

2003

## The Impact of Litigation on Rural Students: From Free Textbooks to School Consolidation

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### Recommended Citation

Robert M. Bastress, *The Impact of Litigation on Rural Students: From Free Textbooks to School Consolidation*, 82 Neb. L. Rev. (2003)  
Available at: <https://digitalcommons.unl.edu/nlr/vol82/iss1/3>

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Robert M. Bastress\*

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The past three decades have seen an historic assertion of authority by state courts in the development of a wide range of educational policies. The courts have made that assertion in the course of giving content to constitutional provisions that compel the state to maintain public schools. Judicial decisions in many states have recognized a right to an education that is not only judicially enforceable, but is also subject to a significant degree of judicial control. Most prominent in that regard, of course, have been the decisions by the twenty-six state courts that have ordered overhauls of school finance systems to

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achieve a more equitable distribution of education resources.<sup>1</sup> Courts have also addressed other, more discreet issues in defining the right to an education, and in doing so have affected significant changes for rural education. One issue that rural citizens historically have considered to be of the highest concern has nevertheless remained largely immune from judicial intervention. That issue is school consolidation: To what extent should courts impose substantive limitations on state efforts to close and consolidate community schools?<sup>2</sup>

The following review proceeds in three parts. Part I looks at cases that have defined the state's obligation to provide a "free education." Part II provides references and some cursory observations on the impact of the school finance cases on rural schools. Part III then examines historical, educational, and legal developments around school consolidation.

## I. SCOPE OF THE RIGHT TO A FREE EDUCATION

Every state constitution mandates state-provided schooling.<sup>3</sup> To varying degrees, the courts have found that these provisions confer on their state's children a "right to an education." To what extent, though, does this mean a right to a "free education?" Can a state condition the ability to attend school upon the payment of a tuition, as do all states for post-secondary education? Can a public school require payment of special fees outside the core curriculum? Can it charge for transporting children from home to school? In giving content to constitutional provisions, courts have encountered these questions and provided some guides in determining the scope of the right to an education.

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1. Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. XX (2003); see also Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, app. at 185-94 (1995); Jon Mills & Timothy Mclendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make "Adequate Provision" for Florida Schools*, 52 FLA. L. REV. 329, app. II at 402-09 (2000); Douglas S. Reed, *Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC'Y REV. 175, app. at 219-220 (1998).
  2. This article refers with some frequency to "community schools." That is not a specifically defined concept, but it refers generally to schools serving an area that its residents have historically considered to be a community and that permits children within the attendance zone to get to school without unduly long bus rides. Thus, identification of a "community" is both subjective and objective and includes cultural, social, and geographical considerations.
  3. See Shavers, *supra* note 1 (cataloging these provisions); Mills & Mclendon, *supra* note 1, app. I at 387-402 (cataloging these provisions).

### A. Tuition

There is so little case law on the issue of tuition for public schooling that it is probably safe to conclude that each state constitution establishes a right to a *free* public education, leaving only the question as to what is encompassed by the term “education.” The United States Supreme Court has suggested that a tuition-based educational system might even violate the federal equal protection guarantee, at least as applied to indigent children. While rejecting the argument that Texas’ property tax-based finance system discriminated against the poor in violation of the Fourteenth Amendment, the Court in *San Antonio Independent School District v. Rodriguez*<sup>4</sup> noted that it “would present a far more compelling set of circumstances for judicial assistance” if a state made “elementary and secondary education . . . available . . . only to those able to pay a tuition assessed against each pupil[.]”<sup>5</sup>

Subsequently, the Court did invalidate a Texas program that conditioned public education for children of illegal aliens upon the payment of tuition, which few of those children could afford.<sup>6</sup> The Court reasoned that education is essential for participation in modern society and in a democracy, and that the Texas tuition plan would create a permanent underclass whose members were identified by the wrongs of their parents, a virtual caste system that was anathema to our concept of equal protection.<sup>7</sup> On the other hand, the Court has upheld, against a federal challenge, a *bona fide* residency requirement – which conditioned free attendance on district residency – and the assessments that a school district imposed on nonresident students.<sup>8</sup>

Because the states do not charge tuition to resident students, there has been little or no need to litigate the validity under state constitutions for such assessments.<sup>9</sup> There have been cases, however, in

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4. 411 U.S. 1 (1973).

5. 411 U.S. at 25 n.60. *See also* *Chandler v. Sch. Dist.*, Civ. Action No. 71-S-51 (N.D. Ind. 1971) (enjoining disciplinary actions and suspensions of indigent children for nonpayment of fees) (copy on file with the author).

6. *Plyler v. Doe*, 457 U.S. 202 (1982).

7. *Id.* at 213-20.

8. *Martinez v. Bynum*, 461 U.S. 321 (1983).

9. In a most unusual case, however, a North Carolina appellate court struck down, under the North Carolina Constitution, an attempt by a school district to impose a tuition on one of its resident students who wanted to transfer to a school in another district. *Streeter v. Bd. of Educ.*, 446 S.E.2d 107 (N.C. App. 1994). The district had poor performing schools and had experienced a drain of students. Because the district’s funding depended, in part, on attendance, it naturally wanted to stop the drain, which simply worsened the performance problem. The North Carolina court concluded, however, that the district had “no authority” to impose the tuition and that it was in conflict with statements made by the North Carolina Supreme Court that the state constitution required schools to be tuition free. *Id.* at 109 (citation omitted).

which courts have addressed whether the state owes any duty to provide alternative educational services to a student under a long term suspension from school. This issue has taken on greater significance since Congress' enactment of the *Gun-Free Schools Act*,<sup>10</sup> which conditioned a state's receipt of federal education dollars on its enactment of a law requiring local school boards to expel from school for at least one year any student who possessed a firearm at a school, subject to an administrative discretion to modify the requirement on a case-by-case basis.<sup>11</sup> Within a short period of time after the Act's passage in 1994, all fifty states met the requirement,<sup>12</sup> and a great many of them extended the Act's zero tolerance policy to include possession of not only firearms, but also of other weapons, drugs, alcohol, and tobacco.<sup>13</sup> As a consequence, the country has experienced, since 1995, a dramatic increase in the number of suspensions and expulsions,<sup>14</sup> and many, if not most, have been for nonviolent behavior.<sup>15</sup>

One reaction to a student's participation in dangerous or asocial behavior proclaims that the student has basically forfeited his or her right to an education. Just as a criminal act can lead to the suspension of most basic freedoms and to incarceration, so too, can a youth's actions suspend the state's obligation to deliver an education. The federal statute does not mandate otherwise, and many states do not provide for alternative education.<sup>16</sup> The Massachusetts Supreme Judicial Court, at least, has held that that failure is not unconstitutional. *Doe v. Superintendent of Schools*<sup>17</sup> recognized that precedent<sup>18</sup> had established that Part II, c. 5, § 2 of the Massachusetts Constitution imposes an enforceable duty on the Commonwealth to provide education in the public schools and to fund such schools fairly and adequately. That authority, however, did not create a fundamental right in an individual student triggering strict scrutiny "whenever school officials determine, in the interest of safety, that a student's misconduct warrants expulsion."<sup>19</sup> Applying the lowest level of re-

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10. 20 U.S.C. § 7151 (2001). Upon its original enactment in 1994, the Act was codified at 20 U.S.C. §§ 8921-8923. The *No Child Left Behind Act*, Pub. L. No. 107-110, Title X, § 1011(5)(C), 115 Stat. 1425, repealed those sections and reenacted them as 20 U.S.C. § 7151.

11. 20 U.S.C. § 7151(b)(1).

12. Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM U. L. REV. 1039, 1047, 1047 n.46 (2001).

13. *Id.* at 1049; accord, James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J.L. & PUB. POL'Y 369, 370, 372 (2001).

14. Insley, *supra* note 12, at 1054-55 (citation omitted).

15. Peden, *supra* note 12, at 371-74; Insley, *supra* note 12, at 1040, 1051-55.

16. Insley, *supra* note 12, at 1067, 1067 n.174.

17. 653 N.E.2d 1088 (Mass. 1995).

18. *McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516 (Mass. 1993).

19. *Doe*, 653 N.E.2d at 1095.

view, the court then concluded that "a student's interest in a public education can be forfeited by violating school rules"<sup>20</sup> and that requiring an alternate education for expelled children "would be likely to have a serious detrimental effect on the ability of school officials to deter dangerous behavior within a school by imposing expulsion as a sanction."<sup>21</sup>

On the other hand, one cannot deny that a year's expulsion from school at a formative age can have a disruptive, even devastating, impact on a child's development. Removing a student from the school system and tossing him into an unstructured and isolated environment would likely propel him toward additional hostile behavior and would do nothing to prepare him for adult life. States continue to provide an education to those youths who have engaged in criminal conduct severe enough to warrant incarceration.<sup>22</sup> It would be ironic, indeed, if students who engage in some lesser misconduct would be left without any instruction for an extended period of time.

For these reasons, a few cases have concluded that a state's obligation to provide free public education may persist through a long-term suspension. The West Virginia Supreme Court of Appeals held in *Cathe A. v. Doddridge County Board of Education*<sup>23</sup> that the state's position that it had no responsibility to provide any education to expelled students was "constitutionally infirm because the State has not shown that applying such a limitation to *all* such children under *all* circumstances is reasonably necessary and narrowly tailored to further the compelling state interest in safe and secure schools."<sup>24</sup> Rather, the state must determine on a case-by-case basis what educational opportunities and services should be provided to an expelled student taking into account "the unique circumstances of the individual child," the safety of others in the school environment, and the need

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20. *Id.* at 1096.

21. *Id.* at 1097; *accord, In re Jackson*, 352 S.E.2d 449 (N.C. App. 1987) (holding public schools do not have to provide suspended students with an alternative education); *see also* *Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So. 2d 237 (Miss. 1985) (holding that although Mississippi statutes conferred upon students a fundamental right to an education, the state could impose expulsion to accomplish substantial interest in maintaining a safe school environment).

22. *See, e.g., In re G.S.*, 749 A.2d 902, 907 (N.J. Super. 2000); *Tommy P. v. Bd. of County Comm'rs*, 645 P.2d 697 (Wash. 1982) (holding state mandatory attendance and juvenile justice statutes confer on juveniles in detention facilities the right to an education).

23. 490 S.E.2d 340 (W. Va. 1997).

24. *Id.* at 350 (emphasis in the original). The court relied on Article XII, section 1 of the West Virginia Constitution, which states that the "Legislature shall provide . . . a thorough and efficient system of free schools." The court had previously read that provision to create for children a fundamental right to education that the state could not compromise, unless it could demonstrate that the restriction (or discrimination) was necessary to the achievement of a compelling state interest. *See, e.g., Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979).

to deter other students from committing prohibited acts.<sup>25</sup> Only "extreme circumstances and . . . a strong showing of necessity in a particular case," however, could justify a decision to deny all state provided education.<sup>26</sup> Similarly, a New Jersey court has held that "the State has a constitutional obligation to provide an education to a juvenile who has been adjudicated delinquent and placed on probation, even though his local school district has expelled him."<sup>27</sup>

## B. Textbooks and Fees for Curriculum-Related Activities

Several cases have addressed whether the right to an education includes the right to have textbooks provided at government expense. Despite the apparent importance of textbooks in securing an adequate education, two federal circuits concluded in the seventies that the United States Constitution does not require that the states must pay for them. Indeed, the Second Circuit in *Johnson v. New York State Education Department*<sup>28</sup> characterized a claimed right to free books as so clearly unsound that it did not even raise a question substantial enough to require the convocation of a three-judge panel to determine the constitutionality of the underlying state statute.<sup>29</sup> Applying a very low standard of review, the majority reasoned that the state could move "one step at a time" in providing services and that it had taken many steps in funding education, but retained the discretion not to take this particular one.<sup>30</sup> The United States Supreme Court

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25. *Id.*

26. *Id. Cathe A.* modified the requirement set forth in an earlier decision, *Phillip Leon M. v. Greenbrier County Bd. of Educ.*, 484 S.E.2d 909 (W. Va. 1996), which held that the state must – without qualification – create an alternative program for students suspended or expelled for a year. See generally Roni R. Reed, Note, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582 (1996).

27. *In re G.S.*, 749 A.2d at 907. The youth in *G.S.* was one of several students who served as "lookouts," while a co-conspirator phoned in a bogus bomb threat from the school cafeteria. Although *G.S.* had no prior disciplinary record, he was expelled from the school pursuant to its zero tolerance policy.

28. 449 F.2d 871 (2d Cir. 1971).

29. At that time, and until 1976, 28 U.S.C. § 2281 required cases raising a substantial question about the constitutionality of a state statute to be referred to a three-judge district, consisting of a circuit judge and two district judges, with a direct appeal to the United States Supreme Court.

30. *Johnson*, 449 F.2d at 877. The court also held that the State could condition the provision of textbooks on local voter approval of a special assessment. *Id.* at 878.

Judge Irving Kaufman dissented, maintaining that the plaintiffs had "established at the very least a substantial claim." *Id.* at 880. He emphasized the resulting deprivation that indigents, like the plaintiffs, would experience to their psychological well-being as well as their educations by being forced to attend schools in which children without money must suffer the stigma of working without books side by side with wealthier children with books. The books, admitted the defendants, were "essential to a quality educational program." *Id.* at 883.

subsequently granted a writ of certiorari to review the case but then vacated and remanded it to the district court for a determination on mootness.<sup>31</sup> The case never returned. The Sixth Circuit, in an unreported decision, also concluded that the federal constitution did not require the states to provide textbooks, even for those who could not afford to purchase them.<sup>32</sup>

Not surprisingly, challenges relying on state constitutional provisions have fared better. In applying those provisions to determine the scope of what constitutes a "free" education, state courts have used one of three approaches.<sup>33</sup> One asks whether the charged-for objects or services are "essential to the prescribed curriculum"<sup>34</sup> or "are necessary elements of any school's activity."<sup>35</sup> A second approach in-

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Thus, this was a case of clear discrimination along wealth lines that required a three-judge panel, Kaufman concluded.

