

THE LEGAL FOUNDATIONS OF PUBLIC SCHOOL FINANCE†

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Many forces have shaped public school finance policy in the United States, and of these forces the law is, perhaps, the most significant. Since the beginning of organized schooling in the United States, individuals have often challenged governments' authority regarding the provision and financing of public schools. These legal challenges offer an historical perspective that is often missing from public policy debate. Without a doubt, the legal basis for school finance has evolved over time and is embedded in and grows out of the historical development of public education in the United States.

This article focuses on the evolutionary development of certain legal principles that undergird school finance policy. It explores the following key concepts:

1. Over time, many forces, including state constitutions, legislative enactments and the common law, have shaped the basic framework of school governance in the United States.
2. The courts have firmly established the states' authority over education.
3. State legislatures have broad powers to provide for and control education, subject only to constitutional limits and political pressures.
4. States have a clearly established authority to tax for school purposes.
5. Equal tax provisions contained in state constitutions apply only to the levy of taxes and not to the distribution of tax revenues; thus, legislatures have broad discretion in the allocation of state revenue to local school districts.
6. State education articles create a valid state purpose, which justifies legislative attempts to equalize school revenues among the school districts.
7. Local school districts are creatures of the state with limited powers authorized by statutes. These powers include all

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those expressly delegated, as well as those necessarily implied to fulfill the statutory purpose.

1. STATES' AUTHORITY OVER EDUCATION

That the states have authority over education is a truism of constitutional law. This authority is grounded in common law, made evident in state constitutions through education articles, and exercised with few constraints by legislatures. These statements, though, belie the historical tensions that influenced the development of free, public schools as they are known today.

A. *Common Law and Early Legal Developments*

The general rule of the common law is that the parents' authority over the child extends to the child's education. Parental authority, however, is not unlimited and has been held to be subordinate to the state's police power, which allows the state to impose reasonable restrictions on its citizenry for the general welfare of society.¹ This legal principle is illustrated quite well by educational activities in the New England colonies during the seventeenth century. The religious authorities of the Massachusetts Bay Colony were not content to rely on parental responsibility for education and enacted various laws requiring parents to teach their children to read or requiring towns of certain sizes to employ a teacher or establish grammar schools. For example, the Massachusetts School Law of 1642, empowered town officials to hold all parents and masters accountable for their children's ability "to read and understand the principles of religion and the capitall lawes of this country" by imposing "fines upon such as shall refuse to render such accounts."² If fines were not a sufficient incentive for compliance with the law, the selectmen with judicial consent could apprentice out the children of those individuals they determined "not to be able and fitt to imploy and bring up."³ This law did not establish schools—it only provided a mechanism by which parents and others could be held accountable for teaching their children to read the Scriptures.

¹ 59 AM. JUR. 2D, *Parent and Child* § 16 (1987). See also *Campbell v. Aldrich*, 79 P.2d 257, 261 (Or.), *appeal dismissed*, 305 U. S. 559 (1938) (public education and its control are proper subjects for exercise of police power).

² 1 EDUCATION IN THE UNITED STATES: A DOCUMENTARY HISTORY 393 (Sol Cohen ed., 1974).

³ *Id.*

Just five years later, in 1647, colony officials enacted a law that has come to be known as the "Old Deluder Satan Act."⁴ This law was significant in that it began to formalize the schooling process by requiring towns of fifty householders to employ a teacher for the purpose of instruction in reading and writing as a way of foiling "that ould deluder, Satan."⁵ According to the law, the teachers' wages would be paid by the children's parents or by the general population of the towns. Towns with one hundred families were required to establish a grammar school to prepare children for the university. Failure to comply with the law resulted in a fine of five pounds being levied against the town and payable to the next school. Although these two laws have received the most attention by education historians, it should be noted that various towns in Massachusetts established schools at least two years prior to the 1647 enactment.⁶

The fact that religious concerns motivated these early laws does not minimize their importance in affirming the authority of government to require its citizens to provide for education. Such laws began to accustom the people to the idea that government had the right, and, indeed, the duty to require the provision of education for children. How the education was to be paid for was another matter that has yet to be fully resolved, notwithstanding the estimated expenditure of \$257.5 billion for public elementary and secondary schools in 1992-93.⁷ The legal principles governing school finance were forged in the crucible of conflict throughout the nation's history. Newton Edwards and Herman Richey were quite accurate in their observation that even though we tend to trace the origins of free schools to the early Massachusetts laws, history shows that the underlying principles "evolved slowly and painfully," and "the struggle for free schools was not won overnight."⁸

B. *States Education Articles*

The next major step in formalizing the states' authority over education was the inclusion in state constitutions of education articles.

⁴ *Id.* at 394.

⁵ *Id.*

⁶ *Id.* at 396-97. Historical sources show that the inhabitants of Dedham and Roxbury in 1645 voted to provide for a free school in their respective towns, and voted to raise £20 per year for the school master.

⁷ NATIONAL CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *DIGEST OF EDUCATION STATISTICS* 1993 (1993).

⁸ NEWTON EDWARDS & HERMAN C. RICHEY, *THE SCHOOL IN THE AMERICAN SOCIAL ORDER* 299, 329-32 (1963).

An education article is that constitutional provision which contains some statement about the state's role in public education. Interestingly enough, only six of the original thirteen states made any general reference to schools in their initial constitutions, although all states ultimately added an education article at some point in their history.⁹ These references tended to be vague exhortations to the legislatures to encourage schools, or to provide for the establishment of schools at some convenient time. For example, both North Carolina¹⁰ and Pennsylvania,¹¹ in their constitutions of 1776, required their legislatures to establish a school "for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices" Delaware's second constitution in 1792 required the legislature to establish schools "as soon as convenient."¹² The constitutions of Vermont¹³ and Maine¹⁴ commanded their legislatures to establish schools in each town, but required the towns to pay for them. Vermont's constitution further required that the towns pay the salaries of the masters so that instruction would be "at low prices."¹⁵ The initial constitutions of Alabama,¹⁶ Mississippi¹⁷ and Ohio¹⁸ incorporated the language of the Northwest Ordinance to the effect that "schools and the means of instruction shall be forever encouraged."¹⁹

⁹ CHARLES KETTLEBOROUGH, *THE STATE CONSTITUTIONS AND THE FEDERAL CONSTITUTION AND ORGANIC LAWS OF THE TERRITORIES AND OTHER COLONIAL DEPENDENCIES OF THE UNITED STATES OF AMERICA* (1918); WILLIAM F. SWINDLER, *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* (1973); FRANCIS N. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* (Scholarly Press 1976) (1909). The six original states making reference to education in their first constitutions were Connecticut (1818) (Connecticut remained under its colonial charter until its Constitution of 1818), Georgia (1777), Massachusetts (1780), North Carolina (1776), Pennsylvania (1776), and Rhode Island (1842) (Rhode Island continued under its colonial charter until 1842).

¹⁰ N.C. CONST. of 1776, § XLI (quoted in BEN P. POORE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* 1414 (2d. ed. 1878)).

