

1996

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William E. Sparkman

John Dayton

Fred Hartmeister

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### Recommended Citation

Sparkman, William E.; Dayton, John; and Hartmeister, Fred (1996) "Financing Wyoming's Public Schools: The Wyoming Legislature Gets to Try Again," *Land & Water Law Review*. Vol. 31 : Iss. 2 , pp. 469 - 507. Available at: [https://scholarship.law.uwyo.edu/land\\_water/vol31/iss2/12](https://scholarship.law.uwyo.edu/land_water/vol31/iss2/12)

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University of Wyoming

College of Law

# LAND AND WATER LAW REVIEW

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VOLUME XXXI

1996

NUMBER 2

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## **Financing Wyoming's Public Schools: The Wyoming Legislature Gets to Try Again**

*William E. Sparkman,\* John Dayton,\*\* and Fred Hartmeister\*\*\**

### INTRODUCTION

[T]he legislature must first design the best educational system by identifying the "proper" educational package each Wyoming student is entitled to have whether she lives in Laramie or in Sundance. The cost of that educational package must then be determined and the legislature must then take the necessary action to fund that package. Because education is one of the state's most important functions, lack of financial resources will not be an acceptable reason for failure to provide the best educational system. All other financial considerations must yield until education is funded.

The state financed basket of quality educational goods and services available to all school-age youth must be nearly identical from district to district. If a local district then wants to enhance

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\* Professor of Educational Leadership and Associate Dean in the College of Education, Texas Tech University. B.A. 1969, M.Ed. 1973, Ph.D. 1975, University of Florida.

\*\* Associate Professor of Educational Leadership, University of Georgia. B.S. 1984, M.A. 1986, Ball State University; J.D. 1990, Ed.D. 1991, Indiana University.

\*\*\* Assistant Professor of Educational Leadership in the College of Education, Texas Tech University. B.S. 1973, Valparaiso University; M.B.A. 1979, University of Denver; Ed.D. 1986, J.D. 1990, University of Wyoming.

the content of that basket, the legislature can provide a mechanism by which it can be done. But first, before all else, the constitutional basket must be filled.<sup>1</sup>

In the concluding remarks to its unanimous November, 1995 decision in *Campbell County School District v. State*, the Wyoming Supreme Court left no doubt as to the precise contours of the state's responsibility for providing and adequately financing public education in the state. In doing so, the court clearly and unequivocally concluded that the state's present system of financing its public schools is unconstitutional. The court gave the Wyoming legislature until July 1, 1997, to comply with its judgment by adopting reform legislation and implementing a new school finance system.<sup>2</sup>

*Campbell* illustrates the power of the language embedded in the state constitution's education article and the determination of the supreme court that the legislature must act affirmatively to comply with its constitutional duty. From a national perspective, the result adds to the growing number of school finance cases in which the decision goes beyond fiscal equity and challenges the state to provide a constitutionally adequate educational program that is equitably financed.<sup>3</sup> What began as a challenge to certain components of the state school finance system has essentially ended with a command to the legislature to reform the state's public school system by defining the best educational system for each student, to determine the cost of that educational package, and then to provide the necessary funds to support that system of public education as its paramount constitutional duty.<sup>4</sup> Moreover, the quality educational programs available to students must be nearly identical from school district to school district. Lack of available financial resources will not be an excuse, and public education will have first claim to available resources before other considerations.

This article begins with a breakdown of the *Campbell* decision and includes a summary of prior Wyoming school finance legislation and litigation. This section is followed by a brief overview of public school finance as it presently exists in the fifty states. The *Campbell* decision is then analyzed for its consistencies and inconsistencies as viewed within the context of the contemporary majority rule in school finance litigation.

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1. *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995) (*Campbell*).

2. *Id.* at 1280.

3. See *infra* notes 193-197 and accompanying text.

4. In a subsequent order denying rehearing and responding to requests for clarification, the court stated that its ruling in *Campbell* "was prospective in operation and not intended to disturb present statutory provisions for financing of school operations, including bonded indebtedness." *Campbell*, 907 P.2d at 1281.

## I. CAMPBELL—AN OVERVIEW

A. *Background*

In January, 1992, four Wyoming school districts brought suit against the State of Wyoming and various elected state officials asserting that certain elements of the state school finance system were unconstitutional.<sup>5</sup> The plaintiffs based their claims on the Wyoming Constitution's equal protection clause<sup>6</sup> and the education article.<sup>7</sup> A coalition of twenty-three of the smaller school districts in the state intervened as defendants with the state.<sup>8</sup> Laramie County School District No. One and the Wyoming Education Association then intervened as plaintiffs aligned with the original four plaintiff school districts and claimed that certain additional elements of the school finance system also were unconstitutional.<sup>9</sup> For the most part, the school district litigants separated themselves according to student population. The larger or more heavily student populated districts were positioned as plaintiffs, whereas the smaller or less populated districts were aligned with the state. Essentially, the large district plaintiffs contended that the school finance system failed to fund their actual operating costs of the basic education program — thus denying their students an equal opportunity to a quality education. The small districts, on the other hand, intervened with the state in an attempt to maintain the status quo, thus attempting to protect themselves from a possible redistribution of existing funds if the plaintiffs prevailed. From the perspective of the small districts, the funding formula was weighted appropriately in their favor since it recognized that it arguably costs more to educate each student in a less populated school district. The small districts felt that the present system provided sufficient revenue for a minimal educational program for all school districts in the state.<sup>10</sup> Ultimately, at issue were five primary components of Wyoming's public school finance system: the divisor feature, the municipal divisor feature, the recapture provision, the optional local mill levy, and the capital construction feature.<sup>11</sup>

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5. The original plaintiffs included Campbell County School District No. One, Uinta County School District No. One, and Sweetwater County School Districts Nos. One and Two. The state officials included the State Superintendent of Public Instruction, the Governor, the State Treasurer, and members of the State Board of Education. *Campbell*, 907 P.2d at 1243-44. The Governor and State Treasurer were later dismissed from the case. *Id.* at 1244 n.1.

6. WYO. CONST. art. I, § 34 states that "All laws of a general nature shall have a uniform application."

7. WYO. CONST. art. VII, §§ 1-14.

8. *Campbell*, 907 P.2d at 1244.

9. *Id.*

10. *Id.* at 1251.

11. *Id.* at 1244.

Following an October, 1993 trial, the state district court for the First Judicial District, Laramie County, ruled that the municipal divisor feature, the recapture provision, and the optional local mill levy were unconstitutional. The district court also concluded that both the divisor and the capital construction components were constitutional.<sup>12</sup> The plaintiffs appealed that portion of the trial court's decision dealing with the divisor and capital construction components; conversely, the state-aligned defendants appealed the ruling as to the municipal divisor, recapture, and optional local mill levies.<sup>13</sup> In *Campbell*, the Wyoming Supreme Court affirmed the district court's decision that the municipal divisor, recapture, and optional mill levy were unconstitutional. However, the supreme court reversed the lower court's decision with respect to the constitutionality of the divisor and capital construction features.<sup>14</sup> In effect, the court concluded that the entire foundation program for funding public education in Wyoming was unconstitutional.

The supreme court identified three foundational questions which served to summarize the multitude of disparate issues presented for its consideration:

1. Whether the court's exercise of its judicial power to declare school finance system statutes unconstitutional violates the doctrine of separation of powers?
2. Whether the court must apply a rational basis or strict scrutiny standard of review to determine the constitutionality of the school finance system statutes?
3. Whether the challenged components of the school finance system are constitutional under the appropriate standard of review.<sup>15</sup>

The court's resolution of these issues was influenced by several important factors including its 1980 decision in *Washakie County School District No. One v. Herschler*;<sup>16</sup> the ostensible reform measures enacted by the state legislature following the *Washakie* decision; the operation of the challenged school finance system; the procedural background of *Campbell*; the rationale supporting the district court's decision; and, perhaps most importantly, the language of the state constitution's education article and how the existing educational system was operating under those constitutional provisions.<sup>17</sup>

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. 606 P.2d 310 (Wyo.), *cert. denied*, 449 U. S. 824 (1980).

17. *Campbell*, 907 P.2d at 1245-46.

### B. *The Washakie Decision*

School finance litigation seems to unfold as a continuing saga as legislatures respond to judicial mandates by "reforming" successfully challenged finance systems with the attendant political compromises—only to face additional legal challenges later as the hope of reform vanishes in the reality of policies that failed to go far enough to rectify the alleged disparities.<sup>18</sup> Public school finance in Wyoming has been no exception as the state's supreme court declared in 1980 that the system violated the state's equal protection clause in *Washakie County School District No. One v. Herschler*.<sup>19</sup> Although *Washakie* was decided on the basis of the state's equal protection clause,<sup>20</sup> several important finance issues arose from the 1980 case that guided the supreme court 15 years later in *Campbell*. First, the *Washakie* court reaffirmed an earlier position that, "as nearly as practicable, funds derived from ad valorem tax levies must be equally divided amongst the school districts of the entire state."<sup>21</sup> Second, the court ruled that the education provisions of the

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18. See generally, Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y at 517 n.8 (1991) (where various factors are discussed in fiscal equity law suits that give rise to continued litigation over time).

19. 606 P.2d 310 (Wyo. 1980). On June 20, 1978, three school districts and their school board members filed a declaratory judgment action seeking to have the Wyoming school finance system declared unconstitutional under the equal protection clause of the state constitution. The plaintiffs claimed that they had a right to a school finance system under the state constitution that provided a relatively uniform amount of money per pupil to each of the state's school districts, a claim grounded in the notion of equal educational opportunity. Moreover, they claimed that under the extant school finance system, which had been created by the legislature, they were denied equal educational opportunity because of the fiscal disparities resulting from the state system. A district court dismissed the complaint on procedural grounds after some intermediate proceedings. On appeal, the Wyoming Supreme Court held that plaintiffs had standing to sue, and that the claim stated a justiciable cause of action. Consequently, the court ruled on the merits of the case. After reviewing the evidence of substantial disparities in assessed valuation per pupil and total revenue per pupil generated under the school finance system, the court concluded that the quality of a child's education depended upon local property wealth. The court held the right to an education cannot be conditioned on local wealth in that such a system does not afford equal protection. In making its determination that the school finance system was constitutionally flawed, the court had to determine the appropriate standard of review for an equal protection challenge based on adequate and independent state grounds arising under the state constitution. The court determined that education was a fundamental interest under the Wyoming Constitution, and that property wealth was a suspect classification; thus requiring that the statutory finance scheme be subjected to strict scrutiny. Under strict scrutiny, the state has the burden of demonstrating a compelling state interest which is served by that challenged law and which cannot be attained by less onerous alternatives. The court concluded that the state failed to show that other methods of achieving equality in financing were not possible. *Id.*

20. *Id.* at 340.