31. 409 U.S. 75 (1972). Justice Marshall filed a concurrence to the remand and expressed his view that the "case obviously raises questions of large constitutional and practical importance." *Id.* at 77.
  32. *Carnes v. Commonwealth*, 538 F.2d 328 (6th Cir. 1976) (summary disposition), *cert. den.* by 429 U.S. 1049 (1977); *accord*, *Carpio v. High Sch. Dist.*, 524 P.2d 948 (Ariz. 1974). The Sixth Circuit's result was somewhat questionable since it (unlike *Johnson*) came after *Rodriguez*, which implied that the denial of a meaningful opportunity to obtain an adequate education because of an inability to pay could state an equal protection violation, 411 U.S. at 25 n.60, and after *Lau v. Nichols*, 414 U.S. 563 (1974), which held that San Francisco's school system violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, by failing to provide bilingual instruction to the city's non-English speaking Chinese. Such students, the unanimous Court said, were "effectively foreclosed from any meaningful education." *Id.* at 566.
- In contrast to *Johnson* and *Carnes*, some other federal courts in the seventies indicated a contrary view of the federal equal protection implications of textbook and fee assessments. The Ninth Circuit, in *Canton v. Sch. Dist.*, 498 F.2d 840, 843 n.5 (9th Cir. 1974), held that indigent plaintiffs stated a claim that could survive a motion to dismiss in challenging curricular fees and in alleging that the defendants penalized (with grade reductions and physical punishment) and humiliated children who did not pay the fees. *Accord* *Williams v. Page*, Civ. Action No. 18536 (7th Cir. 1971); *A.C.O.R.N. v. Sch. Dist.*, No. LR-71-C-77 (E.D. Ark. 1973). Similarly, *Chandler v. Sch. Dist.*, Civ. Action No. 71-S-51 (N.D. Ind. 1971), ordered a school district to halt disciplinary actions and suspensions of indigents for non-payment of fees.
33. *Hartzell v. Connell*, 679 P.2d 35, 39 (Cal. 1984); *Bond v. Sch. Dist.*, 178 N.W.2d 484, 488 (Mich. 1970).
  34. *Smith v. Crim*, 240 S.E.2d 884, 885 (Ga. 1977); *accord* *Vandevender v. Cassell*, 208 S.E.2d 436, 438 (W. Va. 1974); *Granger v. Cascade County Sch. Dist.*, 499 P.2d 780 (Mont. 1972).
  35. *Bond*, 178 N.W.2d at 487 (alternative holding); *Paulson v. Minidoka County Sch. Dist.*, 463 P.2d 935, 938 (Idaho 1970). The *Paulson* court, which originated the standard, also emphasized that textbooks are assigned by the school, they are a fixed expense peculiar to schooling, all students within each class use the same books, and their benefits inure to every student in equal proportion. Thus, school books "are . . . indistinguishable from other fixed educational expense items such as school building maintenance or teachers' salaries." *Id.* at 938-9.



quires whether the at-issue item is "an integral fundamental part of the elementary and secondary education."<sup>36</sup> Regardless of which of these variations is used, the answer has been that the "free" education mandated by the state constitution precludes the state or school district from assessing needy students (at least) for textbooks or curricular fees.<sup>37</sup> Textbooks are so basic to the learning process and are now of such "paramount importance"<sup>38</sup> that providing an education without them would not satisfy a state's constitutional obligation to provide "free" public education. "Books and school supplies are a part of the education system. This is true whether we apply the necessary elements of the school's activities test or the integral part of the education system test."<sup>39</sup> Indeed, the West Virginia Supreme Court of Appeals has ruled that the state cannot charge even non-indigent students for textbooks.<sup>40</sup>

A third approach, however, has produced a different result. Several courts have interpreted their state free education provision by inquiring as to the historical meaning ascribed to the provision by its framers.<sup>41</sup> Thus, the Wisconsin Supreme Court arrived at its conclusion that its free schools clause did not require the provision of free textbooks "from an historical analysis of what practices were in existence in 1848 which we may reasonably presume were also known to the framers of the 1848 Constitution."<sup>42</sup> Similarly, North Carolina's court found it necessary to inquire "into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation."<sup>43</sup> Predictably, courts making such inquiries conclude that textbooks were not generally given to students of the era in which the applicable provision originated.<sup>44</sup> An 1889 Indiana court described the then prevailing view:

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36. *Bd. of Educ. v. Adams*, 467 S.E.2d 150, 159 (W. Va. 1995); see also *Hartzell*, 679 P.2d at 39; *Pacheco v. Sch. Dist. No. 11*, 516 P.2d 629, 631 (Colo. 1973); *Bond*, 178 N.W.2d at 488. The *Hartzell* court characterized the second approach as akin to "necessary elements of any school's activity." 679 P.2d at 39. The results in cases applying that standard, however, are generally following the "essential to the prescribed curriculum cases." See notes 51-55 & accompanying text *infra*.

37. See cases cited *supra* notes 33 & 35-36; see also *Moran v. Sch. Dist. #7, Yellowstone County*, 350 F. Supp. 1180 (D. Mont. 1972).

38. *Adams*, 467 S.E.2d at 162.

39. *Cardiff v. Bismarck Public Sch. Dist.*, 263 N.W.2d 105, 113 (N.D. 1978).

40. *Adams*, 467 S.E.2d 150.

41. *Sneed v. Bd. of Educ.*, 264 S.E.2d 106, 110 (N.C. 1980); *Marshall v. Sch. Dist. RE No. 3 Morgan County*, 553 P.2d 784, 785 (Colo. 1976); *Bd. of Educ. v. Sinclair*, 222 N.W.2d 143, 145 (Wis. 1974); *Hamer v. Bd. of Educ.*, 265 N.E.2d 616, 619 (Ill. 1970); see also *Beck v. Bd. of Educ.*, 344 N.E.2d 440 (Ill. 1976).

42. *Sinclair*, 22 N.W.2d at 145.

43. *Sneed*, 264 S.E.2d at 110.

44. That was the conclusion of each of the cases cited *supra* note 41. It must be noted, however, that the Colorado and Illinois cases (at least) were brought by

Blackboards, charts, maps, tellurians [probably meaning globes], and dictionaries are a class of articles, apparatuses and books which are not required for each individual scholar, but one of each would be sufficient, in most instances, for the whole school, and could be used by the teacher in giving instruction to the pupils. No person being required to furnish such common property for the benefit of the whole school, they can only be supplied by the trustee. The authority, (of the township trustee to purchase items of general use) certainly, cannot be extended to the right of purchasing general text-books for the use of each of the individual pupils.<sup>45</sup>

That is, schools of that era did not require each student to read or study from a book; rather, students learned through teacher instruction supplemented by visual aids available to and shared by the entire class or school. Such schooling met the needs of the times, thus satisfying the state's obligation to provide a "free" education. To think, however, that students can receive an adequate education in the twenty-first century without books is to "ignore reality."<sup>46</sup> The courts insisting on defining their education clauses by using nineteenth (or eighteenth) century norms have focused entirely on what was provided as "free" in the framers' era rather than focusing on the far more obvious framers' intent of providing an *adequate* education that enables all students a meaningful opportunity to participate in our society.<sup>47</sup>

Finally, a few states have specific language in their educational provisions that resolves the issue of whether schools may charge for books. Arizona's Constitution, for example, includes Article XI, section 6:

The University and all other State educational institutions shall be open to students of both sexes, and the instruction furnished shall be as nearly free as possible.

The Legislature shall provide for a system of common schools by which a free school shall be established and maintained in every school district for at least six months in each year, which school shall be open to all pupils between the ages of six and twenty-one years.

Another provision of the Arizona Constitution, Article XI, section 1, imposes a duty on the legislature to establish and maintain a public

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parents who apparently had the means to pay for the book fees, and that both states provided textbooks for indigents. The North Carolina defendant also had a waiver policy for those unable to pay. The *Sneed* Court invalidated the policy because it failed to provide adequate notice to all students of the policy's existence.

45. *Chandler v. Cmty. Sch. Corp.*, 312 N.E.2d 915, 922 (Ind. 1974) (quoting *Sch. Township v. Barnes*, 21 N.E. 747, 748 (1889)).
46. *Randolph*, 467 S.E.2d at 164 (holding delivery of "a thorough and efficient system of free schools" required governmental provision of textbooks to all public school children).
47. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 489-93 (1954) (holding that because of vast increases in the demand and need for public education between 1868 and 1954, framers' specific notions about the constitutionality of racially segregated schools were not determinative of their latter day constitutionality).

school system, including kindergarten schools, common schools, high schools, and universities. Reading these provisions together and relying on other historical evidence, the Arizona Supreme Court concluded in *Carpio v. Tucson High School District No. 1*<sup>48</sup> that "common schools" encompassed grades one through eight,<sup>49</sup> that only common schools had to be entirely free, that high schools only had to be "as nearly free as possible," and that, therefore, high schools could charge for textbooks.<sup>50</sup>

### C. Extracurricular Activities

Framing the question can determine the result with regards to whether a free public education must include the opportunity to participate, free of cost, in extracurricular activities. Since the one room schools of the nineteenth century did not have formal extracurricular activities, jurisdictions that take an historical approach would presumably conclude that such programs do not have to be part of the free package. States that ask whether the charged item or service is essential or necessary to the curriculum conclude that extracurricular fees may be assessed.<sup>51</sup> "Items which are 'extra-curricular' are, by definition outside of or in addition to the regular academic courses or curriculum of a school."<sup>52</sup> If, however, a fee to support extracurricular activities is imposed on all students, regardless of whether they participate, then it becomes a tax on attendance and would operate like an unconstitutional tuition.<sup>53</sup> Courts that have posed the issue as whether the item at issue is an "integral, fundamental part of the elementary and secondary education" have concluded that extracurricular activity fees may not be imposed.<sup>54</sup> "They are [no] 'less fitted for the ultimate purpose of our public schools, to wit, the making of good

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48. 524 P.2d 948 (Ariz. 1974).

49. Not all courts have agreed with that conclusion. The Idaho Supreme Court in *Paulson* found that "common schools," as used in its constitution, embraced high schools and pointed to the substantial majority of decisions supporting that view. 463 P.2d at 937-38 nn.2-5. The Arizona Supreme Court, however, confronted specific constitutional language that dictated a different interpretation.

50. See also *Chandler*, 312 N.E.2d at 922 (constitutional duty to provide "for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all" precluded only tuition assessments and did not require free textbooks).

51. See *Smith v. Crim*, 240 S.E.2d 884 (Ga. 1977); *Paulson*, 463 P.2d 935; see also *Vandevender v. Cassell*, 208 S.E.2d 436, 438 (W. Va. 1974).

52. *Paulson*, 463 P.2d at 939.

53. *Id.*

54. See *Hartzell v. Connell*, 679 P.2d 35, 39 (Cal. 1984); *Moran v. Sch. Dist. #7, Yellowstone County*, 350 F. Supp. 1180 (D. Mont. 1972).

citizens physically, mentally, and morally, than the study of algebra and Latin[.]”<sup>55</sup>

#### D. Transportation to and from School

Courts are also divided over the issue of whether a school system may charge students for their transportation to and from school, an issue which has obvious importance for rural students because they generally do not live within walking distance of their schools.<sup>56</sup> In *Kadrmās v. Dickinson Public Schools*,<sup>57</sup> the United States Supreme Court held that a state did not violate the Fourteenth Amendment’s Equal Protection Clause by charging a fee to ride the school bus. The Court refused to extend the holding of *Plyler v. Doe* beyond its “unique circumstances.” “Unlike the children in that case, Sarita Kadrmās has not been penalized by the government for illegal conduct by her parents.”<sup>58</sup> The Court distinguished other cases relating to indigents because the indigents in those cases had no choice available to them.<sup>59</sup> “North Dakota does not maintain a legal or a practical monopoly on the means of transporting children to school.”<sup>60</sup> The Kadrmās family had pled poverty, but they could not prove that their daughter had no practical alternative means to get to school. After they had refused to pay on a \$97 assessment to ride the school bus, they arranged for private transportation for Sarita to get to school and ended up incurring more than \$1,000 in expenses.<sup>61</sup>

Applying their state constitutions, North Dakota and Michigan courts have concluded that transportation of students to and from school is not an essential part of a system of free public education and that the state is not, therefore, precluded from charging for it.<sup>62</sup> The

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55. *Hartzell*, 679 P.2d at 42 (citation omitted); see also *Kelley v. Bd. of Educ.*, 293 F. Supp. 485, 493 (M.D. Tenn. 1968).

56. *Kadrmās v. Dickinson Pub. Sch.*, 487 U.S. 450, 472 (1988) (stating that “free bus transportation is an important component of public education in a sparsely populated State”).

57. 487 U.S. 450 (1988).

58. *Id.* at 459.

59. See *Little v. Streater*, 452 U.S. 1 (1981) (discussing fee for blood test in quasi-criminal paternity case); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (discussing filing fee for divorce action); *Griffin v. Illinois*, 351 U.S. 12 (1956) (discussing fee for trial transcript in a criminal appeal).

60. 487 U.S. at 460-61.

61. *Id.* at 455. That Sarita was able to attend school may have been critical to the ruling. As Justice Marshall noted in his dissent, which was joined by Justice Brennan, the Court did not “address the question whether a State constitutionally could deny a child access to a minimally adequate education.” *Id.* at 466 n.1. Justice Stevens, joined by Justice Blackmun, also dissented.

62. See *Kadrmās v. Dickinson Pub. Schs.*, 402 N.W.2d 897 (N.D. 1987), *aff’d on other grounds*, 487 U.S. 450 (1988); *Sutton v. Pub. Sch.*, 323 N.W.2d 582 (Mich. App. 1982). The Michigan Constitution has a provision that says “the legislature may

California Supreme Court reached a similar result applying the test that asks whether the activity is an integral fundamental part of education.<sup>63</sup> That inquiry, the court said, "focuses 'upon the educational character of the activities in question,'"<sup>64</sup> and "[t]ransportation is simply not an educational activity."<sup>65</sup> The reasoning was, apparently, that children are not learning anything while on a school bus.<sup>66</sup> A court applying an historical analysis would probably uphold transportation fees, since nineteenth century children typically walked (or perhaps rode a horse)<sup>67</sup> to their neighborhood schools and it was not until the 1930's that school buses became practical and common. Before then, states were not heavily involved in transporting children to and from schools.<sup>68</sup>

On the other hand, the West Virginia Supreme Court of Appeals has established that education in that state is a fundamental right and has concluded that the "right is meaningful only if school children are able to get to school."<sup>69</sup> In consequence of that, the court has ordered a school board to provide transportation to students on a poorly maintained road and, if necessary, purchase a vehicle smaller than a school bus to transport the children on the road;<sup>70</sup> ordered another school board to: provide bus service to children who lived on a private road;<sup>71</sup> and ordered the Department of Highways to increase the level of maintenance on a road to permit a board to meet its transportation duties.<sup>72</sup>

## II. SCHOOL FINANCE LITIGATION

Serious treatment of the school finance cases is beyond the scope of this article. Fortunately, commentators and litigators with far greater

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provide for the transportation of students to and from any school." MICH. CONST., art. 8, § 2 (emphasis added).