¹¹ PA. CONST. of 1776, § 44 (quoted in 8 SWINDLER, *supra* note 9, at 284).

¹² DEL. CONST. of 1792, art. VIII, § 12 (quoted in 1 THORPE, *supra* note 9, at 580).

¹³ VT. CONST. of 1777, ch. II, § XL (quoted in 9 SWINDLER, *supra* note 9, at 495).

¹⁴ ME. CONST. of 1819, art. VIII (quoted in 3 THORPE, *supra* note 9, at 1661).

¹⁵ VT. CONST. of 1777, ch. II, § XL (quoted in 9 SWINDLER, *supra* note 9, at 495).

¹⁶ ALA. CONST. of 1819, art. VI (quoted in 1 THORPE, *supra* note 9, at 110).

¹⁷ MISS. CONST. of 1817, art. VI, § 16 (quoted in 4 THORPE, *supra* note 9, at 2045).

¹⁸ OHIO CONST. of 1802, art. VIII, § 3 (quoted in 5 THORPE, *supra* note 9, at 2910).

¹⁹ An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, 1 Stat. 51, 53 (July 13, 1787) ("Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.").

With the exception of Indiana in 1816²⁰ and Michigan in 1835,²¹ new states added to the union after 1840 adopted somewhat more specific education articles in their constitutions reflecting an increased state responsibility over what was becoming an essential attribute of government. As evidenced by the more expansive education articles found in state constitutions, political and economic rationales for the evolving school laws superseded the religious motives that underpinned the early colonial school laws. The later generation of education articles exhorted the state legislatures to create a system of public schools and often qualified the phrase with terms such as "general and uniform," "thorough and efficient," or "complete and uniform." Even though many education articles contained the term "free" public schools, it would be many years before that idea was realized.

Every state constitution now contains an education article commanding the legislature to provide for a system of free, public schools.²²

²⁰ IND. CONST. of 1816, art. IX, § 2 ("a general system of education, ascending in a regular gradation from township to a State University, wherein tuition shall be gratis, and equally open to all") (quoted in 2 THORPE, *supra* note 9, at 1069).

²¹ MICH. CONST. of 1835, art. X, § 3 ("a system of common schools") (quoted in 4 THORPE, *supra* note 9, at 1939).

²² See ALA. CONST. art. XIV, § 256 ("a liberal system of public schools"); ALASKA CONST. art. VII, § 1 ("a system of public schools"); ARIZ. CONST. art. XI, § 1 ("a general and uniform public school system"); ARK. CONST. art. XIV, § 1 ("a general, suitable and efficient system of free public schools"); CAL. CONST. art. IX, § 5 ("a system of common schools"); COLO. CONST. art. IX, § 2 ("a thorough and uniform system of free public schools"); CONN. CONST. art. VIII, § 1 ("free public elementary and secondary schools"); DEL. CONST. art. X, § 1 ("a general and efficient system of free public schools"); FLA. CONST. art. IX, § 1 ("a uniform system of free public schools"); GA. CONST. art. VIII, § 1 ("an adequate public education"); HAW. CONST. art. X, § 1 ("a statewide system of public schools"); IDAHO CONST. art. IX, § 1 ("a general, uniform and thorough system of public, free common schools"); ILL. CONST. art. X, § 1 ("an efficient system of high quality public educational institutions and services"); IND. CONST. art. VIII, § 1 ("a general and uniform system of Common Schools"); IOWA CONST. art. IX, § 3 ("encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement"); KAN. CONST. art. VI, § 1 ("establishing and maintaining public schools"); KY. CONST. § 183 ("an efficient system of common schools"); LA. CONST. art. XIII, § 1 ("a public educational system"); ME. CONST. art. VIII, pt. 1, § 1 ("the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision at their own expense, for the support and maintenance of public schools"); MD. CONST. art. VIII, § 1 ("a thorough and efficient System of Free Public Schools"); MASS. CONST. ch. V, § II ("to cherish the interests of literature and the sciences, and all seminaries of them; especially the University at Cambridge, public schools and grammar schools in the towns"); MICH. CONST. art. VIII, § 2 ("a system of free public elementary and secondary schools"); MINN. CONST. art. XIII, § 1 ("a general and uniform system of public schools"); MISS. CONST. art. VIII, § 201 ("maintenance and establishment of free public schools"); MO. CONST. art. IX, § 1(a) ("establish and maintain free public schools for the gratuitous instruction"); MONT. CONST. art. X, § 1(3) ("a basic system of free quality public elementary and secondary schools"); NEB. CONST. art. VII ("free instruction in the common schools"); NEV. CONST. art. XI, § 2 ("a uniform system of common schools"); N.H. CONST. art. LXXXIII ("cherish the interest of literature and the sciences, and all seminaries and public schools"); N.J. CONST.

The descriptive adjectives vary, but the command is clear—public education is a legislative responsibility. What is not so clear is the nature of that responsibility. It should be noted, however, that it was not until 1973 that the New Jersey Supreme Court became the first court to invalidate a state school finance system as violative of the state's education article's "thorough and efficient" clause.²³ The current litigation involving claims under state education articles is beyond the scope of this article, but has been covered elsewhere.²⁴

C. *State School Laws*

To focus exclusively on the constitutional education articles as the basis for the states' legal authority over education is to miss an important point. Regardless of whether the state constitution explicitly creates a legislative duty to establish and support schools, legislatures have the inherent power to do so subject only to constitutional limitations. It is a principle of constitutional law that state constitutions do not grant power, but only limit its exercise by the legislative branch.²⁵ For example, Illinois did not include an education article in its state con-

art. VIII, § 4 ("a thorough and efficient system of free public schools"); N.M. CONST. art. XII, § 1 ("a uniform system of free public schools"); N.Y. CONST. art. XI, § 1 ("a system of free common schools"); N.C. CONST. art. IX, § 2 ("a general and uniform system of free public schools"); N.D. CONST. art. VIII, § 2 ("a uniform system of free public schools"); OHIO CONST. art. VI, § 2 ("a thorough and efficient system of common schools"); OKLA. CONST. art. XIII, § 1 ("a system of free public schools"); OR. CONST. art. VIII, § 3 ("a uniform, and general system of Common schools"); PA. CONST. art. III, § 14 ("a thorough and efficient system of public education"); R.I. CONST. art. XII, § 1 ("promote public schools"); S.C. CONST. art. XI, § 3 ("a system of free public schools"); S.D. CONST. art. VIII, § 1 ("a general and uniform system of public schools"); TENN. CONST. art. XI, § 12 ("a system of free public schools"); TEX. CONST. art. VII, § 1 ("an efficient system of public free schools"); UTAH CONST. art. X, § 1 ("establishment and maintenance of the State's education system"); VT. CONST. ch. II, § 68 ("a competent number of schools ought to be maintained in each town"); VA. CONST. art. VIII, § 1 ("a system of free public elementary and secondary schools"); WASH. CONST. art. IX, § 2 ("a general and uniform system of public schools"); W. VA. CONST. art. XII, § 1 ("a thorough and efficient system of free schools"); WIS. CONST. art. X, § 3 ("the establishment of district schools, which shall be as nearly uniform as practicable"); WYO. CONST. art. VII, § 1 ("a complete and uniform system of public instruction").