21. *Id.* at 319. This determination was grounded in the court's 1972 decision in *Sweetwater County Planning Comm. for Org. of Sch. Dist. v. Hinkle*, 491 P.2d 1234 (Wyo. 1971), where the court relinquished jurisdiction over a school district reorganization plan until the legislature convened to deal with the issue of the equalization of ad valorem taxes for school purposes on a statewide basis.

state constitution "leave no doubt that the legislature has complete control of the state's school system in every respect, including division of the state into school districts and providing for their financing."<sup>22</sup> Third, education in Wyoming is a fundamental interest under the state constitution.<sup>23</sup> Fourth, with respect to the unequal distribution of school revenues, the court made several critical observations: most school funds were not distributed according to the need for quality education,<sup>24</sup> equality of dollar input is a manageable criterion,<sup>25</sup> disparity in financial resources relates directly to the quality of education,<sup>26</sup> and there is no practical way to achieve equality of quality education until equality of educational financing is achieved.<sup>27</sup> Fifth, exact or absolute equality in per pupil funding is not required given the need to compensate for special needs of individual students, groups, and local conditions.<sup>28</sup> Sixth, any funding system devised "must not create a level of spending which is a function of wealth other than the wealth of the state as a whole."<sup>29</sup> Seventh, the financing of capital outlay for school facilities is part of the total educational package and must be equalized by the state.<sup>30</sup> In declaring the extant school finance system under consideration in *Washakie* as violative of the state's equal protection clause, the court ordered that the legislature devise a constitutional plan that would be implemented by July 1, 1982. According to the court, the goal of any such plan was financial parity among the state's school districts.<sup>31</sup>

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However, the court acknowledged that it could no longer ignore inequalities in school taxes throughout the state. *Id.*

Just a year later and in yet another school district reorganization case, the court revisited the issue and reiterated the serious nature of the fiscal disparities caused by differences in the assessed valuation of local real property. *Johnson v. Schrader*, 507 P.2d 814 (Wyo. 1973). The court warned that such fiscal disparities could be construed to be a denial of equal protection. *Id.* at 816.

22. *Washakie*, 606 P.2d at 320.

23. *Id.* at 333.

24. *Id.* at 334.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Washakie*, 606 P.2d at 336. *See generally* KERN ALEXANDER & RICHARD G. SALMON, PUBLIC SCHOOL FINANCE 221 (1995) (where the authors discuss how states have attempted to provide unequal treatment for unequals; i.e. vertical equity, by various adjustments to the school finance formula designed to accommodate legitimate differences in educational needs of pupils as well as differences in the characteristics of schools and school districts that influence costs).

29. *Washakie*, 606 P.2d at 336. *See generally* JOHN COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION 2 (1970) (where the principle of fiscal neutrality (i.e., expenditures per pupil should not be related to local school district property wealth) was introduced into the legal discourse on school finance equity).

30. *Washakie*, 606 P.2d at 337.

31. *Id.*

### C. School Finance Reform in the Aftermath of Washakie

The school finance system that was declared unconstitutional in *Washakie* was a foundation-type plan whereby the state shares in the cost of a minimum education for every student by providing a subvention to local school districts in an inverse relation to their local wealth.<sup>32</sup> Following the court's decision, a select committee of the Wyoming legislature addressed the issues raised in *Washakie*, and made certain recommendations to the legislature for changing the distribution formula. The legislature then enacted statutes to reform the school finance system, including a mandatory local 25-mill levy, a state 12-mill levy and an optional county six-mill levy.<sup>33</sup> One of the select committee's recommendations was to redistribute some local wealth to other districts as a way of making the school finance system fiscally neutral.<sup>34</sup> A constitutional amendment was approved by the voters authorizing the legislature to recapture from the wealthy school districts revenues generated by the local 25-mill levy which exceeded the foundation amount.<sup>35</sup> However, local wealth remained a factor in the finance plan because of the optional six-mill local levy.<sup>36</sup>

When the new school finance system was implemented in 1983, the legislature declared that it was only transitional and would later be succeeded by another system that would be designed to more accurately reflect the costs of education.<sup>37</sup> However, as noted by the court in *Campbell*, the "legislature never studied, enacted, or implemented a new cost-based system, and the 1983 interim system became permanent."<sup>38</sup>

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32. Algebraically, state aid per pupil (SAPP) for a foundation program is:

$$\text{SAPP} = \text{FEPP} - (\text{RTR} \times \text{PVPP}),$$

where

FEPP = foundation expenditure per pupil,

RTR = local required tax rate, and

PVPP = local property value per pupil.

A district's total state aid (TSA) would be:

$$\text{TSA} = \text{SAPP} \times \text{Pupils},$$

where

SAPP = state aid per pupil, and

Pupils = number of students in the school district.\*

\*Teacher units could be substituted and used as the needs measure.

See also ALLAN R. ODDEN & LAWRENCE O. PICUS, *SCHOOL FINANCE: A POLICY PERSPECTIVE* 174 (1992).

33. *Campbell*, 907 P.2d at 1246-47.

34. *Id.* at 1247.

35. *Id.*

36. *Id.* at 1246-47.

37. *Id.* at 1247.

38. *Id.*



#### D. Operation of the Challenged School Finance System

In order to provide a context for a discussion of the five components of the school finance system that were challenged in the *Campbell* district court trial, the general framework of the Wyoming school finance plan is presented. Like all state school finance plans with the exception of Hawaii,<sup>39</sup> Wyoming relies upon a complex equalization formula designed to provide some degree of fiscal equality among the state's 49 school districts. Equalization formulas are designed as a cost sharing arrangement between the state and the local school districts whereby state aid goes to the local school districts in an inverse relation to local wealth.<sup>40</sup>

Under the statutory formula implementing the State Foundation Program, each school district computes the amount of funding to which it is entitled. This amount is called the foundation guarantee, and amounted to \$92,331 per classroom unit in Wyoming in 1992.<sup>41</sup> The foundation guarantee is determined by the number of classroom units (CRU) a district can claim based on the ratio of students to teachers in schools of differing enrollments multiplied by the state guaranteed minimum guaranteed dollar value per classroom unit.<sup>42</sup> A CRU is based upon a formula which is predicated on an assumption of diseconomies of scale—that it costs more per student to educate students in districts with fewer students than it does to educate students in districts with more students. The CRU is calculated by dividing a school's average daily membership (ADM) by another number known as a divisor.<sup>43</sup> A different divisor is used for elementary, junior, and senior high schools.<sup>44</sup> The statutory divisor schedule ranges from a divisor of 8 to 23.<sup>45</sup> The divisor increases as the size of the student population in the school increases. The smallest schools in terms of ADM are guaranteed one classroom unit. An interesting feature

39. John A. Thompson, *Public School Finance and Governance Issues in Hawaii*, in *SCHOOL FINANCE POLICY ISSUES IN THE STATES AND PROVINCES: ANNUAL UPDATE 1995*, 41 (Carla Edlelfson, ed. 1995). Hawaii is the only state in the union that has a single statewide school district that is governed in part by an elected board of education, and partly by the legislature of the state. It is also the only state in which none of the funding for education is raised through the use of a property tax. *Id.*

40. See generally NATIONAL EDUCATION ASSOCIATION, *UNDERSTANDING STATE SCHOOL FINANCE FORMULAS* (1987).

41. *Campbell*, 907 P.2d at 1249.

42. *Id.* at 1248-49.

43. *Id.* Average daily membership is a method used by school agencies to count and report students. It is determined by the number of students enrolled in a school averaged over the counting period, usually a period of one month, six weeks, or some other period of time. *Id.*

44. *Id.* at 1249.

45. *Id.* (citing BARRY W. NIMMO, *THE WYOMING SCHOOL FOUNDATION PROGRAM—A BRIEF LOOK AT OPERATIONS AND FUNDING* 49 (1990-91), and quoting WYO. STAT. § 21-13-308(c) (1977)).

of the classroom unit calculation is that all schools of a particular category located within the incorporated area of a city or town, must be treated as one school. Therefore, the classroom units for districts with several smaller schools located in one town are calculated using the larger divisors which provide for proportionally fewer classroom units and fewer dollars per pupil. The school district then computes the amount of funding it will generate through local taxes, fines, and fees. When local revenues are less than the foundation guarantee, that difference is paid to the school district as a foundation entitlement. When local revenues exceed the guarantee, then the school districts does not receive a state entitlement. In some cases, excessive local revenues result in the school district's rebating a certain amount to the state. That rebate amount is known as foundation recapture and is returned to the state's foundation fund for eventual redistribution to qualifying low property wealth school districts. In addition to a foundation guarantee based upon enrollment, past expenditures for "add-ons"<sup>46</sup> are also calculated to determine the total amount of the foundation guarantee. For example, school districts are reimbursed for 75 percent of their transportation expenditures and 85 percent of their special education expenditures.<sup>47</sup>

The court observed that the value of the classroom unit as well as the schedule of divisors are determined by the legislature based upon assumption and are not based on any cost study or analysis.<sup>48</sup> According to the court, the divisor is a critical element in determining the number of classroom units for each school district and, consequently, the amount of revenue a school district will receive.<sup>49</sup> Another critical element which can limit a school district's funds is the municipal divisor which treats all schools of a certain level as one local school when such schools are all within an incorporated city or town or within five miles of an incorporated city or town.<sup>50</sup> The formula permits recalculation for school districts which actually have higher student populations than estimated.<sup>51</sup>

Local school districts may also generate funds through the optional mill levy, which are outside of the Foundation Program and will not

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46. *Id.* at 1248 n.7 ("add ons" include transportation operation and maintenance, transportation capital outlay, tuition paid, costs of isolation/homebound students, special education, one-teacher schools, and vocational education).

47. *Id.* at 1248.

48. *Id.* at 1249.

49. *Id.*

50. *Id.*

51. *Id.*

reduce a school district's state entitlement.<sup>52</sup> The amount of local funds generated through the optional mill levy is completely dependent upon assessed local property values. Thus, wealthy districts can raise more money per mill than can poorer districts.<sup>53</sup> There is, however, some state power equalization to assist poorer districts.<sup>54</sup> Funding for capital construction is also distinct from the Foundation Program.<sup>55</sup>

### *E. Campbell's Procedural History*

In 1992, four of Wyoming's larger school districts initiated a challenge of the school finance system that had been put into place following the *Washakie* decision.<sup>56</sup> The plaintiff districts presented evidence that in the intervening years since *Washakie* the legislative changes in the finance system had increased and exacerbated the fiscal disparity among the state's school districts. The plaintiffs claimed that the fiscal disparities were unjustifiable and constituted a denial of equal educational opportunity. They sought a declaratory judgment that the extant school finance system was unconstitutional under the *Washakie* requirement of equality of financing in order to achieve equality of quality education.<sup>57</sup>

The plaintiff school districts argued that the finance system including the methods for raising and allocating the revenues and funding capital construction created fiscal disparities of two kinds. One type of disparity was wealth driven, meaning that it was related to differences in local school district wealth among the state's 49 school districts. Specifically, the plaintiffs challenged the statutes authorizing the optional mill levy, the 109-percent recapture level, and the capital construction funding as creating wealth-driven disparities.<sup>58</sup> The other type of alleged disparity related to irrational and arbitrary spending. Here the plaintiffs argued that certain features of the finance system perpetuated spending differences among the school districts that were not justified on the basis of actual cost differences. The specific statutes attacked for causing irrational, arbitrary spending

52. *Id.*

53. *Id.*

54. *Id.* at 1249-50. The term "power equalization" refers to the fact that the state provides funds to those poorer districts where one voter-approved optional mill raises less than the state average assessed property value. *Id.*

55. *Id.* at 1249-50

56. *Id.* at 1243. The four original plaintiff school districts were Campbell County School District No. One, Uinta County School District No. One, and Sweetwater County School Districts Nos. One and Two. *Id.*

57. *Campbell*, 907 P.2d at 1250.