63. *Arcadia Unified Sch. Dist. v. Dept. of Educ.*, 825 P.2d 438 (Cal. 1992).

64. *Id.* at 444 (emphasis & citation omitted).

65. *Id.* at 445.

66. The court emphasized, albeit in a footnote, that the state provision authorizing the transportation fee provided that indigent students did not have to pay the fee. Thus, the Court did "not anticipate that any child will be unable to attend school as a result of a proper application" of the law. 825 P.2d at 446 n.11.

67. *See Kadrmaz*, 402 N.W.2d at 900 n.1.

68. An argument could be made, however, that transportation simply was not a concern when most students lived within a doable walking distance of their schools and when pedestrian travel was very safe. The state did not then fund transportation because there was nothing to fund, and children (except perhaps those in very remote areas) were not prevented from attending a school because of the lack of transportation.

69. *Collins v. Ritchie*, 351 S.E.2d 416, 418 (W. Va. 1986).

70. *Shrewsbury v. Bd. of Educ.*, Wyo. County, 265 S.E.2d 767 (W. Va. 1980).

71. *Kennedy v. Bd. of Educ.*, McDowell County, 337 S.E.2d 905 (W. Va. 1985).

72. *Collins*, 351 S.E.2d at 418-19.

expertise on the subject than this author have provided a rich literature on the subject.<sup>73</sup> A couple points call for emphasis.

The school finance cases essentially challenge the inequalities and failures in state funding that resulted from over reliance on local property taxes<sup>74</sup> or some other local tax.<sup>75</sup> A common refrain throughout these cases is that rural areas generally lose out in such systems because they have less property wealth, fewer commercial and industrial establishments,<sup>76</sup> greater poverty,<sup>77</sup> and higher per pupil costs.<sup>78</sup> The latter are unavoidable because rural students are, by definition, scattered over a wider catchment area than students in more populous areas. Rural districts have to provide either more schools or more buses per pupil than suburban and urban districts.<sup>79</sup> Schools, school main-

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73. See, e.g., Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773 (1992); John Dayton, *An Examination of Judicial Treatment of Rural Schools in Public School Funding Equity Litigation*, 24 J. EDUC. FIN. 179 (1998) [hereinafter *An Examination of Rural Schools*]; John Dayton, *Rural School Funding Inequities: An Analysis of Legal, Political, and Fiscal Issues*, 14 J. RES. RURAL EDUC. 142 (1998); Enrich, *supra* note 1; Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995); Mills & Mclendon, *supra* note 1; Reed, *supra* note 1; Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483 (1998); Shavers, *supra* note 1; Symposium, *Adequacy Litigation in School Finance*, 28 U. MICH. J.L. REFORM 481 (1995); Symposium, *Investing in Our Children's Future: School Finance Reform in the '90's*, 28 HARV. J. ON LEGIS. 293 (1991); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights under the New Jersey Constitution of 1948*, 29 RUTGERS L. REV. 827 (1998); Mark G. Yudof, *School Finance Reform: Don't Worry, Be Happy*, 10 REV. LITIG. 585 (1991).
74. See, e.g., *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).
75. See, e.g., *Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 144 (Tenn. 1993) (holding sales taxes collected locally favored metropolitan areas which had disproportionate shares of retail sales).
76. Many states tax such entities at a higher rate than residential property. See, e.g., W. VA. CONST., art. X, § 1. In addition, if state law requires a local referendum to approve a levy or a bond sale, jurisdictions that can deflect much of the tax burden off of voters and onto businesses will have a much easier time passing a referendum.
77. See, e.g., *An Examination of Rural Schools*, *supra* note 73, at 198-99.
78. For a canvass of the cases as they deal with those problems of rural areas, see the articles by John Dayton cited in note 73, *supra*. For further discussion of rural funding issues, see, e.g., Bernal L. Green & Mary Jo Schneider, *Threats to Funding for Rural Schools*, 15 J. EDUC. FIN. 302 (1990); David C. Thompson, *Financing Rural and Urban Schools: A Growing Schism*, 21 PLAN. CHANGING 67 (1990). Many courts have noted the historical funding inequities experienced by rural school districts. See, e.g., *Opinion of the Justices*, 624 So. 2d 107, 124 (Ala. 1993); *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186, 221 (Ky. 1989); *Edgewood v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989); *McDaniel v. Thomas*, 285 S.E.2d 156, 172 (Ga. 1981); *Pauley v. Kelly*, 724, 255 S.E.2d 859, 886 (W. Va. 1979).
79. See, e.g., Aimee Howley & Craig Howley, *Rural School Busing*, ERIC Doc. No. EDO-RC-01-7 (2001), available at <http://www.ael.org/eric/digests/edorc01-7.htm>;

tenance, buses, bus drivers, and bus maintenance all cost money. In addition, to deliver an adequate curriculum, rural schools often need to add expenses for itinerant teachers, distance learning facilities, low student-teacher ratios, or enormously large catchment areas that cause further swelling of the transportation budget.<sup>80</sup> Rural areas also tend to have disproportionately high numbers of students with disabilities or special education needs,<sup>81</sup> which further raise the price of delivering an education. As a consequence of these factors, rural school districts have had an especially high stake in the outcome of the finance cases,<sup>82</sup> and to the extent that any decisions may have succeeded in creating greater equity and quality in public schools, rural schools have been prime beneficiaries. An unusual exception to that generalization is in Wyoming, where its supreme court in *Campbell County School District v. State*<sup>83</sup> invalidated what appeared to be an arbitrary funding formula with some very quirky and complicated features. Among other things, the state foundation grant funded smaller schools at higher per student rates than larger schools and funded schools outside of towns and cities at higher levels than in-town schools. In addition, the grant reimbursed districts for most of their transportation, special education, and other high cost expenses.<sup>84</sup> The result was a funding system that allocated revenues in a manner unrelated to the district's actual costs, which the court concluded violated the state constitution.<sup>85</sup>

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CRAIG B. HOWLEY, THE RURAL SCHOOL BUS RIDE IN FIVE STATES: A REPORT TO THE RURAL SCHOOL AND COMMUNITY TRUST, at [http://www.ruraledu.org/docs/howley\\_bus.pdf](http://www.ruraledu.org/docs/howley_bus.pdf) (2001) (copy on file with the author); KIERAN KILLEEN & JOHN SIPPLE, SCHOOL CONSOLIDATION AND TRANSPORTATION POLICY: AN EMPIRICAL AND INSTITUTIONAL ANALYSIS, at [http://www.ruraledu.org/killeen\\_sipple.pdf](http://www.ruraledu.org/killeen_sipple.pdf) (2000) (copy on file with the author); BARBARA KENT LAWRENCE ET AL., DOLLARS & SENSE: THE COST EFFECTIVENESS OF SMALL SCHOOLS 13, at <http://www.ruraledu.org/docs/dollars.pdf> (2002) (transporting rural students is more than twice as expensive as transporting urban and nearly 50 percent more costly than busing students in suburban districts).

80. See, e.g., authorities cited *supra* note 79; *infra* note 153 and accompanying text; *infra* notes 195-96 and accompanying text.
81. See, e.g., REP. SPECIAL TASK FORCE OF RURAL SCH. DISTS., W. VA. DEPT. EDUC., SCHOOLS IN CRISIS: STUDENTS AT RISK, 11-14 (1989) [hereinafter SCHOOLS IN CRISIS].
82. As others have pointed out, see, e.g., *An Examination of Rural Schools*, *supra* note 73, at 198, public attention has focused more on the funding imbalances between inner city and suburban schools. That is natural, since big cities provide homes to a lot more people and to the major media. By definition, rural areas have smaller populations and, hence, less attraction for the media and less political clout.
83. 907 P.2d 1238 (Wyo. 1995).
84. *Id.* at 1248, 1252-54.
85. *Id.* at 1278-79. New Jersey has also presented a somewhat different situation. Over the past twenty years, the *Abbot* litigation has focused on inadequate education provided in the state's inner city schools and has held that those schools have

One particular bone of contention in the cases has been the disparities in teacher pay between cities, suburbs, and rural areas. Generally speaking, the latter districts pay a lower salary on average than the more populous districts. Recognizing that, the Tennessee Supreme Court recently reenforced its holding<sup>86</sup> that an education funding formula cannot meet state constitutional standards without an effective salary equalization component and a mechanism for annual review of that figure.<sup>87</sup> “[T]eacher salaries are an indispensable part of any constitutional funding plan” and “a constitutional plan ‘must include equalization of teachers’ salaries according to the BEP formula.’”<sup>88</sup>

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much greater needs. The New Jersey Supreme Court has accordingly required the state to fund those schools at much higher levels. See *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998); *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985). Recently, however, a collection of twenty rural school districts have initiated proceedings claiming inequalities similar to those in the *Abbott* districts and seeking enhanced funding and educational opportunities. See *Keaveney v. Dept. of Educ.*, 2000 N.J. AGEN. LEXIS 814 (2000).

86. The court had held in *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) [hereinafter *Small Schools I*], that the gross disparities in educational opportunities created by the state’s school finance scheme, which relied heavily on locally raised revenues, rendered the plan unconstitutional. Generally, the state’s rural schools had much poorer facilities and many fewer resources than did their urban and suburban counterparts. *Id.* at 145-46. The court then referred the matter to the legislature to come up with a plan that would meet constitutional standards. In so doing, the court noted that those standards would not permit “the indifference or inability of [local government units] to defeat the constitutional mandate of substantial equality of opportunity.” *Id.* at 141. The legislature thereupon developed a Basic Education Plan (“BEP”), which continued to rely on both state and local revenues to finance schools, but with a unit’s local share to be determined by its relative ability to pay. The BEP also directed that the revenues should be collected and redistributed by the state according to a formula based on 43 factors deemed essential to a decent education. The factors included such things as the costs of textbooks, vocational education, guidance counseling, librarians, nurses, administrators, etc. The BEP did not, however, include the cost of engaging teachers. In *Tennessee Small School Systems v. McWherter*, 894 S.W.2d 734 (Tenn. 1995) [hereinafter *Small Schools II*], the court sustained the BEP except its “omission of a requirement for equalizing teachers’ salaries.” *Id.* at 738. “Teachers, obviously, are the most important component of any education plan,” and their compensation - the major item in every education budget - is a significant factor in determining where teachers choose to work. *Id.* The court thus held that the “plan must include equalization of teachers’ salaries according to the BEP formula” for the plan to be constitutional. *Id.* The legislature did not include teacher costs in the BEP, but responded instead with a one-time effort to bring below-average districts up to a rather arbitrarily arrived at figure (about \$28,000). There was no provision to adjust this number annually, as occurred with the BEP factors.
87. *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002) [hereinafter *Small Schools III*].
88. *Id.* at 25-26 (quoting *Small Schools II*, 894 S.W.2d at 738). The court rejected the state’s contention that “salaries have been equalized because all public school teachers have a minimum salary based on training and experience factors.”



## III. CONSOLIDATION

## A. History

The twentieth century began with public education dominated by small schools, many of them one room school houses, and by small independent districts.<sup>89</sup> Control of rural schools rested almost entirely on local lay trustees, and state regulation was *de minimis*.<sup>90</sup> Over 200,000 one room schools dotted the country, educating at least half of the school children.<sup>91</sup> Despite this highly decentralized system of governance, the content of the instruction in the schools was very similar, dominated by McGuffey's Readers, the three 'r's, and Protestant ethic.<sup>92</sup> In 1908, President Theodore Roosevelt formed the National Commission on Country Life to address rural problems, including the "rural school problem," and thus spawned the Country Life movement, which generally promoted consolidation of small, inefficient country schools.<sup>93</sup> Educational reformers influenced decision-making, too. Most notably, Stanford University professor Ellwood Cubberley attacked the inadequacy of rural schools: "Compared with a good town or city school the country school is poor, often miserably poor, and numerous classes [*i.e.*, grade levels], overburdened pro-

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Small Schools III, 91 S.W.3d at 241. "[M]aking adjustments based on training and experience benefitted wealthier school districts because more funds were channeled to districts where better trained and experienced teachers worked[.]" *Id.* The opinion is not clear whether the court intended for training and education to be factored out entirely in determining what figure would equalize salaries for BEP purposes.

The decision also conceded, however, that teacher salaries would not be identical in every school district. "[N]othing in the law prevents a local school system from supplementing teachers' salaries from its own local non-BEP funds when such funds are in addition to its local BEP contribution." *Id.* at 243. That is, the state determines the amount needed to pay all the teachers statewide based on a statewide average, then assesses the districts to pay their share calculated by their ability to pay, and finally redistributes the money to permit each district to pay teachers at the equalized level. The wealthier districts will pay in more for teachers (as well as for everything else) than they will get back, but they can tax themselves over and above their BEP share if they want to pay their teachers more.