²³ *Robinson v. Cahill*, 303 A.2d 273, 294 (N.J. 1973), *cert. denied sub nom. Robinson v. Dickey*, 414 U.S. 976 (1974).

²⁴ See generally WILLIAM E. SPARKMAN, *School Finance Challenges in State Courts*, in *THE IMPACTS OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE: ADEQUACY, EQUITY, AND EXCELLENCE* 193 (Julie K. Underwood & Deborah A. Verstegen eds., 1990). Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517 (1991).

²⁵ See *Buse v. Smith*, 247 N.W.2d 141, 148 (Wis. 1976). The Wisconsin Supreme Court stated that when analyzing a state constitution "the search is not for a grant of power to the legislature, but for a restriction thereon." *Id.*

stitution until 1870,²⁶ but the legislature adopted the first state school law in 1825,²⁷ just seven years after statehood. Thus, if an act is not prohibited by the state or federal constitutions, the legislature has the plenary authority to act, subject only to direct constitutional limitations or political pressures.

The enactment of the first school laws by the states appeared to be a function of cultural beliefs, tradition and settlement patterns. As noted above, the religious motives of the New England colonies influenced the history and development of local schools in that part of the country. However, support for the early school laws was far from universal, and the town schools in New England gradually declined due to a number of factors.²⁸ By the time these colonies became states, however, their citizens had become accustomed to being required to support schools.

Over time, the town schools gave way to district schools as settlement patterns began to be more dispersed over the vast territory. Moreover, state constitutions began to include education articles which referred to a *system* of public schools.²⁹ To carry out their authority over education, state legislatures authorized the creation of local school

²⁶ ILL. CONST. of 1870, art. VIII, § 1 (quoted in 2 THORPE, *supra* note 9, at 1035). The Illinois Constitution of 1848 did not contain an education article, but it did authorize the general assembly to exempt from taxation land it deemed necessary for school purposes. ILL. CONST. of 1848, art. IX, § 3 (quoted in 2 THORPE, *supra* note 9, at 1004). The constitution also provided that the corporate authorities of school districts could be vested with the power to assess and collect taxes for corporate purposes. *Id.* § 5 (quoted in 2 THORPE, *supra* note 9, at 1005).

²⁷ An Act Providing for the Establishment of Free Schools, 1825 Ill. Laws.

²⁸ ADOLPHE E. MEYER, AN EDUCATION HISTORY OF THE AMERICAN PEOPLE 37-41 (1957). Meyer argued the Massachusetts School Law of 1647 was "disliked, scoffed at, and even dodged and disobeyed" even when colony officials raised the fines to £20. In regard to the decline of the town schools, Meyer opined that political, economic, and socio-geographical forces caused the demise of the town school and the subsequent emergence of the moving school. A moving school was simply the schoolmaster who, instead of teaching in town school during the year, would travel from one community to another, teaching a time in each until he had covered the whole township. The length of time the schoolmaster stayed in each community seemed to be directly related to the amount of money available from the patrons or town treasury. Soon the moving school itself was subject to local pressures as communities demanded the right to keep a school of their own. According to Meyer, the district school was a natural outgrowth of the growing displeasure with the moving school. *Id.* at 50-51.

²⁹ See, e.g., CAL. CONST. of 1849, art. IX, § 3 ("a system of common schools"); GA. CONST. of 1868, art. VI, § 1 ("a thorough system of general education"); IND. CONST. of 1816, art. IX, § 2 ("a general system of education"); IOWA CONST. of 1846, art. 9, § 3 ("a system of common schools"); MD. CONST. of 1864, art. VIII, § 4 ("a uniform system of free public schools"); MICH. CONST. of 1835, art. X, § 3 ("a system of common schools"); MINN. CONST. of 1857, art. VIII, § 3 ("a thorough and efficient system of public schools"); NEB. CONST. of 1867, Education, § 1 ("a thorough and efficient system of common schools"); OR. CONST. of 1857, art. VIII, § 3 ("a uniform and regular system of common schools"); PENN. CONST. of 1873, art. X, § 1 ("a thorough and efficient system of public schools").

districts as subordinate units of government for the purpose of providing schools. Questions soon arose as to the legal authority of school districts, particularly in fiscal matters. An early Massachusetts case demonstrates the legal principle that local school districts, as creatures of the state, may exercise delegated as well as certain implied powers.³⁰ Massachusetts adopted a state school law in 1789, which codified colonial practices by requiring the towns to provide schools.³¹ Subsequent laws authorized the inhabitants of local school districts to raise money to purchase property and construct schoolhouses.³²

In 1813, Phineas Wood entered into a contractual arrangement with the residents of the Fourth School District in Rumford, Massachusetts to build a schoolhouse on his land and to lease the property to the school district for \$170.³³ When he failed to complete the building, the school district officials sued him.³⁴ At issue in this case was whether the school district had sufficient corporate powers to maintain an action on the building contract and property lease.³⁵ The court ruled that school districts were quasi-corporations with limited powers as authorized by state statute.³⁶ School districts, according to the court, possessed all powers expressly delegated as well as those necessarily implied to fulfill their legislative purpose, including those in question.³⁷

While the New England states were developing organized schools, other states, particularly those in the South, took a more laissez faire approach to schooling. In some states, absent strong school laws, the predominant form of education for the children of the wealthier people consisted of the tutor in the home, education in small private schools or education in England.³⁸ Children of the poor had to make do with apprenticeship training or the pauper schools that public funds meagerly supported, or with no schooling at all.

Another major transition in school policy occurred when state legislatures began to enact more expansive school laws that went beyond the language contained in the education articles. This development, which proved to be a breakthrough in the transition from pauper to free schools, is exemplified by events in Pennsylvania during

³⁰ *The Inhabitants of the Fourth Sch. Dist. in Rumford v. Wood*, 13 Mass. 193, 197-98 (1816).

³¹ *Id.* at 196.

³² *Id.* at 194-95.

³³ *Id.* at 193.

³⁴ *Id.*

³⁵ *Inhabitants of the Fourth Sch. Dist. in Rumford*, 13 Mass. at 193.

³⁶ *Id.* at 199.

³⁷ *Id.*

³⁸ ELLWOOD P. CUBBERLY, *PUBLIC EDUCATION IN THE UNITED STATES* 25 (1947).

the nineteenth century. The state's first school law in 1802 provided for the education of pauper children pursuant to the constitution's provision that the "poor may be taught gratis."³⁹ In 1848 and 1849, the legislature took a progressive step by requiring local school districts to adopt a system of free common schools.⁴⁰ The school directors of Lowhill township, Lehigh County, continued to provide pauper schools, but refused to establish a common school as required by the new school law.⁴¹ When they were removed from office for failing to comply with the law, they challenged the legislation on the ground that the constitution only required "the establishment of schools throughout the state, in such manner that the poor may be taught gratis."⁴² For the school directors, this meant that their only responsibility was to ensure that the pauper children would receive some modicum of education from public funds.