58. *Id.*

differences included the divisor system, the municipal divisor, and recalculation.<sup>59</sup>

In response, the state and its allies raised a variety of defenses. Essentially, they maintained that the plaintiffs had the burden of proof in establishing the veracity of their claims by showing clearly and exactly beyond any reasonable doubt that funding disparities existed and that such disparities were either wealth-driven or otherwise unjustified by cost differentials. The defendants also countered with an affirmative defense that any disparities necessary to achieve program equity between school districts were not unconstitutional.<sup>60</sup>

During pre-trial activity, the district court ruled that fiscal disparities resulting from the distribution formula (i.e., the divisor system, the municipal divisor, and recalculation), did not invoke strict scrutiny under equal protection analysis. With respect to these components of the finance formula, the district court determined that the plaintiffs had the burden to prove that the resulting disparities were justified on the basis of actual costs.<sup>61</sup> To meet this burden of proof, the plaintiffs were required by the court to prove the following elements:

1. A funding mechanism resulting in a disparity of funds per pupil, not justified by cost differences;
2. That such unjustified disparity exists by virtue of an irrational feature in the formula adopted by the legislature; and,
3. That such formula results in a persistent and intractable condition of disparity not justified by costs.<sup>62</sup>

Harm to educational opportunity would be presumed by the district court if the plaintiffs could prove their claim that the fiscal disparities were unjustified.<sup>63</sup>

#### *F. The District Court's Decision*

Following a three-week trial, the district court ruled on each of the challenged components of the state's school finance system and came to several different conclusions under the equal protection claim. The district court reconsidered its pre-trial determination as to what

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1251.

level of judicial scrutiny would be applied to the various challenged statutes. Specifically, the district court ruled that strict scrutiny would be applied to the components of the finance system that were alleged to cause wealth-driven disparities (i.e., the recapture provision, the optional six-mill levy, and the capital construction feature).<sup>64</sup> The court also ruled that a variation of the rational basis test in the nature of equitable distribution and which invokes a heightened standard of scrutiny would be applied to the distribution formula components (i.e., the divisor, the municipal divisor, and recalculation).<sup>65</sup>

Three issues involved the distribution formula components, with most attention given to the divisors. The court applied the equitable distribution/rational basis test and held that the basic components of the distribution formula were constitutional.<sup>66</sup> This conclusion was reached despite several facts that might otherwise have suggested a contrary decision. First, the district court had accepted the plaintiffs' proof that funding disparities existed as a result of the divisor system resulting in a real funding disadvantage to the students in the larger districts.<sup>67</sup> Second, the court also had accepted that the divisor system itself was flawed in two respects: first, the classroom unit value was arbitrarily based upon political decisions rather than actual cost determinations; and second, the resulting distribution caused funding disparities which were linked to potential differences in educational opportunity.<sup>68</sup> Moreover, the court expressed "serious doubts about the fairness of the funding formula."<sup>69</sup> Despite the findings of fact demonstrating funding differences resulting from arbitrary measures, the district court ruled that the plaintiffs had not provided necessary evidence to demonstrate the level and impact of the funding differences. Accordingly, the court concluded that the plaintiffs had failed to carry their burden of proof. It should be noted that the district court had earlier held that the plaintiffs did not have to prove that an unjustified disparity necessarily caused harm to educational opportunity.<sup>70</sup> The district court also held that the municipal divisor was not rationally justified by real cost differences and thus did not satisfy the equitable distribution test.<sup>71</sup> The district court did not make a ruling on the related issue of recalculation.<sup>72</sup>

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64. *Id.*

65. *Id.*

66. *Id.* at 1256.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1250-51.

71. *Id.* at 1256.

72. *Id.*

The remaining three issues dealt with the wealth-based disparities (i.e., recapture, optional local mill levy, and capital construction finance). On these issues the district court invoked strict scrutiny, and found that both the recapture and optional mill levy provisions created fiscal disparities unjustifiably conditioned upon local wealth.<sup>73</sup> Both components were declared unconstitutional. With respect to capital construction finance, the court concluded that the evidence failed to establish proof of harm to a constitutionally protected right and held it constitutional.<sup>74</sup>

### G. Wyoming's Education Article and the Statutory Finance System

The most compelling factor that was crucial to the supreme court's decision in *Campbell* was the nature of the legislature's constitutional duty under the state's education article to provide for public education. The education article is that collection of constitutional provisions which contain substantive statements about the state's role in public education.<sup>75</sup> It was in this bright light that the court inspected the basic characteristics of the state's educational finance system that had been created by statute pursuant to the constitution.

At the onset, the supreme court noted that education is a fundamental right under the provisions of the Declaration of Rights article of the constitution.<sup>76</sup> The court observed that once the state constitution embraced the fundamental importance of education, it then described in some detail the responsibilities and requirements of the education in a subsequent article.<sup>77</sup> For the court, the fact that the right to a public education was delineated in the Declaration of Rights article coupled with the expansive language of the constitution's education article, evidenced that "the framers and ratifiers ensured, protected and defined a long cherished principle"—arguably strong state control of public education.<sup>78</sup>

The court observed that its prior decision in *Washakie* "established that the right to education correlated to a duty of the legislature, holding

73. *Id.*

74. *Id.*

75. See generally, William E. Sparkman, *The Legal Foundations of Public School Finance*, 35 B.C. L. REV. 572 (1994) (discussing the historical development of state education clauses).

76. *Campbell*, 907 P.2d at 1257. The constitution states:

The right of the citizens to opportunities for education should have practical recognition. The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts.

WYO. CONST. art. I, § 23.

77. *Id.* at 1257. The constitutional requirements for Wyoming's education system are addressed in WYO. CONST. art. VII, §§ 1-14.

78. *Campbell*, 907 P.2d at 1257.

Art. 7, § 1 obligated the legislature to affirmatively act to establish and support a comprehensive system of public education.”<sup>79</sup> Moreover, the court held that the education article further defined the nature of the education system.<sup>80</sup>

Relying upon both historical interpretations as well as modern definitions, the court then set about construing the meaning of the education articles. Given that the right to education was held to be fundamental, the court averred that the constitutional provisions governing public education must be broadly construed.<sup>81</sup> On the basis of its liberal construction of the terms in the education articles,<sup>82</sup> the court concluded that the education system contemplated by the state constitution was:

an organization forming a network for serving the common purpose of public schools which organization is marked by full detail or complete in all respects and productive without waste and is reasonably sufficient for the appropriate or suitable teaching/education/learning of the state’s school age children.<sup>83</sup>

Moreover, the court concluded that the intent of the education articles was to serve as a mandate to the state legislature:

to provide an education system of a character which provides Wyoming students with a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually.<sup>84</sup>

79. *Campbell*, 907 P.2d at 1257 (citing *Washakie*, 606 P.2d at 320). The specific constitutional language requiring the legislature to establish and support schools is as follows:

The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.

WYO. CONST. art. VII, § 1.

80. *Campbell*, 907 P.2d at 1257. The court quoted WYO. CONST. art VII, § 9 which states in part: The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state, between the ages of six and twenty-one years, . . . .

81. *Campbell*, 907 P.2d at 1258.

82. *Id.* The court focused on the phrases “a complete and uniform system of public instruction” and “a thorough and efficient system of public schools adequate to the proper instruction of the state’s youth” in its analysis of critical concepts and terminology. *Id.*

83. *Id.* at 1258-59.

84. *Id.* at 1259.

Noting that the constitution directs the creation of two systems to deliver education (i.e., a complete and uniform system of public instruction, and a thorough and efficient system of public schools), the court concluded that the purpose of the dual requirements is to provide a "proper" education to all school children.<sup>85</sup> Therefore, according to the court, the legislature must "define and specify what a 'proper' education is for a Wyoming child" in order for it to discharge its constitutional duty.<sup>86</sup>

The court then turned its attention to the statutory regime provide by legislation for public education in the state. It delineated the duties of the state superintendent of schools,<sup>87</sup> the state board of education,<sup>88</sup> local school boards<sup>89</sup> with respect to the quality of the elementary and secondary education system, and noted that local school boards are directed by the legislature to comply with the education program established for the entire state.<sup>90</sup> To further explicate the legislature's role in public education, the court recognized that the legislature had mandated a specified curriculum requirement for the study of the state and federal constitutions<sup>91</sup> along with a penalty for noncompliance.<sup>92</sup>

Despite the extensive statutory language implementing the provisions of the education articles, the court noted a major flaw. It found that the state board of education had adopted rules allowing local school districts to establish minimum standards and to evaluate their own performance in meeting those standards without a prescribed level of performance being required.<sup>93</sup> Moreover, the court found that state board rules<sup>94</sup> allow students to graduate from local schools with mastery of the common core of knowledge and skills at the performance levels set locally despite the language of the statutory graduation requirement mandating districts to prepare students for college admis-

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85. *Id.* The notion of a "proper" education derives from WYO. CONST. art. VII, § 9, the pertinent part of which states: "a thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state, between the ages of six and twenty-one years."

86. *Campbell*, 907 P.2d at 1259.

87. *Id.* at 1259-60 (citing WYO. STAT. § 21-2-202 (Supp. 1995)).

88. *Id.* at 1260 (citing WYO. STAT. § 21-2-304 (Supp. 1995)).

89. *Id.* at 1260 (citing WYO. STAT. § 21-3-110 (Supp. 1995)).

90. *Id.* at 1260 (citing WYO. STAT. § 21-9-101 (1992)).

91. *Id.* at 1260 (citing WYO. STAT. § 21-9-102 (1992)).

92. *Id.* at 1260 (citing WYO. STAT. § 21-9-103 (1992)).

93. *Id.* at 1260 (citing WYO. STATE. BD. OF EDUC. RULES AND REGULATIONS, ch. VI, School Accreditation (1993)).

94. *Id.* at 1263 (citing WYO. STATE. BD. OF EDUC. RULES AND REGULATIONS, ch. VI, School Accreditation (1993)).



sion.<sup>95</sup> For the court, this flaw in allowing local school districts considerable autonomy in establishing standards and assessing their own performance created the potential situation whereby there were “forty-nine autonomous education systems” in Wyoming.<sup>96</sup>

#### H. *The Campbell Decision*

The supreme court’s decision in *Campbell* was heavily influenced by its prior decision in *Washakie*. The court reiterated its position from the 1980 school finance case that an equal opportunity for a quality education was a fundamental right guaranteed by the state constitution, and could not be denied because of unequal funding.<sup>97</sup> However, in that earlier case the court had not defined what it meant by “equal opportunity for quality education,” holding instead that until fiscal parity was obtained it was not possible to achieve “equality of quality.”<sup>98</sup> The court in *Washakie* simply required systemic reform of the state educational system, including the school finance system.