89. See, e.g., CHARLES H. AMBLER, A HISTORY OF EDUCATION IN WEST VIRGINIA 205-273, 389-460 (1951); Craig Howley, *School District Size and School Performance*, RURAL EDUC. ISSUE DIG. 2 (2000), available at <http://www.ael.org/re/rural/pdf/digest3.pdf>.
90. David Tyack, *School Governance in the United States: Historical Puzzles and Anomalies*, in DECENTRALIZATION AND SCHOOL IMPROVEMENT 1 (Jane Hannaway et al. eds., 1993).
91. ANDREW GULLIFORD, AMERICA'S COUNTRY SCHOOLS 35 (3rd ed. 1996).
92. Tyack, *supra* note 90, at 4; Alan J. DeYoung & Paul Theobald, *Community Schools in the National Context: The Social and Cultural Impact of Educational Reform Movements on American Rural Schools*, 7 J. RES. RURAL EDUC. 3, 7 (1991).
93. Gulliford, *supra* note 91, at 41; DeYoung & Theobald, *supra* note 92, at 8.

grams, absence of equipment and lack of ideas and impulses to action offer odds against which the best of teachers can make but little headway."<sup>94</sup> Cubberly's proposed remedies were to centralize and consolidate.<sup>95</sup> He saw consolidation as the way to "redirect and revitalize" country schools and "a system better adapted to the needs of rural people."<sup>96</sup>

These influences had an effect. Although the number of districts at the onset of the century is unknown, a knowledgeable estimate has put the number nationwide at 150,000. By 1931-32, that number stood at 127,531 and has been steadily decreasing.<sup>97</sup> Today, there are but 15,000 or so school districts in the United States.<sup>98</sup>

Beginning in the thirties and accelerating after the war, improvements in transportation and roads, changes in living patterns, and ever increasing demands for more advanced instruction in mathematics and the sciences created demands for and made easier the consolidation of rural schools. Educational reform for most of the twentieth century's second half focused on "maximizing the teaching of 'skills and knowledge,' required for an urban based national economy, while at the same time reducing costs."<sup>99</sup> The Cold War and the post-Sputnik reformers argued that the curricular offerings of small rural schools were inadequate to meet the demands of the modern age. The calls for consolidation grew even louder after then-President of Harvard University James Bryant Conant published his influential work, *The American High School Today*, calling for high schools with no fewer than one hundred students per graduating class to meet curricular needs.<sup>100</sup> Conant wrote that he was "convinced small high

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94. Faith Dunne, *Reform and Resistance: Rural School Improvement Projects in the United States*, in RURAL EDUCATION IN URBANIZED NATIONS: ISSUES AND INNOVATIONS 325, 331 (Jonathan P. Sher ed. 1981) (citation omitted).

95. Dunne, *supra* note 94, at 331 (citation omitted).

96. Gulliford, *supra* note 91, at 43 (citation omitted).

97. The numbers of districts, at ten year intervals since 1931-32, have been:

1931-32 - 127,531

1941-42 - 71,094

1961-62 - 35,676

1970-71 - 17,995

1981-82 - 15,912

1990-91 - 15,358

1999-2000 - 14,928.

See NAT. CTR. FOR EDUC. STATISTICS, U.S. DEPT. OF EDUC., DIGEST OF EDUCATION STATISTICS, at <http://nces.ed.gov/pubs2002/digest2001/tables/dt090.asp> (2001) (1990-91 and 1999-2000 figures) [hereinafter DIGEST OF EDUC. STATS.]; see also FRANK W. LUTZ, TRENDS AND OPTIONS IN THE REORGANIZATION OR CLOSURE OF SMALL OR RURAL SCHOOLS AND DISTRICTS, ERIC DOC. NO. ED321964 (1990) (1930-31 to 1980-81 figures), available at <http://ericir.syr.edu>. The low point was in 1996, when there were 14,766 districts. DIGEST OF EDUC. STATS.

98. *Id.*

99. DeYoung & Theobald, *supra* note 92, at 9.

100. *Id.* at 10.

schools can be satisfactory only at exorbitant expense" and that the highest priority should be the "elimination of the small high school by district reorganization" (*i.e.*, consolidation).<sup>101</sup> The "recommended" size for high schools continued to grow after that, and consolidations continued apace. Thus, despite the enormous expansion in student population between 1930 and 1980, the number of public schools during that period dropped from over 238,000 to well under 100,000.<sup>102</sup>

## B. Resistance

Throughout this century-long movement toward larger rural schools, communities have persistently and mightily resisted the closing of their local schools.<sup>103</sup> This resistance has been variously explained. Cubberly essentially attributed it to ignorance, describing the rural resisters as "extremely conservative, unprogressive, jealous, penny-wise, and lacking in any proper conception of the value of good educational conditions. Any progressive proposal is usually met by determined and often unreasoning opposition, and progress by consent of the voters is a slow and arduous undertaking."<sup>104</sup> Others described "[l]ocalism, parochialism, frugality, and traditionalism" as "strong elements in the opposition to consolidation,"<sup>105</sup> while school

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101. JAMES BRYANT CONANT, *THE AMERICAN HIGH SCHOOL TODAY* 37-38 (1959).

102. DeYoung & Theobald, *supra* note 92, at 9, put the number in 1980 at 61,000, although at least one government table states there were then 85,982. See DIGEST OF EDUC. STATS., *supra* note 97. Enrollment increased and the emergence of charter schools in the latter half of the nineties pushed the number of schools back up to 92,000 by the year 2000. *Id.* The number of one-teacher schools dropped precipitously from approximately 150,000 in the early thirties to their virtual elimination by the mid-seventies. Howley, *supra* note 89, fig. 1 at 2-3. See also DIGEST OF EDUC. STATS., *supra* note 97.

103. Many commentators have observed and expanded on this phenomenon. See, e.g., ALAN PESHKIN, *THE IMPERFECT UNION: SCHOOL CONSOLIDATION AND COMMUNITY CONFLICT* (1982); Alan DeYoung & T. Boyd, *Urban School Reforms for a Rural District: A Case Study of School/Community Relations in Jackson County, Kentucky*, 21 J. THOUGHT 25, 42 (1986); Dunne, *supra* note 94; James G. Ward & Francis J. Rink, *Analysis of Local Stakeholder Opposition to School District Consolidation: An Application of Interpretive Theory to Public Policy Making*, 8 J. RES. RURAL EDUC. 11 (1992).

104. Dunne, *supra* note 94, at 332 (citation omitted).

105. Ward & Rink, *supra* note 103, at 17. However, Ward and Rink's judgment of the resisters is somewhat nuanced. After studying a particular community's resistance to consolidation, the authors concluded:

Concern over loss of local control seems to have been a major force in the opposition to consolidation. While we found strong elements of local control in this study, we also found the concept to be far more complex than other studies have shown. . . . Within the concept are not only elements of localism but also fears of others and their values and lifestyles. Local control also means a commitment to participatory democracy and a Jeffersonian view of governance, although it is not clear whether community politics are pluralist or elitist. A campaign to maintain local control can also signal an opposition to loss of prestige and power on the part of

officials often attributed local resistance to consolidation to ignorance and “capricious reasons” such as “old athletic rivalries, jealousies between communities, unwillingness to locate a new school in another town, and, of course, the ‘if it was good enough for me, it’s good enough for my kids’ rationale . . . .”<sup>106</sup>

A different set of observers, however, have described resistance to school closings as grounded in “the importance of place, local and life-long community interaction, local kinship attachments, and intergenerational stability” that many rural residents associated with community schools.<sup>107</sup> Personal observations of rural citizens fighting to preserve their school attest to their commitment to parental and community involvement with the school, to more individualized instructional and counseling capabilities, to pride in the school, and to a desire to preserve the community’s values, which are perceived to be at risk if the children are transported away to attend a distant and larger school.<sup>108</sup>

School closings in rural communities across the country have repeatedly recreated the same story. State officials concerned about economic efficiency and the perceived inadequacies of small rural schools apply pressure on local officials – or, in some cases, simply preempt local decisionmaking – to bring about the closing and consolidation of schools. Local citizens organize and resist with great vehemence. Sometimes, they can manage local political victories by gaining a majority on the local school board.<sup>109</sup> Frequently, consolidation oppo-

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certain individuals. Local control can also be a euphemistic stalling device to maintain and prolong exclusionary policies and discrimination against certain groups.

*Id.* at 18.

106. Emil J. Haller & David H. Monk, *New Reforms, Old Reforms, and the Consolidation of Small Rural Schools*, 24 EDUC. ADMIN. Q. 470, 475-76 (1988).

107. DeYoung & Theobald, *supra* note 92, at 10.

108. See, e.g., LAWRENCE ET AL., *supra* note 79, at 15-17; Randall S. Sell et al., *Socio-economic Impacts of School Consolidation on Host and Vacated Communities*, AGRIC. ECON. REP. No. 347 (1996).

109. If the decision to close and consolidate schools is not made locally but at some point higher up the state’s educational hierarchy, resistance to closures becomes much more difficult because the rural citizenry’s political strength will obviously be deleted. Moreover, gaining political control of a local board does not necessarily ensure victory for community activists, even in the short term. Citizens in Monre County, West Virginia discovered just that when their state supreme court informed them that the newly elected school board could not reverse a school closing and consolidation decision made by a prior board. *Pell v. Bd. of Educ.*, 426 S.E.2d 510 (W. Va. 1992). The court reasoned that the new board’s decision to stop the consolidation process and to turn down \$7.8 million in state aid to construct a new high school was arbitrary and capricious. But, the dissent pointed out:

In a democracy, no political coalition is expected to be permanent – indeed, that almost is a *precondition* of democracy. In this case I find nothing arbitrary or capricious on the part of the board – they simply

nents resort to litigation, but the claims available are typically procedural<sup>110</sup> – that officials failed to maneuver all the administrative prerequisites – and thus offer only the ability to delay a closing decision and the prospect for later political takeover. Yet, even when community school proponents do achieve a local political advantage, sustaining that edge over time can prove to be a difficult and exhausting proposition, and once control is lost, even for the short term, the effects can be long term. Once a school is closed and consolidated into another, it is rarely, if ever, reopened. As will be shown below, state officials have considerable means available to apply pressure for consolidation, and state education departments persistently use them.<sup>111</sup>

To this date, community school advocates have not succeeded in gaining control at the higher levels of the political hierarchy, despite the fact that these battles have been waging for decades and despite the intensity of the emotions. That failure is, in part, a function of numbers. Most of the battles arise in sparsely populated areas, which, by definition, involve a relatively small number of voters. The political challenge is especially daunting when the arena is statewide, *i.e.*, when the decisions are being made, as they increasingly are, in the state capitol rather than in the local community. Organizing various communities affected by consolidation and tapping their emotional intensity has proven to be difficult because the controversies have been dispersed over time and space. Finally, there remains a persistent perception among many people in urban and suburban areas, among elected officials, and within state educational departments that local opposition to consolidation is invariably based on parochialism, prejudice, narrowmindedness, and opposition to progress.<sup>112</sup>

### C. Consolidation Today

The most recent pressures for consolidation may well be an outgrowth of the equity in school finance reforms of the past twenty-five years. A couple factors explain that. For one, the equity movement

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implemented the voters' will in a system where government should come from the people instead of coming at the people.

*Id.* at 517 (Neely, J., dissenting). Democratic decisionmaking often takes a back seat when the issue is consolidation. The case illustrates the cool reception that community school activists frequently encounter in the judicial system.

110. See *infra* notes 124-27 and accompanying text.

111. See *infra* notes 114-123 and accompanying text; see also, *e.g.*, Haller & Monk, *supra* note 106, at 475-77; Herbert J. Walberg & Herbert J. Walberg III, *Losing Local Control*, 23 EDUC. RESEARCHER 19 (1994); *infra* notes 134-142 and accompanying text. Haller and Monk found, in a New York study, that state-hired consultants ("nearly always current or retired state officials") who prepared studies required by statute prior to school consolidation decisions never recommended against consolidation and "few even suggested that there were any disadvantages to a merger." Haller & Monk, *supra* note 106, at 475.

112. See, *e.g.*, *supra* notes 104-06 and accompanying text.

has generally had the effect of increasing education spending. That increase has intensified pressures to save money and to take advantage of economies of scale. Many perceive that consolidation advances that goal. Second, not only has there been a general increase in education funding, but state governments have assumed a greater share of the funding responsibility. The objection to the nearly nationwide reliance on local property taxes was, of course, that the large variations in district property wealth created similarly large variations in per student funding. Thus, students in poorer districts got less – often much less – of an education than those in the property-rich districts. In addition, taxpayers in property poor districts paid higher rates that produced a smaller return.<sup>113</sup> To achieve greater equity in both funding and taxing, state legislatures had to shift more of the spending burden to the state government. With that increase in effort, however, the legislatures (and the state education departments) also developed an increased desire to assert greater control over the educational process. That created a momentum toward more consolidation and also left local school boards and citizens with less ability to resist. Moreover, as previously explained, the political strength of those defending local schools becomes more diffused and less effective at each rung up the political ladder.

#### D. State Pressures to Consolidate

As a general proposition, state departments of education and legislatures have asserted pressure on local districts to consolidate smaller and rural schools. To promote that end, states have created various devices, some straightforward and others more subtle.<sup>114</sup> Most common has been to condition the grant of capital outlays for school construction and expansion on consolidation.<sup>115</sup> New York, for example,

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113. For example, the Texas system that was challenged in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), was so inequitable in that regard that three of the justices found that it was not rationally related to the state's professed goal of preserving a measure of local control. *Id.* at 64-68 (White, J., dissenting). Assume that district A consists of property with \$10 million in assessed value and that district B has \$100 million worth of property. District A taxes its property owners at four percent of assessed value to yield \$400,000 to spend on schools, and district B taxes at a two percent rate to yield \$2 million dollars for education.

114. See generally Craig B. Howley, *A Territorial Imperative: The Authority of the State to Reorganize Public Schools and Districts*, 9 J. RES. RURAL EDUC. 74 (1993). Officials at the state and local levels often rely on covert methods because, as will be developed below, consolidation often provokes popular and emotional resistance. Thus, officials attempt to deflect political backlash with "the devil made me do it" defense.