In the resulting landmark case of *Commonwealth v. Hartman*, the Pennsylvania Supreme Court upheld the common school law as within the prerogative of the legislature.⁴³ It reasoned that the state, unlike the federal government, retained every attribute of sovereignty that was not taken away by the constitution.⁴⁴ Because there was nothing in the state constitution restricting the legislature in matters of education, it could expand the system to include common schools.⁴⁵ Accordingly, the legislature was not prohibited from doing *more* than required by the constitution so long as it ensured that provision was made for the education of the poor children in the townships.⁴⁶ The case reinforced the plenary power of the legislature over education and proved to be a major breakthrough in the struggle for free public schools.

The first state school laws were characterized by several important features. First, many of these laws permitted, but did not require, the towns or school districts to tax for school support. Second, a number of the states provided only for pauper or charity schools where public financial support was limited to the children of the poor. Third, all of the states created some type of state school fund supported by proceeds from the sale or rent of public lands.⁴⁷ Fourth, state school laws tended

³⁹ See *Commonwealth v. Hartman*, 17 Pa. 118, 118 (1851).

⁴⁰ See *id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Hartman*, 17 Pa. at 119.

⁴⁵ *Id.*

⁴⁶ *Id.* at 120.

⁴⁷ FLETCHER H. SWIFT, A HISTORY OF PUBLIC PERMANENT COMMON SCHOOL FUNDS IN THE UNITED STATES (1911).

to be short-lived, in that several were repealed shortly after their enactment or fell into disuse. Fifth, these early school laws failed to provide a direct and stable source of school revenues. Instead, states relied on the income from the school funds, tuition and rate bills, as well as revenues from indirect sources such as lotteries, marriage licenses and bank taxes.⁴⁸

By the mid-point of the nineteenth century, education clearly had become a legitimate function of government and a duty of the legislature. The legislature had plenary authority over education subject only to limitations in the state or federal constitutions. The legislature could enact school laws even when the state constitution was silent on the subject. Furthermore, the legislature was not prohibited from enacting school laws that exceeded its constitutional obligation. Courts held that local school districts were quasi-corporations having all powers expressly delegated, as well as those necessarily implied to fulfill their legislative function. Increasingly, government had assumed what had been, under the common law, a parental responsibility. The basic framework of school governance had gradually taken shape through state constitutions, legislative enactments and court cases. But while legislatures and the courts molded the principles of governance, the states only reluctantly addressed the issue of financial support for public schools.

II. AUTHORITY TO TAX FOR SCHOOLS

Without a doubt, the tax issue was central to the struggle for free public schools. According to John Coons, William Clune and Stephen Sugarman:

The real issue in the nineteenth century common school movement was the finance question: in short, *taxes*. The great school debate concerned whether it was moral, right, democratic, and constitutional to make schools a function of government, thereby forcing nonconsenting, nonusing taxpayers to support them.⁴⁹

The irony of the controversy was that there was no legal basis for opposition to school taxes—but tell that to disgruntled taxpayers. It is a principle of constitutional law that the power to tax is an

⁴⁸ See generally CUBBERLY, *supra* note 38, at 82-119. EDGAR W. KNIGHT, *EDUCATION IN THE UNITED STATES* 249 (1951).

⁴⁹ JOHN E. COONS ET AL., *PRIVATE WEALTH AND PUBLIC EDUCATION* 46-47 (1970).

essential attribute of sovereignty, one that is limited only by constitutional and statutory provisions.⁵⁰ Because legislatures have an inherent power to levy taxes for public purposes, and because they are not prohibited by their state constitutions from enacting school laws, it follows that there is no legal barrier to taxation for school support.

A. *Values in Conflict*

The legal logic fails to take into account the strong individualistic tendencies in the population that caused strenuous objection to the idea of compelling "nonconsenting, nonusing taxpayers" to support schools. Attributing selfish motives to the opponents of school taxes is easy, but sometimes those objections emerged from deeply held values that were brought into conflict by the common school movement. The struggle for free public schools in the United States reflected more than an opposition to taxation or a skepticism of government. The essence of the struggle was rooted in two competing values in a democratic society: individualism and altruism.⁵¹ The common school movement, which began in the 1820s, reflected a growing concern for the economic and political importance of education in a rapidly developing nation.

Social and political changes in the first decades of the nineteenth century, particularly the growth of cities in the northeast and western expansion, stimulated the demand for tax-supported schools. Where state constitutions promised free schools, advocates realized that free schools demanded some means of support beyond tuition or rate bills. Furthermore, a uniform system of public schools as envisioned by the later state constitutions would not be possible without a sizable and stable source of revenue. It became clear to the proponents of free public schools that some form of direct taxation was necessary.

B. *Early Development of School Taxes*

Legislatures reluctantly authorized certain communities to organize school taxing districts with permissive authority to tax the property of those consenting for school purposes or, later, to tax all the property in the district. In general, the power to tax could be exercised only after a vote of local property owners. The permissive legislation soon

⁵⁰ WILLIAM H. ANDERSON, *TAXATION AND THE AMERICAN ECONOMY* 20-49 (1951).

⁵¹ FRANCIS N. THORPE, *A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE 1776-1850*, at 448-89 (1898).

gave way to mandatory local taxation to supplement other sources of school revenues.⁵² Not surprisingly, litigation soon followed.

The earliest cases tended to focus on the methods employed to raise school taxes, particularly the rate bill, and the legality of legislative delegation of power to tax to local school districts. In 1839, in *Brown v. Hoadley*, the Vermont Supreme Court addressed the question of whether a rate bill (that is, a tax only on parents with children in school) violated state statutes providing for free public schools.⁵³ State law provided only a paltry amount of state funds to the school districts, but allowed local voters to decide whether all taxpayers or only those with children in school would pay the balance of money required for school support.⁵⁴ Pursuant to that law, the voters in School District No. 15 of Windsor County, Vermont, approved a tax on those residents with children in school to be collected by means of the rate bill.⁵⁵ Even though he had children in school, Billy Brown refused to pay the rate bill presented by the tax collector, who later seized Brown's heifer as payment.⁵⁶ Brown sued the tax collector for trespass and was allowed by the local court to recover damages.⁵⁷ On appeal to the Vermont Supreme Court, the tax collector argued that the school district was only following state law when it levied the rate bill.⁵⁸ Brown, however, contended that the tax was illegal because the rate bill method was at variance with state law providing for free public schools.⁵⁹ He argued that the schools supported by rate bills were in essence private rather than public.⁶⁰ The Vermont Supreme Court rejected this argument when it stated that a free school was "one to which all inhabitants of the district are at liberty to send."⁶¹ In other words, the court held that the *access* was to be free rather than the *cost*.

In validating the use of the rate bill as an acceptable means of funding local schools, the *Brown* decision delayed for a number of years the idea of free schools supported by all taxpayers. It was not until 1864 that Vermont eliminated the use of rate bills.⁶² We will never know whether Mr. Brown's arguments were motivated by a heightened

⁵² CUBBERLY, *supra* note 38, at 135-37.