Given its holding in *Washakie*, the court averred that the primary issue before it in *Campbell* was whether the legislature had complied with its constitutional duty to provide an equal opportunity for a quality education by reforming its system for financing the state’s public schools in a fashion consistent with the dictates of the education articles.<sup>99</sup> After delineating the three constitutional duties of the legislature with respect to public education,<sup>100</sup> the court concluded that these criteria imposed “an affirmative mandatory duty upon the legislature” and “are judicially enforceable in protecting” educational rights.<sup>101</sup>

Implicitly recognizing a separation of powers issue, the court noted that the judiciary traditionally will not intrude into legislative policy making. However, with reliance on a 1989 Kentucky school reform case,<sup>102</sup>

95. *Id.* at 1263 (citing WYO. STAT. § 21-3-110(a)(xv) (Supp. 1995)).

96. *Id.* at 1263.

97. *Id.*

98. *Id.*

99. *Id.* at 1263-64.

100. *Id.* As characterized by the court, the three constitutional duties which evolve from WYO. CONST. art. VII, §§ 1 and 9 are:

1. The “system of public instruction” must be “complete and uniform”;
2. The “system of public schools” must be “thorough and efficient”; and
3. The thorough and efficient system of public schools must be “adequate to the proper instruction” of the state’s youth.

*Id.*

101. *Campbell*, 907 P.2d at 1264.

102. *Rose v. Council For Better Educ. Inc.*, 790 S.W.2d 186 (Ky. 1989).

the court also recognized its duty to rule on unconstitutional enactments which violate the constitution, and that it must compel legislative action when the breach is a failure to act in accordance with the constitution.<sup>103</sup> Consequently, the *Campbell* court organized the remainder of its decision around three themes—the application of an appropriate standard of review under the equal protection claim, the wealth-based funding disparity claims, and the distribution formula funding disparity claims.

### 1. Standard of Review

Depending on whether a funding component was wealth-related (i.e., revenue raising) or part of the distribution formula (i.e., revenue distribution), the district court varied in its application of either an equitable allocation/rational basis level of scrutiny or strict scrutiny.<sup>104</sup> Upon review, the court held that the district court erred in applying equitable allocation/rational scrutiny.<sup>105</sup> On the basis of its prior ruling in *Washakie*, the court concluded that legislative reforms to the state school finance system would be reviewed with strict scrutiny to determine whether unjustified fiscal disparities from whatever cause had been eliminated.<sup>106</sup> The court noted that even though its application of strict scrutiny was applied to funding disparities based on differences in local wealth in *Washakie*, it explicitly extended that decision to include other causes of disparities as well.<sup>107</sup> In *Campbell*, this extended to and included the disparities caused by the distribution formula. Under strict scrutiny, any state action that impairs the exercise of a constitutionally protected right or one that is based upon a suspect classification will lose its usual presumption of validity; consequently, the state must justify its action by demonstrating a compelling state interest and that no less burdensome alternative is available.<sup>108</sup>

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103. *Campbell*, 907 P.2d at 1264.

104. *Id.* at 1265.

105. *Id.* at 1266.

106. *Id.* (citing *Washakie*, 606 P.2d at 335).

107. *Id.*

108. *Id.* at 1266-67. See generally, Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517 (1991); John Maxfield, Comment, *Wyoming's Equal Protection Clause Mandates Fiscal Neutrality in School Funding*, 16 LAND & WATER L. REV. 691 (1981); Stephen A. Bartholow, Comment, *Equal Protection and the Financing of Public Education in Wyoming*, 8 LAND & WATER L. REV. 273 (1973).

## 2. Wealth-Based Funding Disparities

### a. *Recapture*

To comply with the fiscal neutrality standard of *Washakie*, one school finance reform proposal resulted in a state constitutional amendment to recapture excess property tax revenues from high wealth districts. The amendment allowed the legislature to collect and distribute to other school districts up to 75 percent of local revenue in excess of the state average property tax yield. Subsequently, in 1992 the legislature empowered school districts with statutory authority to keep an additional nine percent of locally-generated revenue which exceeded the foundation guarantee.<sup>109</sup> The plaintiffs contested the constitutionality of the 1992 statute on the grounds that the legislature acted arbitrarily when it failed to provide adequate justification prior to setting the statutory level.<sup>110</sup>

The district court found that although the retention provision was designed to compensate for the social costs imposed on the wealthy recapture school districts by the mineral extraction industry, non-recapture districts also incur extra costs due to student population growth that are not similarly compensated.<sup>111</sup> Moreover, the district court determined that the state failed to carry its burden under a strict scrutiny analysis sufficient to justify the wealth-related funding disparities. On the basis of these findings, the statute implementing the recapture provision was declared unconstitutional.<sup>112</sup>

The supreme court upheld the district court's ruling on the recapture provision.<sup>113</sup> In its rationale, the court opined that only cost-justified funding differences were permitted, and that the legislature was required by *Washakie* to devise a school finance formula based on factors to assign certain weights for special needs and educational cost differences. Upon review, the court concluded that the recapture statute did not comport with these standards and was thus constitutionally deficient in both regards—it was not based upon a weighted formula and the 109-percent retention level was determined arbitrarily rather than being calculated on the basis of specific and actual costs.<sup>114</sup>

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109. *Campbell*, 907 P.2d at 1267-68 (citing WYO. STAT. § 21-13-102(b) (1992)).

110. *Id.* at 1268.

111. *Id.*

112. *Id.*

113. *Id.* at 1269.

114. *Id.*

*b. Optional mill levies*

Without state intervention, any local property tax levied against a school district's assessed property valuation generates an amount of local revenue different from other school districts because of variations in the local property tax bases. To demonstrate this fact, the court reported sample data from two school districts. Campbell County School District No. One had an assessed valuation of real property of \$1.3 billion; and a one-mill tax levy would raise \$1.3 million, or about \$162 per each of the district's 8000 students. Laramie County School District No. One, on the other hand, had about \$269 million in assessed property values and 13,500 students. A one-mill tax rate in Laramie County School District No. One generates about \$269,000, or roughly \$19 per student. The state-wide average was \$64.55 per Wyoming student.<sup>115</sup>

As noted earlier, every school district is required to assess a 25-mill levy on local property. The optional mill levy component allowed local school districts to levy another six-mills of local property taxes to generate funds outside the foundation program without affecting the state aid entitlement.<sup>116</sup> The six optional mills include three mills for school operations and three mills for maintenance. The first mill within each category may be levied by the local school board without voter approval. The final two mills in each category require voter approval.<sup>117</sup> According to the finance formula, the state "power equalizes" only the second mill of those mills requiring voter approval. The power equalization feature is based upon a formula designed to increase the second one-mill optional local levy in property-poor school districts to the amount of the state average—\$64.55 per student.<sup>118</sup>

The district court found that the optional mill levy created funding and spending disparities based on local wealth leading to inequitable educational opportunities.<sup>119</sup> Moreover, the district court found that the wealthiest districts made the most use of the optional mill levy whereas other districts either used the resulting revenue to reduce funding disparities, to maintain a basic educational program, or, in the case of some of the poorer school districts, they did not avail themselves of the optional mills at all since the levy raised so little money.<sup>120</sup> Even accepting the

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115. *Id.* A mill is .1 of 1 percent or 1/10 of a cent.

116. *Id.*

117. WYO. STAT. § 21-12-102 (1992).

118. *Campbell*, 907 P.2d at 1269.

119. *Id.*

120. *Id.* at 1270.

defendants' assertion that local control was a compelling state interest sufficient to justify the optional mill levy, the district court found that there were other alternatives available to permit local discretion without the resulting revenue disparities. Not surprisingly, the district court concluded that the optional mill levy provision was unconstitutional.<sup>121</sup>

The supreme court upheld this aspect of the district court's conclusion with the rationale that the optional mill levy component created wealth-based disparities that impacted on educational opportunity throughout the state.<sup>122</sup> Prior to doing so, however, the court analyzed the defendants' assertion that local control is recognized constitutionally and therefore provides a compelling state interest. The court noted that given its ruling in *Washakie* that the legislature had complete control over the school system and its financing, "it would be paradoxical to permit disparity because of local control."<sup>123</sup> The court also stated it was puzzled at the assertion of a constitutional basis for local control "since under *Washakie* there cannot be both state and local control in establishing a constitutional education system."<sup>124</sup> Despite these observations, the court nonetheless examined Wyoming's constitutional history to settle the issue of whether local control is a constitutionally recognized interest. On the basis of an extensive analysis of territorial history and constitutional language, the court held that "local control is not a constitutionally recognized interest and cannot be the basis for disparity in equal educational opportunity."<sup>125</sup>

In a related issue, the court also considered whether there was any constitutional role for optional local enrichment over and above the state foundation program. Specifically, the court questioned whether the legislature could permit local districts through the optional mill levies to generate funds outside the foundation program "to enrich its students' educational opportunities beyond those offered elsewhere in the state."<sup>126</sup> The court reiterated its determination that under the constitution the legislature must create and maintain a system of schools providing an equal opportunity to a quality education based upon state wealth rather than local wealth.<sup>127</sup> The court opined that there might be a very limited circumstance that would permit local districts to supplement their educational programs with local funds. For the court, this could only be when the

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1274.

127. *Id.*

legislature had finally achieved its constitutional duty “of a cost-based, state-financed proper education,”<sup>128</sup> — but then only when the legislature could articulate a compelling reason for providing a funding mechanism that would allow local enrichment of the education program in an equitable manner.<sup>129</sup> The court also added two cautionary notes: First, it suggested that strict scrutiny might not permit any local enrichment;<sup>130</sup> and second, that if local enrichment in one school district led to educational innovations that would reasonably benefit all students in the state, then, by virtue of the constitutional requirement for a proper education, all students would be entitled to have those innovations made available as part of the state education program.<sup>131</sup>

*c. Capital construction financing*

The district court held that the evidence presented by the plaintiffs of inequities in capital construction funding had failed to prove a constitutional harm.<sup>132</sup> Upon review, the supreme court reiterated its requirement in *Washakie* that there be equity in the financing of capital construction (i.e., that funding must come from total state resources and must be available statewide).<sup>133</sup> This was anchored in the court's view that school facilities are a vital part of the total educational process.<sup>134</sup> The court's resolve was clear in its direction that “[a]ll educational purposes must be appropriately and responsibly funded to comply with the constitutional mandates of a complete and uniform system of public instruction and a thorough and efficient system of public schools adequate for the proper education of the state's school age children.”<sup>135</sup> Holding that students are deprived of an educational opportunity because of inadequate school facilities, the court declared the capital construction funding element unconstitutional and thus reversed the district court's finding of constitutionality.<sup>136</sup>

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128. *Id.*

129. *Id.*

130. *Id.* (relying on the dissent in *Skeen v. Minnesota*, 505 N.W.2d 299, 322 (Minn. 1993)).

131. *Id.* *But see*, PAUL R. MORT & WALTER C. REUSSER, *PUBLIC SCHOOL FINANCE* 389 (1941) (where the authors discuss the adaptability principle as justification for a state school finance plan supporting local initiative. According to Mort and Reusser, if local financial initiative leads to innovations in educational programs, then the state finance system should stimulate rather than hamper local initiative).

132. *Campbell*, 907 P.2d at 1275.

133. *Id.* at 1275.

134. *Id.*

135. *Id.*

136. *Id.* at 1274-75.

