornbeck*; a public school financing scheme based on local wealth violates the thorough and efficient clause of the State Constitution. In addition to evidence of the disparity of financing and educational opportunity, by the State Board of Education's own evidence Maryland's public school financing scheme does not result in the constitutionally-mandated level of adequate education. The *MSPP Reports* provide empirical evidence that, at the very least, Baltimore City has failed to meet the State of Maryland's qualitative standards of education in areas of basic competency required to graduate from high school.

Thus, as in *Abbott*, the constitutionality of Maryland's public school financing scheme can no longer be presumed.<sup>283</sup> With hard evidence that Maryland public schools are failing to meet the State's own definition of thorough and efficient education, the court is entitled to ask for proof of the General Assembly's effort to achieve the legislatively defined goal and for proof of reasonable success at achieving that goal to effectuate compliance with the mandate of article VIII.<sup>284</sup> Moreover, as interpreter of the Constitution, the court has a duty to speak when the General Assembly has failed Maryland school children, and to say that the failure must be remedied.<sup>285</sup>

There is no constitutional right to an excellent public school education.<sup>286</sup> The *Hornbeck* court correctly stated that, under the Maryland Constitution, the state's obligation is limited to providing

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281. See *Abbott*, 119 N.J. at 322, 575 A.2d at 377.

282. See J. MURPHY, MARYLAND EVIDENCE HANDBOOK sec. 1000(A)(3) (1989) "on rare occasions, judicial notice is taken of what are conveniently characterized as 'political' facts. . . . To resolve this issue, the trial judge simply contacts the appropriate branch of government and follows that branch's decision on the issue." *Id.*; see *infra* notes 1 & 8-15 and accompanying text.

283. See Biegel, *supra* note 1 (discussing the application of heightened scrutiny in equal educational opportunity issues).

284. Cf. *Abbott*, 119 N.J. at 322, 575 A.2d at 377.

285. Cf. *id.*

286. See *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 632, 458 A.2d 758, 776 (1983).

the means for the legislatively defined standard of basic or adequate education throughout the state.<sup>287</sup> Under the existing financing scheme, public education may be successful for some children, while children attending Baltimore City schools clearly are being deprived of an adequate education in basic skills. Wealthier parents, who desire more for their children than the basic education mandated by the Maryland Constitution, have the option to send their children to private schools, or to move into neighborhoods with the better schools.<sup>288</sup> Parents with lesser means have no such choice.<sup>289</sup> While financing a basic public education may result in a less than ideal public education for some, that is not sufficient justification for ignoring the constitutional mandate to provide a thorough and efficient system of public education for all.<sup>290</sup>

Some may argue that public school financing reform would eliminate local control over education. This argument, however, has no merit. As the *Edgewood* court stated:

An efficient system does not preclude the ability of communities to exercise local control over the education of their children. It requires only that the funds available for education be distributed equitably and evenly. An efficient system will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives that are not now available to them. Only if alternatives are indeed available can a community exercise the control of making choices.<sup>291</sup>

In fact, local autonomy in the area of public school financing is central to preventing greater equality.<sup>292</sup> Eliminating school districts' dependency on local wealth for public school financing will not alone create adequate education, but it is a crucial step in remedying Maryland's failure to provide an effective education in basic skills in all districts throughout the state.

Since, as evidenced by the *MSPP Reports*, Baltimore City school children are being significantly deprived of an adequate education, and since gross inequities in the quality of educational opportunity among Maryland school districts exist, the situation in Baltimore City is particularly ripe for a constitutional challenge. Maryland's existing public school financing scheme ignores the special needs of

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287. *Id.*

288. See Briffault, *supra* note 22, at 221-22.

289. *Id.*

290. *Cf.* Abbott v. Burke, 119 N.J. 287, 340, 575 A.2d 359, 386 (1990).

291. 777 S.W.2d 391, 398 (N.J. 1989).

292. See Briffault, *supra* note 22, at 5 & 23-29 (discussing the history of public school financing cases and the interest of local autonomy).

disadvantaged students, the effects of municipal overburden, and results in lack of sufficient preparation of students in poorer urban districts to compete in the job market or function as responsible citizens in our democratic society.

## VI. CONCLUSION

When faced with this issue, the Maryland courts should follow New Jersey's enlightened treatment of public school financing based on local wealth, and take affirmative steps to remedy this ongoing constitutional violation. To be in compliance with article VIII, the General Assembly must be required to amend Maryland's public school financing scheme, or to pass new legislation to assure that educational financing is substantially equal. Indeed, because the *Hornbeck* court rejected uniform financing, it left open the possibility that additional state financing could be allowed to address extreme disadvantages.<sup>293</sup> Identifying the districts in need of additional state financing to address extreme disadvantages and providing a mechanism for financing public schools in general are responsibilities of the legislature.<sup>294</sup> Yet it is the court's constitutional duty to enforce the General Assembly's affirmative duty under article VIII to provide sufficient financing for an effective public school education in basic skills in *all* Maryland school districts.<sup>295</sup>

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293. See *Abbott*, 119 N.J. at 397-98, 575 A.2d at 409.

294. See *id.* at 385-86, 575 A.2d at 408-09.

295. See *id.* at 386, 575 A.2d at 409. Perhaps, in response to such a judicial declaration, the Maryland General Assembly will surprise us, as did the Kentucky legislature, by acting swiftly to implement a constitutional system of public school financing. See *supra* notes 184-193 and accompanying text.