⁵³ *Brown v. Hoadley*, 12 Vt. 472 (1839).

⁵⁴ *Id.* at 477-78.

⁵⁵ *Id.* at 473.

⁵⁶ *Id.*

⁵⁷ *Id.* at 473-74.

⁵⁸ *Brown*, 12 Vt. at 474-75.

⁵⁹ *Id.* at 476-77.

⁶⁰ *Id.*

⁶¹ *Id.* at 478-79.

⁶² EDGAR W. KNIGHT, *EDUCATION IN THE UNITED STATES* 265 (3d. ed. 1941).

sense of equality or whether he simply felt aggrieved that his burden of school taxes was not spread among his neighbors without children in school. Clearly, though, he challenged the state to deliver on its statutory promise of free schools.

In addition, early cases in Delaware and Maryland sustained the right of the legislature to delegate to local school districts the authority to tax for school support. In 1841, in *Steward v. Jefferson*, a Delaware court upheld the constitutionality of a school law authorizing local school taxes by majority vote within the school districts.⁶³ Similarly, in 1844, Maryland's highest court upheld a statute allowing school districts to levy a school tax.⁶⁴ Writing about the legislature's delegation of the power to tax for schools, Judge Stephen stated:

We think there was no validity in the constitutional question . . . relative to the competency of the legislature to delegate the power of taxation to the taxable inhabitants for the purpose of raising a fund for the diffusion of knowledge and the support of primary schools. The object was a laudable one and there is nothing in the Constitution prohibitory of the delegation of the power of taxation, in the mode adopted, to effect the attainment of it; we may say that grants of similar powers to other bodies, for political purposes, have been coeval with the Constitution itself, and that no serious doubts have ever been entertained of their validity.⁶⁵

C. *Expansion of School Taxes*

The next phase in the evolution of free public schools occurred when a few local districts used tax revenues to provide educational offerings in grades beyond the common school. Each step in the process was met with legal challenges, and each court decision established further legal precedent for a system of free public schools.

The Massachusetts case of *Cushing v. Inhabitants of Newburyport* is illustrative.⁶⁶ In 1843, the town voted to establish a high school for females and directed the selectmen to purchase a site and to have a facility erected for the school.⁶⁷ This school was to be in addition to the twenty-one other schools the town of 4000 inhabitants sup-

⁶³ 3 Del. (3 Harr.) 335, 337 (1841).

⁶⁴ *Burgess v. Pue*, 2 Gill 11, 19-20 (Md. 1844).

⁶⁵ *Id.* at 19.

⁶⁶ 51 Mass. 508 (1845).

⁶⁷ *Id.* at 508.

ported.⁶⁸ At the time, high schools were available for the male students,⁶⁹ but the district had only provided primary and grammar schools for females.⁷⁰ A certain taxpayer, Mr. Cushing, paid his taxes in 1844, but protested that the tax was illegal.⁷¹ He filed suit and argued that the town was without authority to levy taxes for schools beyond the minimum required by state law.⁷² The court reviewed the history of school support in the state, tracing it to the early settlement of the colony, and this analysis led the court to conclude that the law requiring towns to support schools was mandatory, and not restrictive.⁷³ According to the court, the statutes required the towns to provide a certain amount of schooling, but did not limit their authority to tax for the purpose of providing more schooling than the law specified.⁷⁴ Even though not required by statute, the high school for females was a town school under the law and was properly supported by local taxation.⁷⁵

Similar litigation occurred nearly thirty years later in Michigan, and proved to be a landmark case in the evolution of a free public school system. In 1874, in *Stuart v. School District No. 1 of the Village of Kalamazoo*, three disgruntled taxpayers filed suit against the school district seeking to restrain the collection of that portion of taxes assessed against them that would be used for the support of the high school and for the superintendent's salary.⁷⁶ The plaintiffs argued that the local district could only support common schools and lacked authority to levy taxes to support a high school.⁷⁷ The Michigan Supreme Court, however, rejected these arguments and upheld the school district.⁷⁸ Judge Cooley, writing for the majority, stated:

We content ourselves with the statement that neither in our state policy, in our constitution, or in our laws, do we find the primary school districts restricted in the branches of knowledge which their officers may cause to be taught, or the grade of instruction that may be given, if their voters consent in

⁶⁸ *Id.* at 509.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Cushing*, 51 Mass. at 509.

⁷² *Id.* at 510.

⁷³ *Id.* at 520.

⁷⁴ *Id.*

⁷⁵ *Id.* at 521.

⁷⁶ 30 Mich. 69, 70 (1874).

⁷⁷ *Id.* at 71.

⁷⁸ *Id.* at 84-85.

regular form to bear the expense and raise the taxes for the purpose.⁷⁹

Five years later, the Supreme Court of Illinois upheld the constitutionality of a state statute that authorized elections in the townships to determine whether local taxes would be used to establish and maintain a high school.⁸⁰ The validation of the authority of the state to tax for the support of high schools brought the struggle for free public schools to a successful close in the United States, at least for a portion of the population.

These cases illustrate legal principles which support legislative authority to establish common schools as well as high schools, and to tax the general population for their support. In addition, the courts held that the legislatures might lawfully delegate the power to tax to local school districts, but the power must be exercised according to standards imposed by the delegation.

The late Judge Thomas Cooley in a classic treatise on the law of taxation noted six fundamental principles that provide the basis for school finance:

1. The power of taxation is an essential and inherent attribute of sovereignty, belonging as a matter of right to every independent government. It is possessed by the government without being expressly conferred by the people.

2. Constitutional provisions relating to the power of taxation do not operate as grants of power of taxation to the government, but instead merely constitute limitations upon a power which would otherwise be practically without limit. This inherent power to tax extends to everything over which the sovereign power extends, but not to anything beyond its sovereign power.

3. The state government has inherent power to levy taxes; this authority to tax necessarily falls to the legislative department.

4. The power of the legislature in matters of taxation for public purposes is unlimited except insofar as restricted by the state or federal constitutions or inherent limitations on the power to tax.

⁷⁹ *Id.*

⁸⁰ *Richards v. Raymond*, 92 Ill. 612, 618 (1879). See also *State ex rel McCausland v. Board of Comm'rs of Elk County*, 58 P. 959, 960 (Kan. 1899) (state law requiring county to build and support high school not unconstitutional interference with right of local self-government).

5. Unless restrained by the constitution, the legislature has power to delegate to school districts the power to tax for school purposes. A school district has no inherent power to levy taxes for school purposes, but such power is generally conferred either by statute or the constitution.

6. Whenever the state establishes a school system to be administered by local authorities, it reserves to itself the means of giving the system complete effect and full efficiency in every locality, even though a majority of the people may not appreciate the school's advantages and refuse to support it financially. The legislature may compel local taxation for school purposes.⁸¹

As the nation moved into the twentieth century, the legal questions over school taxes and school finance changed. By the end of the nineteenth century, it was well established legal doctrine that education was a legitimate function of government and that taxes could be levied in its support. Furthermore, such tax support extended from the common school, including both elementary and high schools, to normal schools⁸² and state universities.⁸³

What was not so well established was the procedure for allocating the resulting revenues. Thus, the legal focus shifted from questions about the authority of the state to tax for schools to questions about how the state would allocate its revenues to the school districts.