### 3. Distribution Formula Funding Disparities

Yet another major thrust of the plaintiffs' challenge involved certain components of the school finance distribution formula that allegedly caused funding disparities. These particular elements included the classroom unit (CRU), the divisors, the municipal divisor, and the recalculation formula. Although recognizing elements of deficiency, irrationality, and the fact that students in larger school districts were automatically subject to funding disadvantages, the district court had nonetheless upheld the distribution system because it found that the plaintiffs had failed to meet their burden of proof.<sup>137</sup> The lower court's decision was motivated by its finding that there was only "a genuine potential" for disparity of educational quality or educational opportunity.<sup>138</sup>

The supreme court reversed the district court's ruling with respect to the distribution formula. The court noted that when applying strict scrutiny to the distribution system, the state would bear the burden of proving that the funding disparities were cost-justified or that the disparities were justified by a compelling interest. Critical to the court's analysis was its reasoning that where the evidence establishes fiscal disparities that are not justified by educational cost differentials, then disparities of educational quality or educational opportunity are presumed.<sup>139</sup> Accordingly, the plaintiffs do not bear the burden of proof as previously allocated by the district court. After reviewing the evidence on the various components of the distribution system, the court concluded that the identified disparities were not cost-based and were, therefore, unconstitutional.<sup>140</sup>

The final portion of the *Campbell* opinion focused on the meaning of an equal educational opportunity to a proper education and the imperative for a cost-based funding system. For the court, the meaning of equal educational opportunity to a proper education is summarized by the idea that there should be a level playing field for all children and there must not be "losers" as a result of the education system and its funding mechanisms.<sup>141</sup> The court opined that a proper education was not a static concept, but that the definition would change over time. The court recognized that there must be a match between the needs of students and the availability of an appropriate education program regardless of school size or location. As a basic premise, the court held that for the state school

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137. *Id.* at 1276.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1278.

finance system to provide an equal opportunity for a quality education resources must be distributed in a manner to level the playing field.<sup>142</sup> If there are to be no losers, then the resources must be adequate to fund the educational program needed once that need is determined.<sup>143</sup>

According to the court, "the legislature's paramount priority" is to support "an opportunity for a complete, proper, quality education" following the dictates of the education article.<sup>144</sup> In fulfilling its constitutional duty, the legislature cannot provide a minimum level of education and then fund it as best it can considering other competing state functions. The court's command to the legislature was crystal clear:

. . . competing priorities not of constitutional magnitude are secondary, and the legislature may not yield to them until constitutionally sufficient provision is made for elementary and secondary education.<sup>145</sup>

To assist with its judicial mandate, the court provided the following guidance to the legislature in terms of what must be done to arrive at an education system that would achieve financial parity:

1. Consideration must be given to "local conditions, special needs and problems, and educational cost differentials;<sup>146</sup>
2. A cost of education study must be conducted with the results being used to inform the creation of a new finance system;
3. The legislature must state and describe what a "proper education" is for a Wyoming child regardless of the child's place of residence;
4. The prescribed education system must be the best that can be done according to legislative specifications;
5. The state-financed quality education must be nearly identical from district to district;

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142. *Id.* at 1279.

143. *Id.* The court's language was colorful:

Having no losers in the system requires there be no shrinking pie but a pie of the size needed. Once education need is determined, the pie must be large enough to fund that need.

*Id.*

144. *Id.*

145. *Id.*

146. *Id.*



6. The legislature can provide a mechanism for local enrichment — but only after the state financed quality education program is in place.<sup>147</sup>

By giving the legislature until July 1, 1997, to adopt reform legislation and implement a viable school finance system in compliance with the court's judgment, the legislature has ample time to fulfill its constitutional duty.<sup>148</sup> The court directed the district court to retain jurisdiction of the case until the legislature has complied with the judgment. Subsequent to publication of the court's unanimous decision in *Campbell*, the court entered an order responding to questions as to the prospective operation of the opinion and denying a petition for rehearing.<sup>149</sup>

Having reviewed the *Campbell* decision in some detail, the next section provides a frame of reference as to how *Campbell* fits within school finance litigation as viewed from a national perspective.

## II. JUDICIAL TREATMENT OF SCHOOL FUNDING CHALLENGES<sup>150</sup>

Federal and state constitutions contain provisions guaranteeing equal protection of the laws.<sup>151</sup> In 1971 California's Supreme Court in *Serrano v. Priest* ruled that inequities in the state's system of public school finance violated the equal protection clause of the U.S. Constitution.<sup>152</sup> But in 1973 the U.S. Supreme Court in *San Antonio v. Rodriguez* held that mere relative differences in funding did not violate the equal protection clause of the U.S. Constitution.<sup>153</sup> After the U.S. Supreme Court's decisions in *Rodriguez*, plaintiffs suffered a series of defeats.<sup>154</sup> A notable exception to this trend was the Supreme Court of New Jersey's 1973 decision in *Robinson v. Cahill*.<sup>155</sup> The court based its decision for plaintiffs on guarantees found in the state's education article rather than equal protection claims. Litigation based on equal protection provisions was revived by the Su-

147. *Id.* at 1279-80.

148. *Id.* at 1280.

149. *Id.* at 1280-81.

150. This section updates part of an earlier work. See John Dayton, *An Anatomy of Public School Funding Litigation*, 77 ED. LAW REP. 627 (1992).

151. See Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

152. 487 P.2d 1241, 1244 (Cal. 1971).

153. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

154. *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973); *Olsen v. State*, 554 P.2d 139 (Or. 1976).

155. 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973) (*Robinson I*).

preme Court of California in 1976. In *Serrano II* the court held that continuing inequities in California's system of school funding violated equal protection provisions of the state constitution.<sup>156</sup> As more recent state supreme court decisions attest, equal protection challenges continue to be a viable litigation strategy for plaintiffs challenging public school funding inequities.<sup>157</sup> As indicated by the Supreme Court of California's 1976 decision in *Serrano II*, state courts are free to interpret the provisions of their state's constitution independent of federal precedents, and may find that provisions in their state's constitution provide greater protection for the state's citizens than similar provisions in the Federal Constitution.<sup>158</sup> Since 1970, more than 250 published opinions have held that Federal Constitutional minimums were insufficient to satisfy the requirements of various states' constitutions.<sup>159</sup> If state constitutions were interpreted as guaranteeing no greater rights than the Federal Constitution these guarantees would be largely superfluous since states are prohibited from falling below federal constitutional minimums.<sup>160</sup>

Most state constitutions contain express guarantees of equality of treatment.<sup>161</sup> The equality provisions contained in the states' bills of rights "are among the most diverse guarantees found in American constitutions."<sup>162</sup> However, despite wide variations in specific constitutional language and adoption histories, state courts' analyses of equal protection challenges in school funding cases have been largely uniform because of the pervasive influence of the federal model of equal protection analysis.<sup>163</sup> The issues gen-

156. *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976), cert. denied, 432 U.S. 907 (1977) (*Serrano II*).

157. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993).

158. 557 P.2d 929 (Cal. 1976), cert. denied, 423 U.S. 907 (1977). See also, William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

159. William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 227 (1990).

160. U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

161. See THE AMERICAN BENCH—1985/86, 2491 (1986) ("seven states have no express equality guarantee in their individual rights provisions: (Del., Minn., Miss., Neb., Okla., R.I. (cf. Art. I, § 2), and Tenn.").

162. See *id.* at 2492 (provides a table categorizing the provisions of state equal treatment guarantees).

163. For cases following the federal model of equal protection analysis, see *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (*Serrano I*); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Board of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979); *Fair Sch. Fin. Council v. State*, 746 P.2d 1135 (Okla. 1987); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980), cert. denied, 449 U.S. 824 (1980). For cases rejecting this approach, see *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), cert. denied, 414 U.S. 976 (1973); *Olsen v. State*, 554 P.2d 139 (Or. 1976).

erally considered are: (1) whether education is a fundamental right; (2) whether the plaintiffs constitute a suspect class; (3) what level of judicial scrutiny is appropriate in reviewing the state's system of funding; and (4) whether the state has an appropriate justification for unequal treatment in its public school funding system.

#### A. *Whether Education is a Fundamental Right*

In *San Antonio v. Rodriguez*, the U.S. Supreme Court applied an explicit-implicit test of fundamentality. Under the *Rodriguez* test, the answer to whether education is a fundamental right lies in "assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."<sup>164</sup> Since education provisions are not included in the United States Constitution, the Court in *Rodriguez* concluded that education was not a fundamental right subject to strict scrutiny under the Federal Constitution.

Because provisions concerning state support of education are expressly included in all state constitutions,<sup>165</sup> courts employing the *Rodriguez* explicit-implicit test would conclude that education is a fundamental right in all states. However, most state courts have rejected the *Rodriguez* test of fundamentality.<sup>166</sup> For example, the Supreme Court of California rejected the *Rodriguez* test and instead views as fundamental those interests that "because of their impact on those individual rights and liberties which lie at the core of our free and representative form of government, are properly considered 'fundamental.'"<sup>167</sup>

Whether education is deemed a fundamental right by the deciding court can be significant. Most states' courts require strict scrutiny

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

165. William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989). All states except Mississippi mandate legislative support for public education. *Id.* The Mississippi Constitution makes education a discretionary function for the legislature. See MISS. CONST. art. VIII, § 201.

166. For cases expressly rejecting the *Rodriguez* explicit-implicit test of fundamentality, see *Serrano II*, 557 P.2d at 952; *Lujan*, 649 P.2d at 1017; *Thompson*, 537 P.2d at 644; *Hornbeck*, 458 A.2d at 784-85; *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973); *Board of Educ.*, 390 N.E.2d at 818; *Fair Sch. Fin. Council*, 746 P.2d at 1149; *Olsen*, 554 P.2d at 144 (application of the *Rodriguez* test in Oregon would make "liquor by the drink" a fundamental right). Note also that the Supreme Court of New Jersey in *Robinson* rejected the entire framework of federal equal protection analysis, making a decision on fundamentality unnecessary. Instead, the court adopted a balancing test for analyzing equal protection claims. *Robinson*, 303 A.2d at 282. Under the *Robinson* test, "the court weighs the detriment to the education of the children of certain districts against the ostensible justification for the scheme of school financing. If the court determines the detriment is much greater than the justification, the financing scheme violates the guarantee of equal protection." *Olsen*, 554 P.2d at 145 (adopting the *Robinson* test).

167. *Serrano II*, 557 P.2d at 952.

when reviewing state actions which impinge on fundamental rights.<sup>168</sup> In contrast, a rational basis test is normally applied to interests which are not deemed fundamental.<sup>169</sup> Generally, the level of scrutiny applied determines the outcome.<sup>170</sup> Therefore, the determination of whether education is a fundamental right is an important issue under equal protection analysis,<sup>171</sup> at least where the federal model of equal protection analysis is followed.<sup>172</sup>

### B. *Whether the Plaintiffs Constitute a Suspect Class*

Under the federal model of equal protection analysis, courts afford strict scrutiny review to both fundamental rights and suspect classifications. If plaintiffs fail to convince the court that education is a fundamental right, they may still obtain strict scrutiny review if they convince the court they constitute a suspect class.<sup>173</sup>

Suspect classes are traditionally "those based on race, alienage, and national origin."<sup>174</sup> However, Justice Marshall, dissenting in *Rodriguez*, argued that "personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups."<sup>175</sup> While at least

168. *But see* *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989) (holding that education is a fundamental right, but applying a rational basis test). The method used by the Supreme Court of Arizona in *Shofstall* was later criticized by the Supreme Court of Arizona in *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994) ("We do not understand how the rational basis test can be used when a fundamental right has been implicated. They seem to us to be mutually exclusive. If education is a fundamental right, the compelling state interest test (strict scrutiny) ought to apply.").