115. *E.g.*, *id.* at 77; BARBARA KENT LAWRENCE, EFFECTS OF STATE POLICIES ON FACILITIES PLANNING AND CONSTRUCTION IN RURAL DISTRICTS, ERIC DOC. NO. ED459970 (2001), available at <http://www.ael.org/page.htm?&pv=Xpd=1&index=>

has provided very large financial incentives for mergers and could withhold aid for school construction deemed too small.<sup>116</sup> In Minnesota, legislators overcame local resistance to consolidation by enacting a strict fire inspection program knowing that it would cause a great expense for many districts and that many of those could not afford the expense. Rather than provide assistance to all of them, however, the Minnesota legislature chose instead to set an arbitrary minimum size that schools had to meet to qualify for state aid. It left small districts with no alternative but to consolidate.<sup>117</sup>

In addition, state funding formulae, particularly in calculating the basic foundation grant, often work against the maintenance of small schools and push for consolidation.<sup>118</sup> According to one set of commentators,

In general, financing systems that base additional allocations to school districts on a per-pupil amount of revenue, either through flat grants or categorical aid, are the least beneficial to small schools or small school districts, since such mechanisms usually generate an insufficient amount of revenue to provide the necessary services, to establish required programs, or to hire properly certified teachers.<sup>119</sup>

Some states, for example, pay for minimum teachers' salaries (at a state-established schedule) and other educational personnel, but cap the number of teachers they will fund according to the number of students to be served at particular grade levels or to a maximum teacher-student ratio.<sup>120</sup> Rural districts, with their populations dispersed,

226; LAWRENCE ET AL., *supra* note 79, at 4-6; *see also* Deirdre Purdy, Note, *An Economical, Thorough and Efficient School System and the West Virginia School Building Authority "Economy of Scale" Numbers*, 99 W. VA. L. REV. 175 (1996).

116. Haller & Monk, *supra* note 106, at 476; *see also infra* notes 128-42 and accompanying text (describing West Virginia's school construction program). Haller & Monk quoted an advocate of state-coerced consolidation in New York:

All small districts . . . should be eliminated, if need be by the [state] Commissioner's office. They are and have been expensive, inefficient and indefensible in this day.

[L]egislation is the only answer. Albany in conjunction with the District Superintendents should decide which schools are too small to operate efficiently. Legislation should be enacted that would greatly reduce aid for the inefficient. Then only those who could afford it would want to or should be able to remain small.

Haller & Monk, *supra* note 106, at 476 (citation omitted). That kind of top-down, anti-democratic attitude has pervaded efforts to close and consolidate rural schools.

117. Susan R. Stockdale, *School Consolidation and Minnesota's Fire Safety Inspection Law: A Step Too Far*, 11 LAW & INEQ. 117, 120 *passim* (1992).
118. *See generally* Gerald R. Bass & Deborah Versteegen, *Informing Policymakers About the Impact of State Funding Formula Component on Rural Schools*, 8 J. RES. RURAL EDUC. 15 (1992); Thompson, *supra* note 78.
119. Bass & Versteegen, *supra* note 118, at 19.
120. *E.g.*, ALA. CODE §§ 16-13-231(b)(2) through 16-13-232 (2001); W. VA. CODE § 18-9A-4 (1999) ("no county shall receive an allowance for [professional educators] which number is in excess of . . . fifty-three and one-half professional educators to

have a more difficult time staying within the caps if they maintain local schools rather than consolidating to create larger student bodies and use fewer teachers. In North Dakota, districts got full funding for transportation, but only if they consolidated schools.<sup>121</sup> In addition, Nebraska has revamped its school finance system in ways that pressure rural districts to consolidate schools.<sup>122</sup> Evidence also indicates that enactment of open enrollment laws have tended to assert a negative impact on rural schools and have encouraged consolidation.<sup>123</sup>

### E. Legal Challenges to Consolidation

As previously mentioned, most court challenges to consolidation decisions have relied upon some procedural defect in the process by which the decision was made.<sup>124</sup> These may focus on whether the school board followed all of the statutory prerequisites for a school closing, such as requirements to prepare studies or documents for public inspection, to provide adequate notice to the public, to provide for public input, or submit the question to public referendum.<sup>125</sup> Challengers may also invoke general statutes regulating administrative and agency decisionmaking, such as open meeting laws.<sup>126</sup> In

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each one thousand students in adjusted enrollment"); W. VA. CODE § 18-9A-5 (1999) ("no county shall receive an allowance for an amount in excess of thirty-four service personnel per one thousand students in adjusted enrollment"); W. VA. CODE § 18-9A-5a (setting maximum ratios for teachers and service personnel compared to net enrollment numbers).

121. See *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 451 (1987).
122. E.g., NEB. REV. STAT. § 79-1007.02 (Cum. Supp. 1992) (creates a "standard cost grouping" that lumps together for funding all schools with more than two "formula students" per square mile and, in doing so, underfunds rural schools); NEB. REV. STAT. § 79-1010 (Cum. Supp. 1992) (provides incentives to reorganized districts and unified systems).
123. *Vermont School Choice Experiment May Negatively Affect Rural Schools and Communities*, 4 RURAL POL'Y MATTERS J., 3 (2002) (study of 5 year open-enrollment program showed 76% of participating students moved from small schools to larger schools without demonstrating any academic improvement). See generally Stockdale, *supra* note 117, at 119 n.9. The new *No Child Left Behind Act* could also present a challenge to small schools, especially to those serving low socio-economic communities. The *No Child Left Behind Act* includes a provision, 20 U.S.C. § 6316(b)(1)E)(I) (2003), that confers a right on any student to transfer out of any school in need of improvement, which is identified in subsection (b)(1)(A) as a school that fails for at least two consecutive years to meet state testing standards.
124. *Id.* at 79.
125. See, e.g., *In re 2,952 Registered Voters*, 574 So. 2d 619 (Miss. 1990) (holding no referendum required); *Kaberna v. Sch. Bd.*, 438 N.W.2d 542 (S.D. 1989) (discussing failure to submit to vote); *City of Benwood v. Bd. of Educ.*, 573 S.E.2d 347 (W. Va. 2002) (discussing alleged failure to provide sufficient public input); *Haynes v. Bd. of Educ.*, 383 S.E.2d 67 (W. Va. 1989) (discussing various procedural irregularities alleged and rejected).
126. See, e.g., *Hayes v. Jackson Parish Sch. Bd.*, 603 So. 2d 274 (La. 1992); *McComas v. Bd. of Educ.*, 426 S.E.2d 510 (W. Va. 1992).



most states, at least, opponents of a school closing can also contest in court the substance of a school board's decision, but the standard of review has been extremely deferential, both in its articulation and application.<sup>127</sup>

## F. A Case Study: West Virginia

### 1. Background

A striking example of state imposed forces driving local consolidation can be found in West Virginia,<sup>128</sup> which has closed over three hundred schools since 1989<sup>129</sup> and apparently is still busy at the task.<sup>130</sup> Prior to the late eighties, the state had not experienced the same degree of consolidation that had occurred in many other states. The change began with the state's creation of the School Building Authority (SBA), which the legislature established in 1988 and began to fund earnestly in 1989. The SBA emerged as a major reform rendered

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127. See, e.g., *Porter v. Bd. of Educ.*, 433 S.W.2d 126 (Ky. Ct. App. 1968) (holding board decision must be upheld unless arbitrary or an abuse of discretion); *Clay v. Harrison Hills City Sch. Dist. Bd. of Educ.*, 723 N.E.2d 1149, 1155 (Ohio 1999) (holding board's judgment reversible "only when the board acts fraudulently or in bad faith, or where there has been such arbitrary, unreasonable, or unlawful action as constitutes an abuse of discretion"); *Bd. of Educ. v. West Virginia Bd. of Educ.*, 399 S.E.2d 31 (W. Va. 1990) (applying arbitrary or abuse of discretion standard).
128. The West Virginia education scene during the past two decades has caught the attention of a surprising number of legal and educational analysts. See, e.g., ALAN DEYOUNG, *THE LIFE AND DEATH OF A RURAL AMERICAN HIGH SCHOOL: FAREWELL LITTLE KANAWHA* (David M. Fetterman ed. 1995); BETH SPENCE, *THE STORY OF THE POLITICS OF EDUCATION IN WEST VIRGINIA* (1998) (on file with the University of Nebraska Law College Library); Alan J. DeYoung & Craig B. Howley, *The Political Economy of Rural School Consolidation*, 67 PEABODY J. EDUC. 63 (1992); Margaret D. Smith & Perry A. Zirkel, *Pauley v. Kelly: School Finances and Facilities in West Virginia*, 13 J. EDUC. FIN. 264 (1988); Craig B. Howley, *Compounding Disadvantage: The Effects of School and District Size on Student Achievement in West Virginia*, 12 J. RES. RURAL EDUC. 25 (1996); Craig Howley, *The Matthew Principle: A West Virginia Replication?*, 3 EDUC. POL'Y ANALYSIS ARCHIVES (1995), available at <http://ericir.syr.edu>; Purdy, *supra* note 115; Jonathan R. Werner, Note, *No Knight in Shining Armor: Why Courts Alone, Absent Public Engagement, Could Not Achieve Successful Public School Finance Reform in West Virginia*, 35 COLUM. J.L. & SOC. PROBS. 61 (2002); see also *infra* notes 130, 183.
129. See Eric Eyre & Scott Finn, *Broken Promises*, CHARLESTON GAZETTE, Sept 29, 2002, at C1, available at <http://www.wvgazette.com/section/Series/Closing+Costs/2002100223> [hereinafter *Broken Promises*].
130. Jennifer Biller, *More School Closings on the Horizon*, CLARKSBURG EXPONENT, May 30, 2002, at 1, available at [www.cpubco.com/cgi-bin/LiveIQue.acgi\\$rec=10784cbgFrontPage?cbgFrontPage](http://www.cpubco.com/cgi-bin/LiveIQue.acgi$rec=10784cbgFrontPage?cbgFrontPage); Jennifer Biller, *Regional Schools a 'Real Option'*, CLARKSBURG EXPONENT, May 30, 2002, at 1, available at [http://www.cpubco.com/cgi-bin/LiveIQue.acgi\\$rec=10786cbgFrontPage?cbgFrontPage](http://www.cpubco.com/cgi-bin/LiveIQue.acgi$rec=10786cbgFrontPage?cbgFrontPage); Jennifer Bundy, *Smaller Schools Are Returning Across Nation - Except W.Va.*, CHARLESTON GAZETTE, Nov. 3, 2002, at 1.

by litigation declaring West Virginia's system of school finance to be unconstitutional for creating inequalities and her system of education to be unconstitutional for failing to deliver a "thorough and efficient education" as required by Article XII, section 1 of the state constitution.<sup>131</sup> Given those inequalities and the sorry state of West Virginia's schools, the SBA promised to be a significant reform. The enabling legislation authorized the SBA to sell bonds and use the proceeds to fund schools across the state based upon a set of legislatively identified criteria.<sup>132</sup> Prior to that time, there had been scant state revenues available for capital improvements and school districts had had an extremely difficult time raising the funds locally to finance construction. The concept of a state entity that would, in effect, pool substantial resources from across the state and then redistribute them in an equitable manner made an enormous amount of sense for the state. In particular, this scheme held great promise for the most rural counties.

The Legislature identified seven goals that school districts should strive to meet in their facilities plans:

- (1) Student health and safety;
- (2) Economies of scale, including compatibility with similar schools that have achieved the most economical organization, facility utilization and pupil-teacher ratios;
- (3) Reasonable travel time and practical means of addressing other demographic considerations;
- (4) Multicounty and regional planning to achieve the most effective and efficient instructional delivery system;
- (5) Curriculum improvement and diversification, including computerization and technology and advanced senior courses in science, mathematics, language arts and social studies;
- (6) Innovations in education;
- (7) Adequate space for projected student enrollments.<sup>133</sup>

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

132. See related sections of the West Virginia code beginning with W. VA. CODE § 18-9D-1 (1999).

133. W. VA. CODE § 18-9D-16(d) (2003). The legislature added an additional criterion in 1994:

- (8) To the extent constitutionally permissible, each facilities plan shall address the history of efforts taken by the county board to propose or adopt local school bond issues or special levies.

Deidre Purdy explained the amendment in her note:

The SBA lobbied for this additional goal. Language of the initial legislation, which remains in the statute today, provides that "no local matching funds may be required under the provisions of this section." Some counties had plans funded by the SBA, but failed to pass "matching" bonds, and their funding was snatched. Goal number eight, although after the fact, allows the SBA to take such failure to adopt local bond issues into account despite the otherwise specific language of the statute.

Purdy, *supra* note 68, at 186 n.68 (citation omitted).

The push for consolidation arose with the SBA's implementation of these criteria. Most importantly, the SBA issued an "Economies of Scale" regulation that set forth minimum school sizes for schools to be built using SBA funds. The minima listed were 440 students for K-8 schools, 600 students for 5-8 middle schools, and 750 for 9-12 high schools, with variations for different grade configurations.<sup>134</sup> Although those numbers are not big by national standards, they were for West Virginia. In 1992, even after seventy-five small schools in the state had been closed, sixty-one percent of the state's public schools were smaller than the economies of scales' minima.<sup>135</sup> The guidelines failed to consider population density. According to one observer,

Existing schools were generally smaller than these SBA-required school sizes because the SBA requirements fail to factor in the population sparsity of much of this rural state. Sparsely populated counties must gather widely scattered students from much larger geographic areas — the larger the school the larger the area — with attendant increases in transportation cost and students' time on school buses. In other words, inappropriately sized schools may suffer from diseconomies of scale. To some extent, existing school sizes reflected geographic and demographic realities; the SBA school size requirements ignored them in favor of a one-required-size-fits-all formula.<sup>136</sup>

The real impact of the economies of scale came in their application during the grant process.<sup>137</sup> In deciding which proposed building projects should be funded in a given year, the SBA grades each application on eight (now nine<sup>138</sup>) criteria — those set forth in the statute plus a team "overall rating." Until very recently, the SBA assigned to the economies of scale, curricular improvement, educational innovations, and health or safety criteria a multiplier of 1.5; the remaining criteria had a 1.0 multiplier.<sup>139</sup> Proposals that included consolidation

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134. SCHOOL BUILDING AUTHORITY, W. VA. DEPT. OF EDUC., GUIDELINES AND PROCEDURES HANDBOOK 68 (1995). The guidelines also listed these minimum enrollments: kindergarten — 2 classes of 20 students; grades 1-8 — 2 classes of 25 students per grade level; grades 5-9 — 150 students per grade level; and grades 10-12 — 200 students per grade level. *Id.* The SBA did allow for waivers from these numbers, at least when a county's population was too small to meet them. The SBA has never articulated a basis for its figures and has never done any follow up study to see if there are data to support them. Purdy, *supra* note 115, at 191, 191 n.94; *Broken Promises*, *supra* note 129, at C6. According to one pair of academic observers, "[t]his view of economies of scale is much too naive to serve as a legitimate basis for policymaking. In fact, it is a travesty of policy analysis." DeYoung & Howley, *supra* note 128, at 84.

