



CAMPAIGN FOR FISCAL EQUITY, INC.

**Studies in Judicial Remedies  
and Public Engagement**

**RAPID RESPONSE, RADICAL REFORM:  
THE STORY OF SCHOOL FINANCE LITIGATION  
IN VERMONT**

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Michael A. Rebell, Editor-in-Chief  
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This paper is one in a series of case studies of education finance litigations in various states. Through these studies, we hope to understand how court-ordered remedies were implemented and to determine what role, if any, public engagement processes played in these events. Specifically, we aim to test the hypothesis that reform initiatives are most likely to succeed in states where citizens have been involved in the remedial policy-making process. For that reason, the studies will encompass a wide range of reform experiences, including those where there was much public engagement and those where there was none.

The term “public engagement” is currently used to describe a wide range of activities. CFE’s working definition of public engagement is a collaborative process in which a diverse range of individuals work together to arrive at solutions to complex social problems that a large majority of them can accept. Our hope is that this series of papers will help shape and refine our understanding of public engagement and its uses as a tool for change.

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**RAPID RESPONSE, RADICAL REFORM:  
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LITIGATION IN VERMONT**

by Michael A. Rebell  
and Jeffrey Metzler<sup>1</sup>

**INTRODUCTION**

In February of 1997, barely four months after the Vermont Supreme Court declared that the state's education finance system violated the state constitution,<sup>2</sup> the state legislature enacted the Equal Educational Opportunity Act of 1997, known generally as "Act 60."<sup>3</sup> The new law replaced most local property taxes with a uniform, statewide property tax, and established a per-pupil block grant for every district. Act 60 also established a controversial "sharing pool" requiring affluent districts that chose to spend amounts above the base block grant to share part of their excess revenues with property-poor districts.

While some observers praised this approach "as one of the most aggressive and fairest ways to achieve educational equity,"<sup>4</sup> others dubbed

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<sup>2</sup> *Brigham v. State*, 692 A.2d 384 (Vt. 1997).

<sup>3</sup> 1997 Vt. Acts & Resolves 60.

<sup>4</sup> David Goodman, *America's Newest Class War*, MOTHER JONES, Sept./Oct. 1999, at 68, 70.

the sharing pool "the shark pool,"<sup>5</sup> and some have described Act 60 as "Marxism." The majority of Vermonters appear to support the new law, but there has also been considerable opposition in the form of lawsuits, civil disobedience, and attempts to circumvent the law through private funding stratagems.<sup>6</sup>

How did a small, largely rural New England state come to adopt one of the most radical fiscal equity remedies in the country? How could such far-reaching legislation be enacted only four months after the court's decision, when similar efforts in others states have taken years? Why did the Vermont Supreme Court hand down a powerful decision on the merits barely four months after initial filings without requiring any of the facts to be developed at a trial, and why did that decision establish important new precedents for defining an "adequate education" when plaintiffs did not even raise an adequacy claim? Finally, given the history of extensive town-meeting democracy in Vermont, what role did public engagement processes play in this rapid remedial response? These are the intriguing questions that this monograph will attempt to answer.

## I. EARLY LEGISLATIVE REFORM ATTEMPTS

Like most states, schools in Vermont traditionally were funded primarily through local property taxes. Each district determined its own school budget and set its own property tax rate. The funds generated by the

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<sup>5</sup> Joetta Sack, *In Vermont Funding Shakeup, A Bitter Pill for Gold Towns*, EDUC. WEEK, Oct. 28, 1998.

<sup>6</sup> See, *Stowe Citizens for Responsible Gov't v. State*, 730 A.2d 573 (Vt. 1999); Joetta Sack, *News in Brief: Vt. Sues 'Gold Towns' Over Finance Law*, EDUC. WEEK, Jan. 20, 1999; Dan Seufert, *Sherbourne Voters OK Plan of Act 60 Defiance*, RUTLAND HERALD, June 2, 1998 at A1; Joetta Sack, *In Vt. Funding Shakeup, A Bitter Pill for Gold Towns*, EDUC. WEEK, Oct. 28, 1998; Kathleen Burge, *Vt. Towns Protest School Tax Plan; Law Forces Sharing of Property Levies*, BOSTON GLOBE, March 3, 1998; Stephen Greene, *Big Fund Hits a Nerve in Vermont*, CHRONICLE OF PHILANTHROPY, April 22, 1999.

local tax rate depended on the property values within the district. Thus, in districts where property values were very high, a given tax rate could generate substantially more revenue for education than in districts where property values were low. A major purpose of state aid was to attempt to partially offset this disparity.