169. *Roosevelt*, 877 P.2d at 811.

170. *See* Thro, *supra* note 159, at 225 n.30 (noting that strict scrutiny is strict in theory, fatal in fact).

171. For cases expressly ruling that education is a fundamental right, *see Shofstall*, 515 P.2d at 592) (*but see Roosevelt*, 877 P.2d at 811 declining to decide whether education is a fundamental right under the state's constitution); *Serrano II*, 557 P.2d at 951; *Serrano v. Priest*, 487 P.2d 1241, 1255 (Cal. 1971); *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 192 (Ky. 1989); *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993); *Bismarck Public Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 256 (N.D. 1994); *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979); *Kukor*, 436 N.W.2d at 579; *Washakie*, 606 P.2d at 333. For cases expressly rejecting education as a fundamental right, *see Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1017 (Colo. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156, 167 (Ga. 1981); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 732 (Idaho 1993); *Thompson v. Engelking*, 537 P.2d 635, 647 (Idaho 1975); *Gould v. Orr*, 506 N.W.2d 349, 350 (Neb. 1993).

172. A determination of fundamentality is unnecessary under the *Robinson* balancing test. For cases adopting the *Robinson* test, *see Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973); *Board of Educ. v. Walter*, 390 N.E.2d 813, 819 (Ohio 1979); *Olsen v. State*, 554 P.2d 139, 145 (Or. 1976).

173. *See Julius Menacker, Poverty as a Suspect Class in Public Education Equal Protection Suits*, 54 ED. LAW REP. 1085 (1989).

174. BLACK'S LAW DICTIONARY 1297 (5th ed. 1979).

175. *San Antonio*, 411 U.S. at 121 (Marshall, J., dissenting).

two courts have accepted this argument,<sup>176</sup> it is likely that the majority of courts will continue to reject this argument.<sup>177</sup>

### C. Level of Judicial Scrutiny

In most cases, when strict scrutiny was applied the state's system of school funding was overturned.<sup>178</sup> When a rational basis test was applied the state's system of school funding was generally upheld.<sup>179</sup> The application of intermediate scrutiny to school funding cases has been rare.<sup>180</sup>

### D. State Justifications for Inequality

When courts follow the federal model of equal protection analysis, the state must "demonstrate some compelling State interest to justify the unequal classification" to withstand strict scrutiny.<sup>181</sup> The state will generally fail to meet this heavy burden of proof.<sup>182</sup> In the cases in which intermediate scrutiny has been applied no adequate justification has been identified.<sup>183</sup> Remaining for consideration is what

176. See *Serrano II*, 557 P.2d at 951; *Washakie*, 606 P.2d at 334.

177. See *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1021 (Colo. 1982); *Thompson v. Engelking*, 537 P.2d 635, 645-46 (Idaho 1975); *Hornbeck*, 458 A.2d at 787. Recognizing poverty as a suspect classification may implicate other areas of social welfare legislation, with the possibility of opening the floodgates of litigation in these politically volatile areas.

178. See *Serrano II*, 557 P.2d at 951; *Serrano I*, 487 P.2d at 1259; *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979). *But see Skeen v. State*, 505 N.W.2d 299, 315-16 (Minn. 1993) (ruling for the state and holding that education is a fundamental right but applying strict scrutiny only up to the baseline of minimal adequacy in education, while applying a rational basis test to funding beyond the level of minimal adequacy); *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994) (ruling for the state and holding that education is a fundamental right and that the state's system of funding withstands a strict scrutiny test).

179. See *Shofstall*, 515 P.2d at 592; *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1011 (Colo. 1982); *Thompson v. Engelking*, 537 P.2d 635, 645 (Idaho 1975); *Hornbeck*, 458 A.2d at 788; *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 366 (N.Y. 1982); *Board of Educ. v. Walter*, 390 N.E.2d 813, 821 (Ohio 1979); *Fair Sch. Fin. Council v. State*, 746 P.2d 1135, 1150 (Okla. 1987); *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979); *Richland Co. v. Campbell*, 364 S.E.2d 470, 472 (S.C. 1988); *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wis. 1989). *But see Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 155 (Tenn. 1993) (holding that public school funding systems failed even a rational basis test).

180. See *Hornbeck*, 458 A.2d at 788 (noting that Maryland's system of public school funding would withstand intermediate scrutiny, but rejecting intermediate scrutiny in favor of a rational basis test); *Bismarck v. State*, 511 N.W.2d 247, 259 (N.D. 1994) (holding that education is a fundamental right and applying intermediate scrutiny).

181. *Pauley*, 255 S.E.2d at 878.

182. See *Serrano I*, 487 P.2d at 1260; *Horton*, 376 A.2d at 374. *But see Scott*, 443 S.E.2d at 142 (finding that the state's system of funding withstood strict scrutiny review).

183. See *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 259 (N.D. 1994);

state justification is accepted when the court applies a rational basis test.

According to La Morte: "The most pervasive rationale employed in upholding the status quo involved the preservation of local control over education."<sup>184</sup> When courts have applied a rational basis test to school funding systems challenged under equal protection guarantees, at least two courts have rejected the rationale of local control.<sup>185</sup> Other courts have accepted the rationale of local control as sufficient justification for the funding systems.<sup>186</sup>

Courts overturning the state's system of school funding have criticized the argument that local control justifies educational funding inequities. The Supreme Court of California in *Serrano II* described this rationale as a "cruel illusion" which far from being necessary to promote local control "actually deprives the less wealthy districts of the option."<sup>187</sup> Several other states' supreme courts have reached a similar conclusion.<sup>188</sup>

*Hornbeck*, 458 A.2d at 788 (noting that Maryland's system of public school funding would withstand intermediate scrutiny, but rejected intermediate scrutiny in favor of a rational basis test).

184. See Michael W. La Morte, *Courts Continue to Address the Wealth Disparity Issue*, 11 EDUC. EVALUATION & POL'Y ANALYSIS 3, 11 (1989).

185. *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (rejecting the rationale of local control as justification for funding disparities, and holding that the Arkansas system of school funding failed even a rational basis test); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 155 (Tenn. 1993) (holding that public school funding systems failed even a rational basis test). See also *Bismarck*, 511 N.W.2d at 260-61 (applying intermediate scrutiny and rejecting the state's rationale of local control, holding that local control in North Dakota "is undercut and limited by the legislature's enactment of requirements for statewide uniformity of education").

186. See *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1022-23 (Colo. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156, 167 (Ga. 1981); *Hornbeck*, 458 A.2d at 789; *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 366 (N.Y. 1982); *Board of Educ. v. Walter*, 390 N.E.2d 813, 821 (Ohio 1979); *Olsen v. State*, 554 P.2d 139, 146 (Or. 1976); *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979); *Kukor v. Grover*, 436 N.W.2d 568, 580-81 (Wis. 1989).

187. *Serrano v. Priest*, 557 P.2d 929, 948 (Cal. 1976) (quoting *Serrano v. Priest*, 487 P.2d 12141, 1261 (Cal. 1971)).

188. See *Dupree*, 651 S.W.2d at 93 ("[T]o alter the state financing system to provide greater equalization among districts does not in any way dictate that local control must be reduced"); *Helena Elementary Sch. Dist. No. One v. State*, 769 P.2d 684, 690 (Mont. 1989) (ruling that spending disparities actually deny local control to poorer schools); *Bismarck*, 511 N.W.2d at 260-261 (rejecting local control as a justification for disparities and finding that "local control in North Dakota is undercut and limited by the Legislature's enactment of requirements of statewide uniformity of education"); *Tennessee Small Sch. Sys.*, 851 S.W.2d at 154 ("[T]he better reasoned opinions are those which have rejected the argument that local control is justification for disparity in opportunity."); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989) (improved equity "will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives that are not now available to them. Only if alternatives are indeed available can a community exercise the control of making choices").

### III. EDUCATION ARTICLE CHALLENGES

Shortly after the plaintiffs' defeat in *San Antonio v. Rodriguez*,<sup>189</sup> plaintiffs' hopes for success in school funding cases were revived in *Robinson v. Cahill*.<sup>190</sup> In *Robinson*, the Supreme Court of New Jersey ruled that the state's system of public school funding was unconstitutional because it failed to meet the requirements of the New Jersey Constitution's education article. All states have constitutional provisions describing each state's role in supporting public education.<sup>191</sup> State education articles continue to provide a successful basis for constitutional challenges to school funding inequities.<sup>192</sup>

On the basis of a thorough review of educational article litigation, it appears that state judicial resolution of education article challenges generally involves a three-step process: (1) the court must interpret the meaning of the education article; (2) on the basis of this interpretation the court must determine the magnitude of the state's constitutional duty to support education; and (3) the court must determine whether the state has met the assigned constitutional obligation.

#### A. *Interpreting the Education Article*

Some legal scholars have suggested that education articles can be divided into a four-part framework based on the apparent strength of the constitutional language.<sup>193</sup> Under this framework, category I clauses impose only a minimal educational obligation on the state,<sup>194</sup> category II clauses impose a slightly higher duty requiring a certain minimum standard of quality,<sup>195</sup> category III clauses contain stronger and more specific

189. 411 U.S. 1 (1973).

190. 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973).

191. For a listing of the specific language found in the education clauses of all states, see Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 134 (1989).

192. See *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994) (ruling for plaintiffs based on the state constitution's education article).

193. Thro, *supra*, note 165, at 1661.

194. State constitutions with category I clauses are: ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; CONN. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; KAN. CONST. art. VI, § 1; LA. CONST. art. VIII, § 1; MISS. CONST. art. VIII, § 201; NEB. CONST. art. VII, § 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68.

195. State constitutions with category II clauses are: ARK. CONST. art. XIV, § 1; COLO. CONST. art. IX, § 2; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MONT. CONST. art. X, § 1; N.J. CONST. art. VIII, § 4; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OR.

mandates,<sup>196</sup> and category IV clauses impose the highest level of state obligation.<sup>197</sup> In theory, the likelihood that a state's system of funding will be overturned is the lowest in category I and the highest in category IV. However, a review of judicial decisions on school funding challenges indicates no consistent pattern.<sup>198</sup>

Although there are wide variations in judicial interpretations of constitutional language, there appears to be some consistency regarding the methodology of interpretation. In school funding cases, courts have used three methods of constitutional interpretation: (1) historical analysis of constitutional debates and early legislative interpretations;<sup>199</sup> (2) the

CONST. art. VIII, § 3; PA. CONST. art. III, § 14; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3.

196. State constitutions with category III clauses are: CAL. CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d, § 3; MASS. CONST. pt. 2, ch. 5, § 2; NEV. CONST. art. XI, § 2; R.I. CONST. art. XII, § 1; S.D. CONST. art. VIII, § 1; WYO. CONST. art. VII, § 1.

197. State constitutions with category IV clauses are: GA. CONST. art. VIII, § 1; ILL. CONST. art. X, § 1; ME. CONST. art. VIII, pt. 1, § 1; MICH. CONST. art. VIII, § 2; MO. CONST. art. IX, § 1(a); N.H. CONST. pt. 2, art. LXXXIII; WASH. CONST. art. IX, § 1.