III. STATE ALLOCATION OF SCHOOL REVENUES

During the late nineteenth and early twentieth centuries there were no complex or sophisticated school finance formulas to guide the distribution of school funds. The financing patterns that did develop tended to involve some form of required local taxation supplemented by a paltry amount of state funds. This practice reinforced the essential paradox of the education policy which gained legal and popular currency throughout the nation: state responsibility, but local financial support and control. This pattern of support, however, created extreme disparities in school taxes and expenditures among the local school districts of the states.

⁸¹ See THOMAS M. COOLEY, 1 *THE LAW OF TAXATION* 149-932 (Clark A. Nichols ed., 1924).

⁸² *Briggs v. Johnson County*, 4 F. Cas. 120, 123 (Missouri 1877) (legislature had authority to grant power to tax to establish normal schools).

⁸³ *Merrick v. Inhabitants of Amherst*, 94 Mass. 500, 510 (1866) (legislature has power to authorize town to raise money by selling bonds for agricultural college).

Table I
Percent Revenue Sources for Schools, for Years 1890-1920

	1890	1900	1910	1920
Income From Permanent Funds and land	5.4	4.2	3.2	2.7
County and Local Taxes and Appropriations	67.9	68.0	72.1	78.2
State Taxes and Appropriations	18.4	17.2	14.9	13.8
All Other Sources	8.3	10.6	9.8	5.3

Source: PAUL R. MORT & WALTER C. REUSSER, *PUBLIC SCHOOL FINANCE* 8 (1951).

In their early school laws, many states provided some financial support for local schools from several sources, including income from permanent school funds, state appropriations and direct state taxation. The amount of state aid, however, was not great and constituted a relatively small portion of total school revenues. The laws often required that local towns or school districts levy a school tax in order to receive funds from the state.⁸⁴ Table I shows the percentage distribution of school revenues during the closing decade of the nineteenth century and the early decades of the twentieth century. It is clear from these data that the local districts had the primary fiscal responsibility for public education. In fact, the state's share declined in each decade while the local share increased, reinforcing the notion of local control.

As previously noted, the states often authorized town or county officials to levy taxes for school support and to determine how the tax revenues would be allocated among the local school districts within their jurisdiction. The most common type of state support consisted of flat grants of equal value made to local school districts on the basis of the number of pupils attending school, or on the basis of local wealth measured by assessed valuation of property. Fiscal inequalities necessarily resulted under such allocation schemes, because school districts with more pupils or more assessed valuation received more state aid. When some districts received more school revenue than others, litigation was sure to follow.

The cases that ensued between 1890 and 1964 were prosecuted by individual taxpayers who were disgruntled over what they perceived to be injustices in the allocation methods used by local and state officials to distribute school funds. The plaintiffs typically resided in school districts that received less revenue than other districts in their county,

⁸⁴ CUBBERLY, *supra* note 38, at 188.

or that received no state aid at all. The grievances were motivated not by high-minded concern for equity, but by a particularized interest in reducing local tax burdens, or in obtaining a greater share of school revenues.

A. *Bases for the Legal Claims*

The aggrieved taxpayers based their claims on various equality provisions embedded in state constitutions, particularly those provisions guaranteeing equality in specific or limited instances.⁸⁵ The two most notable provisions were tax uniformity clauses, that required the assessment and levy of taxes to be equal and uniform, and education articles, that contained some statement about the state's role in public education. Although the primary issue in the cases was whether legislative authority in the allocation of school revenues was constrained by the tax uniformity provisions of the state constitutions, the plaintiffs also raised questions about the meaning of the education article and about the application of the Fourteenth Amendment's Equal Protection Clause. These subordinate issues would come to have increased relevancy in school finance cases beginning in the late 1960s.

B. *Tax Uniformity*

The framers of the state constitutions included provisions requiring that the assessment and levy of taxes be equal and uniform to prevent arbitrary taxation by state and local officials. Several state supreme courts had to interpret such clauses to determine whether they applied to the distribution of school funds among local school districts. The plaintiffs in such cases wanted the courts to extend the tax uniformity provision to require that tax revenues be equal to the taxes paid, or that the distribution of the tax revenues among the school districts be equal. In a broader sense, the cases challenged legislative authority to determine how state or local school funds would be allocated to school districts. The outcome of such cases had important consequences for the nascent school finance systems that were developing within various states. These school finance systems resulted from the seminal work of individuals such as Ellwood P. Cubberly, George D. Strayer, Sr., Robert M. Haig, Paul Mort and others who provided the intellectual bases for modern school finance systems.

⁸⁵ SPARKMAN, *supra* note 24, at 199-200; *see also* Robert F. Williams, *Equality Guarantees in States Constitutional Law*, 63 TEX. L. REV. 1195, 1196-97 (1985).

These early school finance plans were based on the equalization concept; that is, officials were to allocate state funds to local school districts in an inverse relation to local property wealth.⁸⁶

The courts were unanimous in their judgments that the tax uniformity provisions referred only to the assessment and levy of taxes, and not to the distribution of the tax revenues. On the question of the authority of legislatures to distribute tax revenues, the courts willingly deferred to legislative discretion in such matters so long as such discretion was not arbitrary.

Two cases involved allocation decisions made by local officials pursuant to state laws authorizing them to levy school taxes and to distribute the proceeds among the local school districts. One of the earliest lawsuits occurred in New Hampshire in 1890.⁸⁷ In an election at its annual meeting in March 1888, the voters in the town of Walpole approved a motion to allocate school funds between the two local school districts on the basis of \$130 to each school and the balance on a per pupil basis.⁸⁸ One district had only 81 pupils with an assessed valuation of \$5,496 per pupil and the other had 274 pupils with an assessed valuation of \$3,691.⁸⁹ The allocation scheme obviously benefited the district with more students. The district with fewer pupils, but more local wealth sought to have the money distributed according to assessed valuation only, a process that would be to its advantage.⁹⁰ Citizens of this district claimed that the constitutional provision mandating that taxes be proportionally assessed also required that the revenues be distributed in relation to taxes paid.⁹¹ The court disagreed and concluded that the proportional assessment requirement did not apply to the allocation of tax revenues.⁹² The court further emphasized the abiding principle that the town's allocation of school money was "a matter of local concern."⁹³

In 1922, the New Mexico Supreme Court upheld a law authorizing the local county commissioners to levy a school property tax county-wide and to distribute the proceeds to the several districts within the

⁸⁶James G. Ward, *An Inquiry Into the Normative Foundations of American Public School Finance*, 12 J. EDUC. FIN. 463 (1987).

⁸⁷*School Dist. No. 1 v. Prentiss*, 19 A. 1090 (N.H. 1889).

⁸⁸*Id.* at 1090.

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

⁹²*School Dist. No. 1*, 19 A. at 1090.