135. Purdy, *supra* note 115, at 177.

136. *Id.*

137. Although the SBA provides that the economies of scale requirements can be waived, such waivers are rare for construction of new schools, unless the project relates to a school building that will house all of a county's students in the affected grades.

138. *See supra* note 133.

139. SCHOOL BUILDING AUTHORITY, W. VA. DEPT. OF EDUC., PROCEDURES FOR REVIEW OF "NEEDS" PROJECTS 8 (1990).

receive an additional boost in the SBA process because the agency assumes that increased school size has the corresponding advantage of enhancing school curriculum.<sup>140</sup> The multipliers contributed to the rigidity of the economies of scale requirements and to the pressure for consolidation because they gave 150% weight to the economies and their related criterion of curricular improvement while leaving uninflated factors, such as impact on student travel, that would most always work against consolidation. That consequence has been further reinforced by the SBA's "overall rating" factor, which simply adds to the preference for increased school size implicit in the calculation of the other rankings.<sup>141</sup> The predictable effect of the SBA's practices was that it funded construction or major remodeling only of those schools that either met the economies of scale or that were district-wide schools (and thus were as large as the district could make them).<sup>142</sup>

Other legal and economic realities added more pressure on rural districts to consolidate schools. West Virginia's school funding system presents particular challenges for its sparsely populated counties.<sup>143</sup> The state pays an unusually large percentage of the Article X, section 1 of the education bill, supplying 59% statewide.<sup>144</sup> The federal government adds 10.4%, and the remaining 30.6% comes from local sources, primarily through property tax assessments. The local contribution varies between 13-40%.<sup>145</sup> That variance is a function of Article X, section 1 of the West Virginia Constitution, which greatly restricts the counties' abilities to raise revenues. First, it creates four classes of property and imposes severe caps on the extent to which property can be taxed. The classes include: (I) personal property; (II) residential and farm property; (III) property outside of municipalities; and (IV) nonresidential property inside municipalities. Moreover, the caps run, respectively, in fifty cent increases from fifty cents to two dollars per hundred dollars of value. Article X, section 1 permits the

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140. Purdy, *supra* note 115, at 193.

141. *Id.* at 193-94.

142. *Id.*; see also authorities cited in *supra* note 130; Brief for Pendleton Citizens for Community Schools at 22-24, W. Va. Sup. Ct. of App. No. 25139 (1998) (copy on file with the author).

143. All of West Virginia's school districts are whole county units. Section 18-1-1 of the West Virginia Code defines a "district" for purposes of the code's chapter on public education as a "county school district" and a "board" as a "county board of education." Section 18-1-3 provides, "[a] school district shall include all the territory in one county."

144. The data was obtained at <http://wvde.state.wv.us/finance/> [hereinafter WVDE] by clicking onto the appropriate table. The figures are from the 2000-01 school year.

145. *Id.* (2000-01 figures).

imposition of an excess levy, but only if it is approved by the voters and only up to 100% of the above caps and only up to five years.<sup>146</sup>

These provisions adversely affect sparsely populated counties<sup>147</sup> in multiple ways. First, those counties have less expensive housing, the terrain is more mountainous and less “useable,” and communities are (by definition) more isolated – all of which contribute to lower property values and, thus, a lower tax base. Second, rural counties have less Class IV property – that is, commercial and industrial property, which can be taxed at twice the rate of residential and farm property.<sup>148</sup> That too, makes for a lower tax base, and it also means that any increases in taxes or excess levies would have to be disproportionately borne by individuals (*i.e.*, voters), rather than businesses. Unemployment, poverty, and free and reduced school lunch rates all run higher in West Virginia’s rural counties than in its more populous areas,<sup>149</sup> and the rural populations tend to be older<sup>150</sup> and are diminishing.<sup>151</sup> As a consequence of those factors, the sparsely populated counties en-

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146. Section 1 requires 60% voter approval and sets a three year limit. Those now apply, however, only to statewide levies, as amendments to Article X have changed those figures for school, county, and municipal levies. See W. VA. CONST., art. X, §§ 10 (school levies) & 11 (county and municipal levies).
147. “Sparsely populated” is a term used in *SCHOOLS IN CRISIS*, *supra* note 81, and is defined as a district with an enrollment of ten students or less per square mile. *Id.* at 2. In 1988, when that study did its calculations, West Virginia had twenty-five sparsely populated counties (or districts). Because of population losses, the 2002 enrollment figures show that there are now at least thirty counties who meet that definition. See E. LEE NORTH, *THE 55 WEST VIRGINIAS: A GUIDE TO THE STATE’S COUNTIES* (2d ed. 1998); W. VA. EDUC. INFO. SYS., W. VA. DEPT. OF EDUC., 2002 ENROLLMENT (2002), available at [http://wveis.k12.wv.us/2002\\_enrollment.htm](http://wveis.k12.wv.us/2002_enrollment.htm). Wyoming, McDowell, Lincoln, Boone, and Wetzel Counties have joined the twenty-five listed in *SCHOOLS IN CRISIS*, *supra* note 81, at 3.
148. See W. VA. CONST., art. X, § 1; *supra* text accompanying note 144.
149. Purdy, *supra* note 115, at 184-85; *SCHOOLS IN CRISIS*, *supra* note 81, at 4-10; see also HOUSING AND HOUSEHOLD ECON. STATISTICS DIV., U.S. CENSUS BUREAU, COUNTY ESTIMATES FOR PEOPLE OF ALL AGES IN POVERTY FOR WEST VIRGINIA (1998), available at [http://www.census.gov/hhes/www/saie/stcty/a98\\_54.htm](http://www.census.gov/hhes/www/saie/stcty/a98_54.htm).
150. West Virginia ranks third with 15.3%, in the percentage of its population over the age of sixty-five, just behind Pennsylvania and Florida. U.S. CENSUS BUREAU, GENERAL POPULATION CHARACTERISTICS, UNITED STATES (2001), available at <http://www.census.gov/population/cen2000/phc-t13/tab03.pdf>. Data on West Virginia’s elderly population by county is available through the *Research and Statistics* link at <http://www.state.wv.us/seniorservices/>.
151. Of West Virginia’s thirty sparsely populated counties, see *supra* note 147, fourteen lost population from the 1990 to the 2000 census and six others had growth only in the 1-2% range. In the census bureau estimates for 2001, eighteen of those thirty counties had dropped in population from the 2000 census. See POPULATION DIVISION, U.S. CENSUS BUREAU, WEST VIRGINIA POPULATION OF COUNTIES BY DECENNIAL CENSUS: 1900 TO 1990 (2001), available at <http://www.census.gov/population/cencounts/wv190090.txt>.

counter a much more difficult time passing bonds and excess levies to supplement their budgets.<sup>152</sup>

In addition to fewer resources, the sparsely populated counties also have higher costs because their transportation budgets are proportionately greater (children living in rural areas have longer bus rides) and they have more demanding special education needs.<sup>153</sup> In addition, the state's foundation grant imposes limits on the number of teachers and service personnel that the state will fund.<sup>154</sup> Thus, districts that employ more teachers and service personnel than the maximums allowed have to pay the related salaries and benefits out of local funds. Rural districts that operate small schools to avoid unduly long bus rides for their children and to keep schools in rural communities have a particularly difficult time staying within the maximums.

The rural counties thus faced this situation: many of their schools were badly in need of repair and replacement; passage of a local bond to finance school construction was not possible; most operated without excess levies; high costs and employing sufficient teachers to keep smaller schools open were straining the rural districts' ability to stay within their budgets; and the SBA was willing to give them millions of dollars to build new schools, but only if they consolidated. The result was not surprising. Over three hundred schools in West Virginia have now been closed since 1989.

Fearing the consequences of this mass consolidation and fighting to prevent the closure of their own high school, a group of citizens from

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152. During the 2001-02 school year, for example, twelve counties operated without an excess levy. All of them were sparsely populated counties. Of the eleven counties whose excess levy was less than 80% of the maximum allowed by the West Virginia Constitution, nine were sparsely populated and the other two would qualify as rural. WVDE, *supra* note 144.
153. SCHOOLS IN CRISIS, *supra* note 81, at ii-iii, 11-14, 18. The state's foundation grant to counties does take into account high costs for rural transportation and for special education students. See W. VA. CODE §§ 18-9A-2 (defining "adjusted enrollment," which is used in calculating the foundation grant, as net enrollment plus twice the number of students in special education programs) & 18-9A-7 (reimbursing low density counties for 90% of transportation cost as opposed to 85% for high density counties). Still, one study found that in the period between 1989-90 and 1994-95, West Virginia left counties with more than \$20 million in unfunded transportation costs and that sparsity of population combined with extensive consolidation correlated with growing deficit problems in many counties. Beth Spence, *Long School Bus Rides: Their Effect on School Budgets, Family Life, and Student Achievement*, RURAL EDUC. ISSUES DIG., (2000) at <http://www.ael.org/rel/rural/pdf/digest1.pdf>; see also *supra* text accompanying note 79.
154. W. VA. CODE §§ 18-9A-4 (setting maximum teacher to student ratio) & 18-9A-5 (setting maximum service personnel to student ratio). The limits remain in place, although newly enacted section 18-9A-5b provides for increased funding for additional personnel beginning in 2005 and running for the succeeding eleven years. Those personnel will be needed to meet the requirements imposed by section 6301 of the *No Child Left Behind Act*.

rural Pendleton County filed a class action seeking to stop the SBA's strict enforcement of its economies of scale as well as the school closings. There is mounting evidence to suggest that the group had good reason for opposing the state's massive consolidation program.

## 2. *The Benefits of Community Schooling*

Rural consolidation necessarily creates larger attendance zones, and that means that students that had previously attended a school in their community will experience extended time traveling to and from the school.<sup>155</sup> Long bus rides for pupils subject them to unproductive, but tiring and unhealthy dead time that displaces time for study and other activities while making it difficult to participate in after-school and evening co-curricular programs.<sup>156</sup> Increased distance from schools also means increased travel time, travel expenses, and opportunity costs for parents. These additional costs, in turn, discourage parental involvement in the educational process and thus reduce a factor that correlates positively with educational achievement.<sup>157</sup> As

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155. See KIERAN KILLEEN & JOHN SIPPLE, *SCHOOL CONSOLIDATION AND TRANSPORTATION POLICY: AN EMPIRICAL AND INSTITUTIONAL ANALYSIS*, at [http://www.ruraledu.org/killeen\\_sipple.pdf](http://www.ruraledu.org/killeen_sipple.pdf) (2000) (copy on file with the author). Killeen and Sipple stated:

When two school districts merge or otherwise fuse their boundaries, the geographic center of that area also moves. The same is true when schools close or modify their attendance boundaries. Children living at the edges of the new boundary must travel further to attend their school because of the interplay between low population density and wider school attendance boundaries.

*Id.* at 11. Killeen and Sipple reported that, during the 1994-95 school year, transportation costs per pupil in rural and small town areas were twice as high as those in urban areas and were 45% higher than those in suburban and metropolitan schools. *Id.* 18, tbl. 1. A survey of nearly 1,200 elementary principals found that rural students are more likely than suburban students to have bus rides of thirty minutes or more, attendance areas greater than ten square miles, and rough rides. Craig B. Howley, Aimee A. Howley & Steven Shamblen, *Riding the School Bus: A Comparison of the Rural and Suburban Experience in Five States*, 17 J. RES. RURAL EDUC. 41 (2001).

156. Michael Fox, *Rural School Transportation as a Daily Constraint in Students' Lives*, 17 RURAL EDUCATOR 22 (1996); Beth Spence, *Long School Bus Rides: Their Effect on School Budgets, Family Life, and Student Achievement*, RURAL EDUC. ISSUE DIG. (2000), at <http://www.ael.org/rel/rural/rurltool.htm>; Belle Zars, *Long Rides, Tough Hides: Enduring Long School Bus Rides*, at [http://www.ruraledu.org/zars\\_busing.htm](http://www.ruraledu.org/zars_busing.htm) (1998); see also Craig B. Howley, *An Agenda for Studying Rural School Busing*, 16 J. RES. RURAL EDUC. 51 (2000); Eric Eyre & Scott Finn, *Riding the School Bus Hazardous to Children*, CHARLESTON GAZETTE, Aug. 25, 2002, available at <http://www.wvgazette.com/section/series/closing©ost/20020826> 8.

157. E.g., J.L. Epstein, *School/Family/Community Partnerships: Caring for the Children We Share*, 76 PHI DELTA KAPPAN 701 (1995); LAWRENCE ET AL., *supra* note 79, at 13 (contending that "[i]nvolvement with family and communities is a no-cost benefit of smaller schools that helps students to live better and richer lives,

travel time expands, both students and parents become less satisfied with their school.<sup>158</sup> It is also the case that those who endure the longest bus rides are typically the most rural and the poorest children, those most at risk in any school system. Consolidated schools are sited, naturally enough, near the population center(s) in the attendance zone in order to reduce the amount of busing and transportation costs. Thus, those with the longer bus rides are generally those who live the farthest from the population center(s). Wealth in most rural districts also tends to be concentrated in the population centers and tends to diminish with distance from the centers.

Smaller, community schools have much higher participation rates by students in extra- and co-curricular activities.<sup>159</sup> Not only can students more easily get to the activities, but there is more opportunity for students to compete. That is, the larger the school, the more that slots for sports, band, choir, school plays, etc., go to only students with exceptional ability and the less there is for the rest of the student body. The high levels of participation in small schools generate student interest and enthusiasm, provide opportunities for enhancing leadership and responsibility, and make students feel needed.<sup>160</sup> Smallness also permits administrators and teachers to pay more individualized attention to students, to identify problems better and sooner, to provide special instruction, and to become personally acquainted with the students and their families. Those traits, in turn, enhance the educational process and reduce dropout rates.<sup>161</sup> They

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and to connect more fully with their school as well"); STAN MAYNARD & AIMEE HOWLEY, PARENT AND COMMUNITY INVOLVEMENT IN RURAL SCHOOLS, ERIC DOC. No. ED408143, at 1 (1997) (stating that "when parents get involved in education, children try harder and achieve more at school"), available at <http://ericir.syr.edu>; Herbert J. Walberg, *On Local Control: Is Bigger Better?*, in SOURCEBOOK ON SCHOOL AND DISTRICT SIZE, COST, AND QUALITY 117 (1992).