198. *Category I*—Alabama, Alaska, \*Arizona, \*Connecticut, Hawaii, Kansas, Louisiana, Mississippi, Nebraska, New Mexico, +New York, North Carolina, +Oklahoma, +South Carolina, Utah, Vermont.

*Category II*—\*Arkansas, +Colorado, Delaware, Florida, +Idaho, \*Kentucky, +Maryland, +Minnesota, \*Montana, \*New Jersey, \*North Dakota, +Ohio, +Oregon, +Pennsylvania, \*Tennessee, \*Texas, +Virginia, \*West Virginia, +Wisconsin.

*Category III*—\*California, Indiana, Iowa, \*Massachusetts, Nevada, Rhode Island, South Dakota, \*Wyoming.

*Category IV*—+Georgia, Illinois, Maine, +Michigan, Missouri, New Hampshire, \*Washington, + (upheld)

\* (declared unconstitutional)

There is no strong correlation between the strength of constitutional language and the outcome of school funding cases. However, in defense of this framework, it should be noted that factors unrelated to constitutional language (differences in factual findings, constitutional histories, decisions based on equal protection rather than education article language, etc.) may have skewed the results in reported cases.

Although conceptually useful, Thro's state-by-state categorization is dated. See e.g., William E. Sparkman & Fred Hartmeister, *The Edgewood Saga Continues: The Texas School Finance System is Constitutional—But Not Yet Out of the Woods*, 101 EDUC. LAW REP. 509 (1995). Following the Texas Supreme Court's most recent ruling in what is now the fourth in a series of *Edgewood* decisions, Texas would now be listed on Thro's categories as a "+" rather than as a "\*".

199. For cases using the historical mode of analysis, see *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1011 (Colo. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156, 163 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635, 641 (Idaho 1975); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 205 (Ky. 1989); *McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516, 523 (Mass. 1993); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1377 (N.H. 1993); *Robinson v. Cahill*, 303 A.2d 273, 287 (N.J. 1973); *Board of Educ., Levittown Union Free Sch. Dist. No. One v. Nyquist*, 439 N.E.2d 359, 368 (N.Y. 1982); *Board of Educ. v. Walter*, 390 N.E.2d 813, 820 (Ohio 1979); *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979); *Richland County v. Campbell*, 364 S.E.2d 470, 472 (S.C. 1988); *Seattle Sch. Dist. No. One v. State*, 585 P.2d 71, 85 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859, 866 (W. Va. 1979).



plain meaning of constitutional language;<sup>200</sup> and (3) a review of other judicial interpretations of similar language.<sup>201</sup> The majority approach is historical analysis.<sup>202</sup> However, many courts use a combination of these modes of analysis.<sup>203</sup>

### B. Determining the Magnitude of the Duty

Once the court has determined the meaning of constitutional language, the court attempts to extract a measurable duty for the legislature in supporting education. Judicially interpreted state duties have ranged from a declaration that children had a "constitutionally paramount . . . right to be amply provided with an education,"<sup>204</sup> to near total deference, finding that "the framers of the constitution have left the legislature free to choose the means of funding the schools . . . ."<sup>205</sup>

Courts that found high levels of legislative duty to support education generally determined that the constitution allowed less legislative discretion in school funding. These courts were more likely to find that the constitution prohibited significant funding disparities.<sup>206</sup> In contrast, courts that found relatively low levels of legislative duty to support education generally determined that the constitution allowed broad legislative discretion in school funding; did not require substan-

200. For cases using the plain meaning mode of analysis, see *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 776 (Md. 1983); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 689 (Mont. 1989); *Fair School Fin. Council v. State*, 746 P.2d 1135, 1149 (Okla. 1987); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989); *Scott v. Commonwealth*, 443 S.E.2d 138, 141 (Va. 1994); *Kukor v. Grover*, 436 N.W.2d 568, 574 (Wis. 1989).

201. See *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 92-93 (Ark. 1983). Note also that other courts use this method in addition to other modes of analysis, see *Hornbeck*, 458 A.2d at 777 (Md. 1983); *Pauley*, 255 S.E.2d at 866; *Rose*, 790 S.W.2d at 210.

202. See *supra* note 199. Some courts have included an extensive historical analysis in their opinions. See *McDuffy*, 615 N.E.2d at 523; *Claremont Sch. Dist.*, 635 A.2d at 1377.

203. For courts using multiple modes of analysis, see *Rose*, 790 S.W.2d at 205, 210; *Hornbeck*, 458 A.2d at 776; *Skeen v. State*, 505 N.W.2d 299, 308 (Minn. 1993); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 150-151 (Tenn. 1993); *Edgewood*, 777 S.W.2d at 394; *Pauley*, 255 S.E.2d at 866; *Kukor*, 436 N.W.2d at 574; *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1257 (Wyo. 1995).

204. *Seattle Sch. Dist. No. One v. State*, 585 P.2d 71, 92 (Wash. 1978).

205. *Richland County v. Campbell*, 364 S.E.2d 470, 472 (S.C. 1988).

206. See *Robinson*, 303 A.2d 273, at 297 (finding that a disparity in expenditures violated the constitutional mandate, and that education funding was a state legislative responsibility, not a local responsibility); *Seattle Sch. Dist. No. One*, 585 P.2d at 92 (holding that the legislature has a paramount duty to support education, and that children have a right to be amply provided with an education); *Rose*, 790 S.W.2d at 205 (holding that the legislature has the sole obligation to provide for education throughout the state by appropriate legislation, and that the system must be an efficient one); *Edgewood*, 777 S.W.2d at 396-97 (holding that large disparities in funding are prohibited by the constitution, and that the legislature must devise a system which correlates tax efforts and educational resources).

tial equality in expenditures; and required only a basic or a minimally adequate education.<sup>207</sup>

### C. *Determining Whether the State Has Met the Assigned Constitutional Obligation*

A determination of whether the state has met its constitutional duty to support education involves measuring the factual findings regarding the state's funding system against the judicially determined constitutional standard. Those systems falling below the constitutional standard are overturned,<sup>208</sup> and those meeting or exceeding the constitutional mandate are upheld.<sup>209</sup> If the court determines the constitution establishes a high degree of legislative duty to support education, the state's system is generally declared unconstitutional.<sup>210</sup> If the court finds a low degree of legislative duty, the state's system is generally upheld.<sup>211</sup>

## IV. REFLECTIONS ON *CAMPBELL*

Although binding only in Wyoming, the *Campbell* decision should reverberate nationally given the Wyoming Supreme Court's position on several key themes and issues. As previously demonstrated in the "Educa-

207. See *Board of Educ. v. Walter*, 390 N.E.2d 813, 824-25 (Ohio 1979) (granting the legislature wide discretion in school funding, limited only where a student is effectively deprived of educational opportunity); *McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981) (the constitution requires only an adequate education and basic educational opportunity); *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 369 (N.Y. 1982) (requiring only a sound basic education); *Hornbeck*, 458 A.2d at 780 (rejecting mathematical equality in school funding); *Fair Sch. Fin. Council v. State*, 746 P.2d 1135, 1149 (Okla. 1987) (the constitution requires only a basic, adequate education); *Richland County v. Campbell*, 364 S.E.2d 470, 472 (S.C. 1988) (the legislature is free to choose the method of school funding).

208. See *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 97 (Wash. 1978); *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 332 (Wyo. 1980); *Helena Elementary Sch. Dist. No. One v. State*, 769 P.2d 684, 690 (Mont. 1989); *Edgewood*, 777 S.W.2d at 398.

209. See *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973); *Thompson v. Engelking*, 537 P.2d 635, 641 (Idaho 1975); *McDaniel*, 285 S.E.2d at 165; *Hornbeck*, 458 A.2d at 780.

210. See *Robinson*, 303 A.2d at 295 (holding discrepancies in dollar input per child inconsistent with the demands of the constitution); *Seattle Sch. Dist. No. One*, 585 P.2d at 92 (establishing a paramount constitutional duty for the state to amply provide for education); *Edgewood*, 777 S.W.2d at 396 (The constitution prohibits the vast disparities as now exist.).

211. See *Board of Educ. v. Walter*, 390 N.E.2d 813, 824-25 (Ohio 1979) (interpreting the constitution as providing wide discretion in funding for the state, limited only where a child is effectively deprived of educational opportunity); *McDaniel*, 285 S.E.2d at 165 (requiring merely a basic adequate education); *Levittown*, 439 N.E.2d at 369 (the constitution only requires a basic sound education); *Fair Sch. Fin. Council*, 746 P.2d at 1149 (only a basic, adequate education is required); *Richland County*, 364 S.E.2d at 472 (the constitution leaves the legislature free to determine the method of school finance).

tion Article Challenges” section of this article, constitutional language describing the duty of the legislature *vis á vis* public education is clearly a vital issue in contemporary school finance litigation across the nation. In this regard, a most important relationship exists between the constitutional mandate incorporated within a state’s education article and how strongly the legislature feels its duty is to comply with the mandate following judicial intervention.<sup>212</sup> Although Thro<sup>213</sup> places Wyoming’s education article within a category of constitutional provisions which contain stronger and more specific mandates than the weaker language perceived in other categories, the *Campbell* decision suggests that the court imposed the highest level of state obligation for public education.<sup>214</sup>

It remains to be seen if courts in other states will follow Wyoming’s lead and invoke a similarly strong approach to the legislature’s obligation under their respective education articles. Perhaps one possibility is that *Campbell* will simply be construed as an outlier with little influence in other states. If, in fact, *Campbell* does portend a shift toward stronger constitutional interpretations, it raises the question of whether legislators or citizens will—or should—seek a constitutional amendment to weaken the language of the education article.<sup>215</sup> A second possibility might involve school finance reformers similarly seeking a constitutional amendment to strengthen the education article in a particular state.

It is noteworthy that the *Campbell* court held that there must be equity in the financing of capital outlay needs of Wyoming’s school districts.<sup>216</sup> Since capital outlay financing has traditionally been the responsibility of local school districts, local wealth definitely plays a factor in access to resources. Some states provide various forms of assistance to local school districts with their building needs.<sup>217</sup>

212. See *supra* note 99 and accompanying text.

213: See *supra* note 196.

214. See *supra* note 206 and accompanying text.

215. Despite not being directly on point with the school funding issues but apparently as a result of the perceived impact of the court’s handling of local control concerns in *Campbell*, Senator Charles Scott, R-30/Casper, sponsored a proposed constitutional amendment during the 1996 legislative session. The proposed amendment focused on local school district autonomy and ostensibly restoring responsibility for making curricular decisions at the local level. Although the proposed amendment failed to clear the Senate in a close (14-13) vote, it would appear that the question of constitutional changes being revisited is far from over. Brett Martel, *Local Control Fails by Bare Minimum*, CHEYENNE (WYO.) TRIBUNE-EAGLE, Feb. 22, 1996, at A6.

216. *Campbell*, 907 P.2d at 1274-75.