⁹³*Id.*

county according to the districts' budget estimates.⁹⁴ The court refused to invalidate the tax, finding that it had been levied equally and uniformly on all property in the county for a public purpose.⁹⁵ Furthermore, the court concluded that the allocation process resulted in a fair and equitable distribution because it was based on the estimated budgets of the districts, even though they received differing amounts of the proceeds of the countywide school tax.⁹⁶ While the case involved local inequalities, the fact that more substantial disparities existed among all school districts in the state, resulting from heavy reliance on local taxes, went unmentioned. That issue would remain for other courts at other times.⁹⁷

The leading case affirming a state's authority to allocate school aid is the 1912 decision, *Sawyer v. Gilmore*.⁹⁸ According to a 1909 Maine law, money from the common school fund was to be distributed on a formula basis (one-third according to the number of pupils and two-thirds according to assessed valuation) to all units of local governments except the unorganized townships.⁹⁹ A resident of one of the unorganized townships filed a lawsuit alleging that the allocation scheme violated the state's equal and uniform tax provision.¹⁰⁰ In upholding the distribution formula, the court ruled that the legislature had discretion in allocating the revenues so long as it was for a public purpose, the only restriction being that the assessment and levy of the tax must be equal.¹⁰¹ In rejecting the claim that the equal and uniform provision required equality of benefits, the court stated:

In order that taxation may be equal and uniform in the constitutional sense, it is not necessary that the benefits arising therefrom should be enjoyed by all the people in equal degrees. . . . Laws must be general in their character, and the benefits must affect different people differently. . . . In a Republic like ours each must contribute for the common good, and the benefits are received not directly in dollars and cents,

⁹⁴ *Reynolds v. Swope*, 207 P. 581, 583 (N.M. 1922).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See generally SPARKMAN, *supra* note 24, at 193.

⁹⁸ 83 A. 673 (Me. 1912); see also *Opinions of the Justices of the Supreme Judicial Court*, 68 Me. 582, 586 (1876) (court, in advisory opinion, affirmed legislature's authority to impose general tax of one mill per dollar on all property in state with proceeds to be used for maintenance of common schools).

⁹⁹ *Sawyer*, 83 A. at 674-75.

¹⁰⁰ *Id.* at 675.

¹⁰¹ *Id.*

but indirectly in a wider diffusion of knowledge, in better homes, saner laws, more efficient administration of justice, higher social order, and deeper civic righteousness.¹⁰²

The court was sensitive to legislative discretion in the allocation of school funds as well as the separation of powers when it noted that:

The method of distributing the proceeds of such a tax rests in the wise discretion and sound judgment of the Legislature. If this discretion is unwisely exercised, the remedy is with the people, and not with the court. . . . We are not to substitute our judgment for that of a coordinate branch of the government working within its constitutional limits.¹⁰³

The key principle that emerged from this case was that the equal and uniform tax provision applied only to the *apportionment* and levy of taxes, not to the *distribution* of tax revenues. This principle has undergirded school finance policy to the present time, as the policy is based on the equalization principle. *Sawyer* has become a landmark school finance case, even though the financing scheme in question was fairly crude by present standards. The case clearly established the primacy of legislative discretion in the allocation of school funds, subject only to the requirement that the funds be for a public purpose, thus giving judicial support for the equalization methods that would follow.

In 1923, the Ohio Supreme Court sustained the constitutionality of a state law aimed at equalizing school revenues through a minimum foundation formula.¹⁰⁴ The state school finance law required all the districts in a county to levy a school tax of 2.65 mills (a mill is .1 of 1% of the assigned tax value of property).¹⁰⁵ Certain districts were entitled to retain the full amount, while other districts only received a portion of the tax proceeds, determined on an established formula basis.¹⁰⁶ The court reaffirmed the principle that the constitution did not require uniformity in the distribution of tax proceeds so long as the appropriation was reasonable and made for a valid state purpose.¹⁰⁷

¹⁰² *Id.* at 675–76.

¹⁰³ *Id.* at 676.

¹⁰⁴ *Miller v. Kornis*, 140 N.E. 773, 778–79 (Ohio 1923).

¹⁰⁵ *Id.* at 773.

¹⁰⁶ *Id.* at 774–75. In general, this formula or method of allocation was based on the number of teachers and other employees in a school district, the number of students enrolled and the cost of transporting students. *Id.* at 776.

¹⁰⁷ *Id.* at 777.

A similar decision was reached by the Oklahoma Supreme Court in the case of *Miller v. Childers*, where the court validated a state law providing aid for weak school districts.¹⁰⁸ Weak school districts were those districts that had expended the entire proceeds of the maximum local tax levy of fifteen mills and were in need of state aid to fulfill the state education requirements.¹⁰⁹ The court reiterated what has come to be known as the equalization principle by stating:

As long as the Constitution requires public funds to be raised by tax levies equally applied to all property, the rich must thereby aid the poor, if an efficient and uniform system of free public schools be maintained throughout the state as by the Constitution required.¹¹⁰

In 1964, the South Dakota Supreme Court refused to apply the tax uniformity provision to the distribution formula of the state's school foundation program.¹¹¹ The challenged law distinguished between operating and nonoperating school districts by restricting state foundation funds only to the operating school districts.¹¹² The court noted that the foundation program was not a tax statute, but only a distribution mechanism involving funds that accrued to it under the law.¹¹³ Accordingly, the legislature had broad discretion to use the money for any public purpose.¹¹⁴

Six major principles emerged from the cases described above. First, tax uniformity provisions in state constitutions do not require that benefits received be equal to taxes paid. Second, tax uniformity provisions apply only to the assessment and levy of taxes and not to the distribution of tax revenues. Third, legislatures enjoy broad discretion in the allocation of tax revenues. Fourth, legislative distribution of tax revenues must be made for a public purpose, and be reasonable and not arbitrary. Fifth, the courts will not substitute their judgement for that of the legislature acting within any limits imposed by the constitution. Finally, when legislative discretion is unwisely exercised, courts will leave any remedy to the political process.

¹⁰⁸ 238 P. 204, 207 (Okla. 1924).

¹⁰⁹ *Id.* at 206.

¹¹⁰ *Id.*

¹¹¹ *Dean v. Coddington*, 131 N.W.2d 700, 703 (S.D. 1964).

¹¹² *Id.* at 701.

¹¹³ *Id.* at 702.

¹¹⁴ *Id.* at 703.