158. Fox, *supra* note 156, at 25-26.

159. *E.g.*, ROGER G. BARKER & PAUL V. GUMP, BIG SCHOOL SMALL SCHOOL: HIGH SCHOOL SIZE AND STUDENT BEHAVIOR (1964) (stating that small schools need every student to populate teams, offices, clubs, plays, etc., so even marginal students are encouraged to participate and feel they belong); Dan T. Smith & Alan DeYoung, *Big School vs. Small School: Conceptual, Empirical, and Political Perspectives on the Re-emerging Debate*, 2 J. RURAL AND SMALL SCHS. 2 (1988); Neil G. Stevens & Gary L. Peltier, *A Review of Research on Small-School Student Participation in Extracurricular Activities*, 10 J. RES. RURAL EDUC. 116 (1994)

160. See authorities cited *supra* note 159.

161. See Mark Fetler, *School Dropout Rates, Academic Performance, Size, and Poverty: Correlates of Educational Reform*, 11 EDUC. EVAL. & POL'Y ANALYSIS 109 (1989); LAWRENCE ET AL., *supra* note 79, at 8-12; Robert B. Pittman & Perri Haughwout, *Influence of High School Size on Dropout Rate*, 9 EDUC. EVAL. & POL'Y ANALYSIS 337 (1987); LAWRENCE A. TOENJES, DROPOUT RATES IN TEXAS SCHOOL DISTRICTS: INFLUENCES OF SCHOOL SIZE AND ETHNIC GROUP, ERIC DOC. No. ED324783 (1989), available at <http://ericir.syr.edu>; see also Judith Kleinfeld et al., *Small Local High Schools Decrease Alaska Native Drop-Out Rates*, 28 J. AM. INDIAN EDUC. 24 (1989).



also make for much safer schools with far fewer discipline problems.<sup>162</sup>

No doubt these common sense benefits of small schools explain why recent research efforts have repeatedly shown that smaller schools blunt the negative impact on educational achievement of low socio-economic status.<sup>163</sup> For example, studies have now been completed in seven different states in which researchers have correlated reduced and free lunch students (to identify low SES students) with their scholastic performance. Each has produced the same result: low SES students do better in small schools.<sup>164</sup> The replication of the studies and their consistent results provide persuasive evidence of the

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162. *E.g.*, BARKER & GUMP, *supra* note 159; Emil J. Haller, *High School Size and Student Indiscipline: Another Aspect of the School Consolidation Issue?*, 14 EDUC. EVAL. & POL'Y ANALYSIS 145 (1992); LAWRENCE ET AL., *supra* note 79, at 8-9.
163. Presentation of these studies include Robert Bickel & Craig B. Howley, *The Influence of Scale on School Performance: A Multilevel Extension of the Matthew Principle*, 8 EDUC. POL'Y ANALYSIS ARCHIVES No. 22 (2000), available at <http://epaa.asu.edu/epaa/v8n22>; William J. Fowler, Jr. & Herbert J. Walberg, *School Size, Characteristics, and Outcomes*, 13 EDUC. EVAL. & POL'Y ANALYSIS 189 (1991) (with SES control, smaller schools and districts performed better than larger schools in helping students learn); Noah E. Friedkin & Juan Necochea, *School System Size and Performance: A Contingency Perspective*, 10 EDUC. EVAL. & POL'Y ANALYSIS 237 (1988) (low SES students in California study performed much better in small schools, while high SES students did somewhat better in large schools); Craig B. Howley, *Compounding Disadvantage: The Effects of School and District Size on Student Achievement in West Virginia*, 12 J. RES. RURAL EDUC. 25 (1996); Craig B. Howley, *The Matthew Principle: A West Virginia Replication?*, 3 EDUC. POL'Y ANALYSIS ARCHIVES 1 (1995), available at <http://ericir.syr.edu>; Gary Huang & Craig Howley, *Mitigating Disadvantage: Effects of Small-Scale Schooling on Students' Achievement in Alaska*, 9 J. RES. RURAL EDUC. 137 (1993); JERRY D. JOHNSON ET AL., *SIZE, EXCELLENCE, AND EQUITY: A REPORT ON ARKANSAS SCHOOLS AND DISTRICTS*, ERIC DOC No. 459987 (2002), available at <http://ericir.syr.edu>; see also BARKER & GUMP, *supra* note 159; Kathleen Cotton, *School Size, School Climate, and Student Performance*, at <http://www.nwrel.org/scpd/sirs/10/c020.html> (1997); CRAIG B. HOWLEY, *THE ACADEMIC EFFECTIVENESS OF SMALL-SCALE SCHOOLING*, ERIC Doc. No. ED372897 (1994) (summary of recent research), available at <http://ericir.syr.edu>; Valerie E. Lee & Julia B. Smith, *High School Size: Which Works Best, and for Whom*, 19 EDUC. EVAL. & POL'Y ANALYSIS 205 (1997); MARY ANNE RAYWID, *CURRENT LITERATURE ON SMALL SCHOOLS*, ERIC Doc. No. ED425049 (1999), available at <http://ericir.syr.edu>.
164. The first six of the studies are summarized in CRAIG B. HOWLEY ET AL., *RESEARCH ABOUT SCHOOL SIZE AND SCHOOL PERFORMANCE IN IMPOVERISHED COMMUNITIES*, ERIC Doc. No. ED448968 (2000), available at <http://ericir.syr.edu>. They are also cited in n. 163 *supra* and include information from the articles by Bickel & Howley, Friedkin & Necochea, Howley (1996), Howley & Bickel, and Huang & Howley. A summary of the last study and some of the data from it appear in RURAL SCH. & CMTY. TRUST, *SMALLWORKS IN ARKANSAS: HOW POVERTY AND THE SIZE OF SCHOOLS AND SCHOOL DISTRICTS AFFECT STUDENT ACHIEVEMENT IN ARKANSAS* (2002), which is available at [http://www.ruraledu.org/keep\\_learning.cfm?record\\_no=486](http://www.ruraledu.org/keep_learning.cfm?record_no=486). See also Craig Howley & Robert Bickel, *The Influence of Scale: Smalls Schools Make a Big Difference for Children from Poor Families*, 189 AM. SCH. BD. J. 28 (2002).

effectiveness of community schools for dealing with the disadvantages of poverty. Indeed, in the most recent study, done in Arkansas, researchers found that "the negative effect of larger schools [on the performance of low income students] was often pronounced."<sup>165</sup>

The rural school is often a center of community life and critical to its sense of culture, quality of life, and economic vitality.<sup>166</sup> When a school closes, the community and the students both lose a valuable connection.<sup>167</sup> As one commentator summarized the research:

Small, rural towns and urban neighborhoods can offer community naturally. . . . When the school is an interwoven part of the community, both are potent educators. . . . By separating schools from communities, consolidation may be contributing to the social problems that concern parents and educators. The sound development of children is closely linked to the well-being of communities. Consolidating schools often destroys those links.<sup>168</sup>

### 3. *The Pendleton County Litigation*

Using expert witnesses and anecdotal testimony, the *Pendleton County* plaintiffs convinced the trial court that small, community-based schools produce significant benefits, especially for rural children with their higher rates of poverty, and that closing their school and the SBA's rigid insistence on consolidation threatened them and rural students statewide with irreparable harm. The court found that the combination of SBA's policies, especially its economies of scales requirement, and the state funding formula had forced local school boards to consolidate schools, that the presumption for consolidation seriously threatened the educational opportunities of low SES students and especially of those in sparsely populated counties, and that West Virginia's consolidation program had failed to achieve its stated goals.<sup>169</sup> Accordingly, the court ruled that the program violated the

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165. SMALL WORKS IN ARKANSAS, *supra* n. 164, at 4.

166. *E.g.*, DEYOUNG, *supra* note 129; PAUL M. NACHTIGAL, RURAL EDUCATION: IN SEARCH OF A BETTER WAY (Paul M. Nachtigal ed. 1982); ALAN PESHKIN, THE IMPERFECT UNION: SCHOOL CONSOLIDATION AND COMMUNITY CONFLICT (1982); Alan DeYoung et al., *The Cultural Contradictions of Middle Schooling for Rural Community Survival*, 11 J. RES. RURAL EDUC. 24 (1995); Thomas A. Lyson, *What Does a School Mean to a Community? Assessing the Social and Economic Benefits of Schools to Rural Villages in New York*, 17 J. RES. RURAL EDUC. 131 (2002); Bruce A. Miller, *Rural Distress and Survival: The School and the Importance of "Community,"* 9 J. RES. RURAL EDUC. 84 (1993).

167. LAWRENCE ET AL., *supra* note 79, at 12-15; Lyson, *supra* note 166; Miller, *supra* note 166; Charles H. Sederberg, *Economic Role of School Districts in Rural Communities*, 4 J. RES. RURAL EDUC. 125 (1987); Sell et al., *supra* note 108.

168. JIM FANNING, RURAL SCHOOL CONSOLIDATION AND STUDENT LEARNING, ERIC Doc. No. ED384484, at 3-4 (1995), available at <http://ericir.syr.edu>.

169. The West Virginia Supreme Court subsequently highlighted the following findings from the circuit court's decision:

a. In order to create large enough enrollments to meet the [SBA/State Board-mandated] economies of scale, school boards in sparsely popu-

plaintiffs' fundamental right to an education guaranteed to them by Article XII, section 1 of the West Virginia Constitution.<sup>170</sup> Naturally, the state appealed, and the West Virginia Supreme Court of Appeals agreed to hear the case.<sup>171</sup>

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lated counties must create extremely large catchment areas, and in some cases consolidate county-wide, thus requiring students to spend inordinately long periods of time commuting.

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c. The long commutes interfere with students' study time, their ability to participate in extracurricular activities, and their educational achievement.

d. Larger schools mean lower participation rates for students in extracurricular activities in the life of the school.

e. Students who are bused the longest distances generally live in the most rural areas of the county and generally come from families with a lower socio-economic status than those who live nearer to the consolidated school.

f. The level of parental involvement, an important barometer of students' educational achievement, diminishes when schools become larger and more distant.

g. Small community schools are more effective in blunting the effects of low socio-economic status on students' educational achievement.

h. Busing students from families and communities with a relatively low socio-economic status (SES) into consolidated schools in communities and with students from a higher socio-economic status has a significant negative impact on the educational achievement of the lower SES students.

[i.] Closing community schools and busing rural students to consolidated schools, especially when the bused children from lower socio-economic backgrounds, creates a significant risk of substantially increasing the dropout rate among students.

j. Consolidation often creates deep and long lasting divisions between the consolidated communities and adversely affects parental involvement in the schools, dropout rates, student achievement levels, and generally the quality of the educational experience.

k. Large schools are not just dysfunctional for poor children; such schools dramatically compound the disadvantages that poor children inevitably confront.

l. Despite the negative correlation between school size and student achievement for students from low socio-economic backgrounds, the SBA's school building program has disproportionately, at a significant rate, closed schools in communities serving low income populations.

Pendleton Citizens for Cmty. Schs. v. Marockie, 507 S.E.2d 673, 677 (W. Va. 1998) [hereinafter PCCS].

170. The West Virginia Supreme Court has repeatedly ruled that Article XII of the state constitution creates for children a fundamental right that cannot be abridged unless the state can establish that such abridgement is necessary to accomplish a compelling governmental interest. *E.g.*, *Cathe A. v. Doddridge County Bd. of Educ.*, 490 S.E.2d 340 (W. Va. 1997); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979).

171. West Virginia has no intermediate appellate court.

Upon issuing its ruling, the court began its discussion by disclaiming any need to examine the evidentiary record because it accepted, "for argument's sake only," the circuit court's factual findings to the following extent:

(1) that SBA and State Board funding policies for school construction and salaries promote and substantially contribute to the closing of smaller high school programs like Circleville High, and drive the establishment of larger, consolidated high schools; and (2) that such high school consolidations, including the Pendleton County high school consolidation at issue in the instant case, have more of an adverse effect on the children whose former school is being closed than on the other children closer to the community where the consolidated school is located — these effects being lengthy travel, difficulties in full participation, etc. — in short, all of the negative effects listed in the circuit court's factual findings that are quoted *supra*.<sup>172</sup>

Based on these assumptions, the court further assumed "that the appellees sufficiently proved that the SBA/State Board policies generally and in the instant case create or contribute to adverse educational effects and disparities, based on wealth and residence, that are of constitutional significance."<sup>173</sup> That assumption made, the court agreed with the circuit judge that the issue to be decided was "whether the challenged actions that create or contribute to such alleged effects and disparities are — under a strict scrutiny review — necessary, reasonable, least restrictive and narrowly tailored to advance a compelling state interest."<sup>174</sup> Even under that imposing standard, however, the state's consolidation program survived because "the circuit court did not evaluate in a meaningfully reviewable fashion any purportedly less injurious, less discriminatory, less restrictive, more narrowly tailored and feasible alternatives to the challenged SBA/State Board policies[.]"<sup>175</sup> So, the appellate court began by stating it did not need to delve the record to resolve disputes over the trial court's factual findings and then based its ultimate ruling on a purported failure of that record and those findings.<sup>176</sup>

That ruling provides an opportunity to community and rural schools advocates, however, if they can show that alternatives can

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172. *Pendleton*, 507 S.E.2d at 678. The "negative effects" that the court refers to are listed in note 169, *supra*.

173. *Id.* at 681.

174. *Id.*

175. *Id.* at 682.