217. See generally, DAVID C. THOMPSON ET AL., FISCAL LEADERSHIP FOR SCHOOLS: CONCEPTS AND PRACTICES 560-61 (1994). See also, FAITH E. CRAMPTON & TERRY N. WHITNEY, *Equity and State Funding of School Facilities*, 3 NCSL LEGISBRIEF No. 15 (April 1995) (where the authors provide a summary of school finance litigation in the United States involving capital outlay funding).

Questions concerning the alleged relationship between expenditures and educational opportunity, educational harm associated with spending inequities, and the effects of unequal capital funding often arise in school funding litigation. Regarding the alleged relationship between expenditures and educational opportunity, no plaintiff since *Serrano v. Priest*<sup>218</sup> has ultimately prevailed without convincing the court of the existence of a positive correlation between expenditures and educational opportunity.<sup>219</sup> The obvious explanation is that if expenditures do not affect the quality of educational opportunity, the funding equalization order sought by plaintiffs would not rationally promote the constitutional interest in educational opportunity the court sees itself as being charged with protecting.<sup>220</sup>

The Wyoming Supreme Court had previously addressed the correlation between expenditures and educational opportunity in *Washakie*,<sup>221</sup> and in *Campbell* the court affirmed its earlier holding on the issue.<sup>222</sup> The court recognized a positive relationship between expenditures and educational opportunity, joining many other states' highest courts ruling on this issue.<sup>223</sup> Referring to its earlier decision in *Washakie*, the court stated: "*Washakie* presumes funding disparity results in educational opportunity disparity."<sup>224</sup> Although recognizing a correlation between expenditures and educational opportunity, the court also recognized that exact equality of expenditures is not constitutionally required, explaining: "More money

218. 487 P.2d 1241 (Cal. 1971).

219. See *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 809 (Ariz. 1994); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 92 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929, 939 (Cal. 1976); *Horton v. Meskill*, 376 A.2d 359, 368 (Conn. 1977); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 198 (Ky. 1989); *McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516, 552-53 (Mass. 1993); *Helena Elementary Sch. Dist. No. One v. State*, 769 P.2d 684, 687 (Mont. 1989); *Bismarck Pub. Sch. Dist. v. State*, 511 N.W.2d 247, 261 (N.D. 1994) (affirming a district court judgment that "the overall impact of the entire statutory method for distributing funding for education in North Dakota is unconstitutional" but lacking the super-majority required by the North Dakota Constitution to declare statutes unconstitutional); *Abbott v. Burke*, 575 A.2d 359, 377 (N.J. 1990); *Robinson v. Cahill*, 303 A.2d 273, 277 (N.J. 1973); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 144 (Tenn. 1993); *Seattle Sch. Dist. No. One v. State*, 585 P.2d 71, 97 (Wash. 1978); *Pauley v. Bailey*, 324 S.E.2d 128, 131 (W. Va. 1984); *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310, 332 (Wyo. 1980). *But see* *McDaniel v. Thomas*, 285 S.E.2d 156, 160 (Ga. 1981); *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 363 n.3 (N.Y. 1982) (recognizing this correlation but nonetheless ruling in favor of the state).

220. For a more thorough examination of this issue, see John Dayton, *Correlating Expenditures and Educational Opportunity in School Funding Litigation: The Judicial Perspective*, 19 J. EDUC. FIN. 167 (1994).

221. *Washakie*, 606 P.2d at 332 ("the quality of a child's education in Wyoming, measured in terms of dollars available for that purpose, is dependent upon the property tax resources of his school district").

222. *Campbell*, 907 P.2d at 1276-77.

223. See *supra* note 220.

224. *Campbell*, 907 P.2d at 1277.

may be needed in one school district to achieve quality education than in another” because of legitimate differences in costs.<sup>225</sup> To date, no state’s highest court has required exact equality in per pupil expenditures.<sup>226</sup>

One of the difficulties for plaintiffs in establishing the necessary correlation between expenditures and educational opportunity is the nebulous nature of educational opportunity. Because of the difficulty of advancing arguments related to academic abstractions of educational opportunity, plaintiffs in recent cases have focused on more tangible examples of harm to students. Evidence showing a demonstrable harmful effect on children resulting from lower expenditures provides a more tangible example of the inequities produced by the state’s system of funding than more academic and abstract expenditure-opportunity arguments. For example, In *Roosevelt v. Bishop* the Arizona Supreme Court recognized tangible harm resulting to children because of inadequate funding for facilities. The court found:

There are disparities in the number of schools, their condition, their age, and the quality of classrooms and equipment. Some districts have schoolhouses that are unsafe, unhealthy, and in violation of building, fire, and safety codes. Some districts use dirt lots for playgrounds. There are schools without libraries, science laboratories, computer rooms, art programs, gymnasiums, and auditoriums. But in other districts, there are schools with indoor swimming pools, a domed stadium, science laboratories, television studios, well stocked libraries, satellite dishes, and extensive computer systems.<sup>227</sup>

Courts in other recent school funding opinions have also recognized harm resulting from inadequate funding.<sup>228</sup> In *Campbell*, the Wyoming Supreme Court recognized educational harm related to funding disparities<sup>229</sup> and found that: “Educational research reports a relationship between the condition of buildings and quality of education.”<sup>230</sup> The court concluded: “We hold deficient physical facilities deprive students of an

225. *Id.* at 1246.

226. *See Dupree*, 651 S.W.2d at 93; *Serrano*, 557 P.2d 929 at 939; *Horton*, 376 A.2d at 376; *Hornbeck v. Somerset*, 458 A.2d 758, 780 (Md. 1983); *McDuffy*, 615 N.E.2d at 522; *Helena*, 769 P.2d at 691; *Robinson*, 303 A.2d at 297-98; *Pauley*, 255 S.E.2d at 865 n.7; *Washakie*, 606 P.2d at 336.

227. 877 P.2d at 808.

228. *See e.g.*, *Rose*, 790 S.W.2d at 197; *Helena*, 769 P.2d at 687; *Bismarck*, 511 N.W.2d at 261; *Abbot*, 575 A.2d at 395; *McWherter*, 851 S.W.2d at 144.

229. 907 P.2d at 1250-51.

230. *Id.* at 1255.

equal education opportunity and any financing system that allows such deficient facilities to exist is unconstitutional."<sup>231</sup>

Another theme that bears mentioning was the *Campbell* court's willingness to embrace the notion that the state funding formula must compensate for special needs.<sup>232</sup> State school finance systems over the past 20 years have been designed to accommodate varying needs of students and school districts by including a variety of weighing factors in the form of program cost differentials, cost of living adjustments, teacher training and experience indices, cost of education factors, sparsity factors and small school adjustments, just to name a few.<sup>233</sup>

There are two correlative issues that bear mentioning in this context. One is historical in nature, and relates to the evolution in school finance policy and the court's understanding of this process. In the late 1960s, legal challenges were filed in federal district courts in Illinois<sup>234</sup> and Virginia<sup>235</sup> against the states' school finance systems. Both cases involved claims from property-poor school districts that the funding formulas failed to consider the variety of educational needs existing within such school districts. In the Illinois case, the federal district court described educational needs as a "nebulous concept," and dismissed the case noting that there "are no 'discoverable and manageable standards'" to determine the constitutionality of the school finance system.<sup>236</sup> Similarly, the federal district court in Virginia held that "the courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the state."<sup>237</sup> By comparison, the Wyoming Supreme Court clearly was not deterred when confronted with the issue of special education needs in *Campbell*.

A second related issue which might generate concern for state legislatures throughout the United States was the court's ruling in *Campbell* that any cost differentials must not be based on political assumptions; rather, such differentials must be justified by actual cost

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231. *Id.* at 1275.

232. *Id.* at 1246 (citing *Washakie*, 606 P.2d at 336).

233. See generally, ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE 208-41 (1992) (where the authors discuss formula adjustments for student needs, education level, scale economies, and price). Adjustment factors in school finance formulas can be traced to the seminal work of PAUL R. MORT, THE MEASUREMENT OF EDUCATIONAL NEED (1924) (where the author developed a technique for deriving a measure of the educational need as a basis for the distribution of state aid to local school districts).

234. *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D.Ill. 1968), *aff'd* 89 S. Ct. 1197 (1969).

235. *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969).

236. *McInnis*, 293 F. Supp. at 329 n.4, 335.

237. *Burruss*, 310 F. Supp. at 574.

studies absent which they will risk being considered arbitrary and irrational.<sup>238</sup> As noted, since many state school finance programs make cost adjustments in the distribution of state aid ostensibly to compensate for legitimate cost differences, it is likely that legislatures may put to the test to show that the adjustments are based on actual cost analysis. Although it is not uncommon for state departments of education or legislative study committees to periodically undertake a variety of finance studies, the real challenge is for the legislature to actually use the results as a basis for public policy. If policy decisions must be made as a result of empirical cost analyses, real funding costs will likely increase and legislators will lose their ability to structure political compromises that often are part of lawmaking.

In what is probably the most far-reaching part of the *Campbell* decision, the court required a complete redesign of the state's public school system "to fulfill the constitutional command that 'equality of financing will achieve equality of quality.'"<sup>239</sup> Other states, most notably West Virginia<sup>240</sup> and Kentucky,<sup>241</sup> have had to deal with similar rulings by their highest courts. This suggests that a state's entire educational system is not immune from litigation, especially when the courts apply an expansive interpretation of the state's education article. It will be interesting to see whether the educational system redesign that has been ordered in other states is having its intended results. Additional compliance litigation certainly is not out of the question.

The Wyoming Legislature was told by the supreme court that financing education was its paramount duty and that financing education could not be done on a left-over basis.<sup>242</sup> Again, this raises significant questions of public policy involving the real competition among various state functions (e.g. prisons, highways, post-secondary education to name just a few), and the growing costs of these important services. It certainly could be argued that increased funding for public education would ultimately lower prison costs,<sup>243</sup> but this argument often falls on deaf ears as voters demand more prisons and longer sentences for convicted criminals.

238. *Campbell*, 907 P.2d at 1268-69.

239. *Id.* at 1279.

240. *Pauley v. Bailey*, No. 75-1268, Opinion, Findings of Fact and Conclusions of Law and Order, at 221 (Cir. Ct. Kanawha County, W.Va., filed May 11, 1982) (*on remand following Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979)).

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

242. *Campbell*, 907 P.2d at 1279.

243. See Charles S. Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401, 403 (1991) ("School failure is associated with incarceration, welfare dependency, and bad health, all of which drain the public coffers.").

In conclusion, the vast majority of school finance-related issues raised in *Campbell* are not unique to Wyoming. As this article demonstrates, many other states have confronted these issues—often with mixed results in terms of the ultimate outcomes in each case. Moreover, it is clear that these issues will not go away, and that courts in other states will continue to grapple with the complex issues surrounding school finance policy. Ultimately, however, these issues will play out in a much broader policy arena.<sup>244</sup>

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244. The court ordered that the Wyoming legislature achieve compliance with the *Campbell* decision by no later than July 1, 1997. *Campbell*, 907 P.2d at 1280. Although public education and school finance received substantial attention throughout the course of the 1996 legislative budget session, essentially the state's legislative response to date has consisted of the creation of a select committee charged with drafting a revamped school finance system for consideration and adoption prior to the court's deadline. Jennifer Hafner, *Process to Build New Education Fund System May Cost \$550,000*, RIVERTON RANGER, Jan. 30, 1996, at 1.