C. Education Article

In addition to claims based on the tax uniformity provision, plaintiffs often invoked their state's education article as a basis for their assertion that the school finance laws were unconstitutional. The *Sawyer* case, discussed earlier, may well be the first time that a plaintiff raised a state's education article in a legal challenge to a state school finance law. The point of contention was the provision of Maine's school finance law that permitted local governments to reduce their \$.80 per capita school tax by the amount of money they received from the state's common school fund.¹¹⁵ This effectively meant that some towns did not have to levy the per capita local tax, because it was offset entirely by the state school fund allocation. It was alleged that this offset provision violated the constitution's education article, which provided that the legislature had a duty "to require the several towns to make suitable provision, at their own expense, for the support and maintenance of the public schools."¹¹⁶ The Maine Supreme Court reasoned that the offset provision did not violate any limitation or prohibition contained in the education article.¹¹⁷ In construing the constitution, the court found that the education article was "mandatory not prohibitory."¹¹⁸ Although the education article mandated a legislative duty "to require the towns to make suitable provision," the court acknowledged that there was no judicial remedy available to compel the legislature to act if it failed to act according to the dictates of the constitution.¹¹⁹ The legislature was "authorized" and had a "duty" to require the towns to provide support for the schools, but there was no requirement that the legislature actually do so. According to the court, the extent of the requirement was left entirely to legislative discretion.¹²⁰

In 1923, in *Miller v. Korns*, the Ohio Supreme Court held that Ohio's education article, which required a thorough and efficient education system, created a legitimate state purpose to justify the state's school finance law aimed at equalizing school revenues according to a needs basis.¹²¹ The school finance law required all districts in a county

¹¹⁵ *Sawyer*, 83 A. at 674-75.

¹¹⁶ *Id.* at 674.

¹¹⁷ *Id.* at 679.

¹¹⁸ *Id.* at 678.

¹¹⁹ *Id.*

¹²⁰ *Sawyer*, 83 A. at 679.

¹²¹ 140 N.E. 773, 778-79 (Ohio 1923).

to levy a specified school tax.¹²² In addition, the law entitled certain districts to retain the full amount of the levy, while others only received a portion of the tax proceeds on a formula basis that took into consideration the number of teachers and other employees in the school district, student transportation expenses and the average daily student attendance.¹²³ Taking this formula into consideration, the Ohio Supreme Court determined that it was reasonably calculated to attain Ohio's purpose of securing a "thorough and efficient" education system as mandated by the state's education article.¹²⁴

A similar decision was reached by the Oklahoma Supreme Court in 1924. As discussed earlier, the Oklahoma Supreme Court, in *Miller v. Childers*, validated a state law providing aid for weak school districts.¹²⁵ In sustaining the law against the challenge of a local taxpayer, the court relied upon the state's education article directing the legislature to "establish and maintain a system of free public schools."¹²⁶ The court noted that the term "system" indicated a degree of uniformity and equality of opportunity.¹²⁷ Accordingly, once the local districts exhausted the required fifteen mill tax levy, the legislature must provide some additional financial support so that the constitutional mandate could be met.¹²⁸ The legislature was justified in appropriating state funds to the qualifying districts to ensure the availability of a constitutionally sufficient school system throughout the state.¹²⁹

The cases described above established at least five major principles. First, state constitutions do not grant legislative authority, they only provide limitations to its exercise. Second, a state's education article does not create a grant of specific legislative authority requiring that public schools be maintained and supported in any particular manner. Third, state legislatures have broad discretion to give effect to an education article subject only to constitutional limitations. Fourth, a state's education article creates a valid state purpose to justify a legislative attempt to distribute school funds on some equalized basis. Finally, courts can interpret a state's education article to impose a constitutional duty on the legislature to establish and maintain a system of free public schools, and to justify a degree of uniformity in the

¹²² *Id.* at 773.

¹²³ *Id.* at 773-74.

¹²⁴ *Id.*

¹²⁵ 238 P. 204, 207 (Okla. 1924).

¹²⁶ *Id.* at 206.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

allocation of school revenues. While the first four principles seem to be well settled, the final one remains controversial, as demonstrated by the present number of school finance cases in state courts.¹³⁰

D. *Equal Protection*

The final basis for claims challenging the states' allocations of school revenues is the Fourteenth Amendment's Equal Protection Clause. Plaintiffs in such cases claim that they have been denied the equal protection of the law because their school districts received less revenue under the school finance laws than did other districts in the state. The courts clearly were not responsive to such claims and dispatched them quickly.

The Maine Supreme Court in *Sawyer* concluded that the school finance law in question was not discriminatory, because it treated persons in similar circumstances alike.¹³¹ It cited with approval the reasoning of the United States Supreme Court in the case of *Bell's Gap R.R. v. Pennsylvania*,¹³² which stated:

The provision in the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways.¹³³

In the case of *Miller v. Korns*, the Supreme Court of Ohio held that the plaintiff received equal protection when he was taxed for a legitimate state purpose by a tax which was levied equally upon every district in the state.¹³⁴ Similarly, the South Dakota Supreme Court found that the state's foundation program, which denied state aid to nonoperating school districts, did not violate the Equal Protection Clause.¹³⁵

IV. SUMMARY

The cases presented in this Article have been important building blocks in the evolution of school finance policy within the several states. They have established principles that the legislature has plenary

¹³⁰ See generally Underwood & Sparkman, *supra* note 24.

¹³¹ *Sawyer*, 83 A. at 680.

¹³² 134 U.S. 232 (1889).

¹³³ *Sawyer*, 83 A. at 680.

¹³⁴ *Miller*, 140 N.E. at 775.

¹³⁵ *Dean v. Coddington*, 131 N.W.2d 700, 702 (S.D. 1964).

authority over education, subject only to limitations or prohibitions contained in the federal or state constitutions, that state legislatures have the power to tax for school purposes, and that state legislatures have broad discretion to distribute the tax revenues among the school districts. Neither the equal and uniform tax provisions of state constitutions nor the Equal Protection Clause constrained early attempts by legislatures to equalize the allocation of school revenues. Finally, state education articles created a legitimate state purpose justifying state allocation plans, even though the extent of the state's duty in financing the public schools remained unclear.

While these early cases supported legislative efforts to erase disparities in school funding, inequalities in the distribution of school revenues endured because of the continued heavy reliance on local property taxes. In addition, there were few challenges to the gross disparities in the local allocations of fiscal resources to schools for children of color. The "separate but equal" doctrine enunciated in the infamous *Plessy v. Ferguson* decision by the United States Supreme Court in 1896¹³⁶ and the subsequent Jim Crow laws enacted by the southern states relegated schools for African-American children to substantially inferior status in terms of financial and moral support. The early school finance cases did nothing to rectify this American tragedy.

From a school finance policy perspective, the cases reviewed in this Article reveal a singular irony. On the one hand, they supported legislative discretion in allocating school funds in a redistributive fashion by providing greater benefits to those school districts with less taxpaying ability when measured by the assessed valuation of real property. This was clearly a step in the right direction given the long history of state trepidation in school finance. On the other hand, even though the equalization principle undergirded most state school finance formulas by the mid-1960s, the design of the finance systems or the political compromises that shaped them resulted in tremendous fiscal disparities among the school districts of a state, whether measured by per pupil expenditures or by local school tax rates.

It became increasingly clear to a few scholars, lawyers, practitioners and parents that even with legislative attempts to implement equalization programs, many students and taxpayers would continue to be disadvantaged because they resided in property-poor school

¹³⁶ 163 U.S. 537 (1896).

districts. By the last few years of the turbulent 1960s, citizens made a new judicial assault on the legality of state school finance structures in both federal and state courts. This new phase of litigation, which is beyond the scope of this article, represented both continuity and change in the long tradition of legal challenges to government tax and funding policies.