176. To do so, the opinion had to ignore considerable evidence in the record and specific factual findings by the circuit court identifying alternatives that would have accomplished the state's alleged purposes without the need for consolidation. See, e.g., *Pendleton Citizens for Cmty. Schs. v. Marockie*, Kanahwa Cir. Ct., Civ. Action No. 96-C-507, Findings of Fact 30 & 40(d) (copy on file with the author). The alternatives are discussed in the text accompanying notes 195-96 and included the use of distance learning and itinerant teachers to permit districts to offer a diverse curriculum without having to close small rural schools and bus students for unacceptably long drives every day.

achieve the state's interests as well as consolidating schools. Then, presumably, the state will have to use those alternative methods. The first step in that analysis requires an identification of those interests and to what extent they are promoted by consolidation.<sup>177</sup> The PCCS court articulated four interests served by its consolidation policies:

- (1) the need to spend limited state educational funds economically;
- (2) the need to see that all students have access to enhanced curricular offerings;
- (3) the need to have modern, safe physical facilities; and
- (4) the need to balance competing local and regional needs, interests and resources to achieve greater statewide equality and adequacy of educational opportunity.<sup>178</sup>

Having stated the interests, the court then assumed – this time without recognizing that it was making an assumption – that consolidation actually serves those interests. That is an assumption that state officials have made repeatedly, and it is not warranted.

The last two interests can be easily dismissed. With regards to the third stated interest, “the need to have modern, safe physical facilities,” there is simply no reason to conclude that a district has to consolidate schools in order to have “modern, safe physical facilities.” The state could build or repair small, community schools that are just as modern and safe<sup>179</sup> as any new or expanded consolidated school. The fourth interest, “the need to balance competing local and regional needs, interests and resources to achieve greater statewide equality and adequacy of educational opportunity,” was not explained by the court. Presumably, its application to the case was that maintaining community schools would require the state to over-invest in those communities to keep their schools in operation, which would mean that the state would have to take revenues from some other place. Taking these revenues would then create inequities and threaten the adequacy of education in the short-changed districts. That reasoning rests on the assumption that maintaining community schools costs

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177. The present undertaking necessarily dictates that these interests be identified and analyzed in the abstract and in the general run of cases. The circumstances in a particular case, of course, could generate particularly persuasive data, or expose additional concerns, that would argue for or against a consolidation proposal. The argument made by the PCCS plaintiffs, and by community schools advocates generally, is that state education departments and officials too often operate on nearly conclusive presumptions that consolidation will create greater efficiency and quality rather than examining the facts in an objective manner.

178. *Pendleton*, 507 S.E.2d at 681. The court added that no one disputed that the interests were compelling. *Id.*

179. Indeed, safety is also promoted by community schools over consolidated schools in at least two ways that are unrelated to the physical structure of the school. Smaller schools generally have fewer discipline problems or violent outbreaks, *see* authorities cited *supra* note 162, and students (overall) would have shorter distances to travel to get to and from their school, thus necessarily reducing the probabilities for traffic accidents.

more than consolidating them.<sup>180</sup> The third interest therefore, is little more than a restatement of the contention that consolidated schools save money.

The state's case thus reduces to the same interests that have historically been used to justify closing and consolidating schools: "[T]he need to spend limited state educational funds economically" and "the need to see that all students have access to enhanced curricular offerings." As previously stated, the PCCS court made no effort to examine whether the state's policies actually further those goals. Similarly, other courts reviewing consolidation decisions have consistently accepted without question officials' arguments that a challenged consolidation will save money and/or enhance the curriculum.<sup>181</sup>

The facts in West Virginia show that the state has not saved money from its fifteen years of consolidations. A 1996 study found that, after closing a quarter of West Virginia's schools, the number of professional educators had increased in the state from 13.45 to 13.54 per pupil, while service workers per pupil had gone from 22.04 to 22.02.<sup>182</sup> More recently, two reporters from the *Charleston Gazette* spent months investigating the after-effects of the massive consolidation and published their findings in a series of articles.<sup>183</sup> Among other things, they reported that from 1991 to 2002, after the state had closed over 300 schools and experienced a thirteen percent drop in attendance (41,000 students), it had an increase in the number of administrators.<sup>184</sup> Over the same period, costs per pupil also steadily

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180. The interest is surely laudable, but it needs some elaboration. Equal funding does not necessarily mean equal educational opportunity. Rural education costs more. When children are spread out over a wide area, the state is either going to have spend more money on transportation to bring those children to the school or spend more money building and maintaining schools near the children. In addition, rural schools generally have higher special education costs. See *SCHOOLS IN CRISIS*, *supra* note 81, at 11-14.

181. See, e.g., cases cited *supra* note 127. In defense of these courts, their standard of review is very limited, *id.*, and they frequently must decide the case based on a record that consists primarily of documents generated by school officials trying to "sell" the consolidation to the public. See, e.g., Haller & Monk, *supra* note 106, at 475. As discussed *infra* at notes 182, 186, 193 and accompanying text, many of the projected benefits claimed by consolidation proponents in West Virginia were wildly exaggerated.

182. Purdy, *supra* note 115, at 195 (citation omitted). Purdy also reported that many counties that had been subjected to significant consolidation had not realized projected savings and were experiencing either new or increased deficits, some for the first time. *Id.* at 196.

183. Eric Eyre & Scott Finn, *Educational Agency Grows While Enrollment Shrinks*, *CHARLESTON GAZETTE*, Oct. 6, 2002, available at <http://www.wvgazette.com/section/Series/Closing+Costs/200210089>.

184. *Broken Promises*, *supra* note 129; Eyre & Finn, *supra* note 183. The per pupil spending exceeded the national average for the first time in 1994. Eyre & Finn, *supra* note 183, at 4. In Pendleton County, where consolidation proceeded after the supreme court ruled in the PCCS litigation and where the state had projected

rose.<sup>185</sup> Meanwhile, transportation costs over the same period nearly doubled even though there were 25,000 fewer students riding a bus<sup>186</sup> and even though the state had extended bus retirements from ten years to twelve years to save money.<sup>187</sup> The increased spending on transportation is attributable, at least in part, to the increases in the length of bus rides. West Virginia now spends nearly seven percent of its education budget on transportation, highest in the nation, and its per pupil spending on transportation ranks tenth.<sup>188</sup>

Recent studies and academic commentary reflect a change in judgment that consolidating schools saves money. Larger schools, it has been found, in fact generate significant hidden costs. These include not only large increases in the transportation budget but also increased costs for added administration, security measures and personnel, and maintenance and operations personnel and expenses.<sup>189</sup> According to one researcher, "the required disciplinary and other administrative personnel of large schools are so costly that, past a certain point, per pupil cost goes up – and keeps going up as the school grows larger."<sup>190</sup> Moreover, two studies have found that even where per student costs of smaller schools were higher than larger schools, the small schools were less expensive in terms of costs per graduate.<sup>191</sup> The difference, of course, is explained by the fact that the smaller schools had a much lower dropout rate than did their larger counterparts. Moreover, if the social costs of large schools and their high dropout rates are factored into the cost analysis, small schools appear as a bargain.<sup>192</sup> Those costs include significantly higher rates

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the county would save \$200,000 a year, the superintendent admitted that the consolidation had not saved money. *Id.* at 5. Despite having an attendance drop of two hundred students, the county had only three fewer teachers and had hired an additional half-time administrator. *Id.*

185. *Id.*

186. As noted in the text, the total number of students in West Virginia declined by 41,000 during the past decade, while the number of bus riders declined by only 25,000. Thus, a larger percentage of students ride the bus today.

187. Eric Eyre & Scott Finn, *Rising Costs, Fewer Students*, CHARLESTON GAZETTE, Aug. 25, 2002, at 4C.

188. *Id.* at 1.

189. Kathleen Cotton, *New Small Learning Communities: Findings from Recent Literature*, NORTHWEST REG'L EDUC. LAB. (2002), available at <http://www.nwrel.org/scpd/sirs/nslc.pdf>; LAWRENCE ET AL., *supra* note 79, at 12-13; James S. Streifel et al., *The Financial Effects of Consolidation*, 7 J. RES. RURAL EDUC. 13 (1991) (stating that "there is no reason to expect financial savings or increased revenues as a result of consolidation"). Research has not revealed any study that has factored in various external costs to students and their families, such as added travel expenses and lost opportunity costs incurred by having to travel to a more distant school.

190. Cotton, *supra* note 189, at 19.

191. LAWRENCE ET AL., *supra* note 79.

192. That is especially true for rural areas, where the choice lies between maintaining a consolidated school that is expensive to operate and maintaining smaller

among dropouts, than among high school graduates who do not go to college, of likely needing public assistance, of living in poverty, and of engaging in criminal activity.<sup>193</sup>

The last interest claimed by the state, that consolidation will enhance curricular offerings, also lacks a factual basis in this age. To begin with, consolidated schools find it just as financially challenging to offer advanced courses as community schools. The experience in West Virginia's aggressive consolidation program has shown that promises made by consolidation proponents about curricular delights have proven to be bogus. The *Charleston Gazette* reported these findings after its months-long research:

To entice parents and students to accept school closings, school officials promised advanced foreign language, science, and math classes. But officials in rural counties have eliminated many of those courses because student enrollment has plummeted, state funding has dropped, and they can't find qualified teachers.

In Wayne County, school administrators promised rigorous Advanced Placement Courses in 12 subjects when three high schools merged into Sping Valley High. Today, the 1,100 student high school offers no AP classes.

In Roane County, school officials promised to provide four levels of Spanish and three levels of German when they closed Spencer and Walton high schools in 1993. Today, consolidated Roane County High offers just two levels of Spanish. (When they were open, Spencer and Walton high schools provided three levels of Spanish plus German.)

And in Pendleton County, administrators promised zoology, calculus, Japanese, and 22 other advanced classes to students from the former Franklin and Circleville high schools. Only one of those classes, drama, is being offered this year.<sup>194</sup>

It is also the case that student demand for or participation in advanced or non-core courses is lowest among low-SES students. Thus, when consolidations occur in communities with a high concentration of poverty, the students living there lose the advantages that community schools provide them,<sup>195</sup> while gaining nothing in enhanced curriculum, even if the new school has the extra courses.

Most disturbing, however, is the fact that in this era there are alternative mechanisms available to school officials that are much less disruptive for students and much cheaper for school districts than building a consolidated school and hauling students over long bus routes. Today, of course, satellite communications, teleconferencing,

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schools that are expensive to operate. That is, rural education is more expensive. See, e.g., authorities cited in *supra* notes 78 & 155. Thus, merely comparing per student or even per graduate costs at small schools versus large schools would not necessarily inform decisions about whether consolidated rural schools are cheaper unless the schools being compared are all rural schools.

193. LAWRENCE ET AL., *supra* note 79, at 12. Eighty-two percent of inmates in the adult prisons in this country are dropouts. *Id.*

194. *Broken Promises, supra* note 129.

195. See *supra* notes 156-165 & accompanying text.



computer software, the internet, and other distance learning technologies permit schools to bring into their classrooms meaningful instruction on virtually any subject.<sup>196</sup> With the technical progress made in these areas, the variety, quality, and diversity of e-learning, cyber learning, virtual learning, e-education, etc., have expanded enormously in the past fifteen years.<sup>197</sup> They now offer possibilities, too, for live, interactive instruction to engage students in ways that only hands-on teaching previously offered. In addition to technological alternatives, use of itinerant teachers (teachers with assignments at multiple schools) can help rural areas meet diverse curricular needs without having to consolidate. Moving art, music, and advanced math instructors around a district in cars or vans offers a safer, less expensive, and less disruptive alternative to busing hundreds of children to schools removed from their community.

It is time for state education officials to reconsider the now long standing presumption in favor of consolidating rural schools. The benefits of community-based education alone justify reliance on it, and there are no governmental interests that are countervailing. If officials fail to recognize that, then states' constitutional doctrines should be invoked to strike down policies and presumptions that coerce school boards into unwise school closings or that do not permit communities to decide for themselves about the fate of their schools.

#### IV. CONCLUSION

Courts in many states have used state constitutional provisions requiring the provision of a free public education to become active players in the educational process and have ordered state departments of education and legislatures to undertake a broad range of major educational reforms. The concept of a free education has now led to the almost nationwide provision of free textbooks and basic supplies. Generally, activist courts have forced more equitable educational sys-

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196. *E.g.*, Bruce O. Barker, *Anytime, Anyplace Learning*, 15 FORUM APPLIED RES. & PUB. POL'Y 88 (2000); Jason L. Hicks, *Distance Education in Rural Public Schools*, 16 U.S. DISTANCE LEARNING ASS'N J. (2002), available at [http://www.usdla.org/html/journal/MAR02\\_Issue/article04.html](http://www.usdla.org/html/journal/MAR02_Issue/article04.html). There is now substantial information available about distance learning. Both the United States Distance Learning Association and the American Center for the Study of Distance Education have websites, <http://www.usdla.org/html/journal> and <http://www.ed.psu.edu/acsde/> respectively, and publish journals. The October 2001 web edition of the *School Administrator* was devoted to web-based instruction. See [http://www.aasa.org/publications/sa/2001\\_10/contents.htm](http://www.aasa.org/publications/sa/2001_10/contents.htm). Distance learning methods are also common in West Virginia. *E.g.*, Allison Barker, *Distance Learning Changing Education in the State*, THE DOMINION POST, Nov. 5, 2002, at A1; Tara Tuckwiler, *College Unplugged: Students Increasingly Expect Wireless Internet*, CHARLESTON GAZETTE, Nov. 3, 2002, at B1.

197. See, *e.g.*, Alexander Russo, *E-Learning Everywhere*, SCH. ADM'R, at [http://www.aasa.org/publications/sa/2001\\_10/russo.htm](http://www.aasa.org/publications/sa/2001_10/russo.htm) (Oct. 2001).

tems in their states and have launched a school equity movement that has also spilled over into states that have not had major court rulings. Corresponding to this movement, however, has been an assumption of greater centralized control by state departments of education. Federal statutes, like the *No Child Left Behind Act*, have further propelled this centralization process by requiring state departments to develop and enforce a wide range of regulations. This increased centralization has brought about a corresponding diminution of local control and fed renewed demands by state officials to close and consolidate community schools. This has imposed particularly adverse consequences on rural and poorer students, who are forced to take long bus rides to get to schools that are less able to meet their needs than were their community schools. To advance state educational goals, state officials should suspend policies that force rural consolidation, and if they are unwilling to do so, then courts should act to prevent the unnecessary and unwarranted closing of community schools.