In 1969, the Vermont legislature passed a law that required the state's contribution to education spending to be at least 40% of total state-wide education expenditures.<sup>7</sup> However, the law provided no mechanism to ensure that the state legislature would actually meet this target. Education spending was subject to annual budgetary struggles, fiscal pressures, and competing budgetary priorities. As a result, funds allocated for education generally fell substantially below the required 40% level. In 1997, for example, less than 30% of educational funding came from state sources, compared with a national average at the time of over 50%.<sup>8</sup>

A further attempt to reform education funding in Vermont came in 1987, when the legislature adopted a new "foundation program" at the urging of Governor Madeleine Kunin.<sup>9</sup> This legislation authorized the state education department to determine the minimum spending levels necessary to meet minimum state standards, and declared that any district with an average tax rate whose spending was below that level would receive the difference in state aid. The goal of the law was to "link [] state general aid to the provision of a good, basic education."<sup>10</sup>

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<sup>7</sup> 1969 Vt. Acts & Resolves 54.

<sup>8</sup> NATIONAL CENTER FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., COMMON CORE DATA: NATIONAL PUBLIC EDUCATION FINANCIAL SURVEY (1996-97).

<sup>9</sup> 1987 Vt. Acts & Resolves 84. See also Robert Rothman, *Vermont Lawmakers Approve New Aid Formula*, EDUC. WEEK, June 3, 1987 (describing the 1987 law). Governor Kunin subsequently became the Deputy Secretary of the United States Department of Education under President Clinton.

<sup>10</sup> Rothman, *supra* note 9 (quoting then Commissioner of Education Steven Kaagan).

While the measure was hailed as an "historic" reform at the time, its weaknesses soon became apparent. The advent of a recession in the late 1980s resulted in a leveling of state aid for education, despite increasing needs. As localities came to rely more and more on local property taxes, legislators from wealthy districts lost any incentive to approve substantial increases in foundation funding. Legislative leaders soon came to the conclusion that "unless you had a formula in which every representative had something at stake, there never would be adequate funding."<sup>11</sup> Failure to maintain an adequate foundation level accelerated the disparities between property-rich and property-poor towns. In 1995, for example, the town of Richford's \$140,000 per-student tax base limited spending to \$3,734 per pupil, while the town of Peru spent \$6,476 per student from a \$2.2 million per-pupil base.<sup>12</sup>

By 1992, five years after the implementation of the foundation formula, it was clear that further reform was necessary. In an informal poll of the Democratic caucus following the '92 election, approximately 90% of legislators identified education finance reform as their number one priority.<sup>13</sup> Various legislative committees began to develop reform concepts, and formal and informal hearings were held throughout the state.<sup>14</sup> Governor Howard Dean appointed a Commission on Educational and Municipal Financing Reform, which he charged with proposing alternative education finance plans.<sup>15</sup> The leadership in the Vermont House of Representatives

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<sup>11</sup> Telephone Interview with Paul Cillo, former Majority Leader of the Vermont House of Representatives (Aug. 9, 2000).

<sup>12</sup> *Brigham v. State*, 692 A.2d 384, 389; See also Robert C. Johnston, *Court Orders Lawmakers to Fix Vt. School Funding Formula*, EDUC. WEEK, Feb. 12, 1997.

<sup>13</sup> Cillo *supra* note 11.

<sup>14</sup> Telephone Interview with John Freidin, former chairman of House Education Committee (August 4, 2000).

<sup>15</sup> Cillo, *supra* note 11. According to Cillo, a bi-partisan approach to education finance reform had been engineered by the former Democratic Speaker of the House, Ralph Wright, and the Republican Governor, Richard Snelling. Snelling's sudden death and the accession of his Democratic lieutenant Governor, Howard Dean, caused the coalition to sunder, and thereafter

also began to focus on developing reform proposals.

In 1994, the Democratically-controlled House passed a far-reaching education finance reform bill.<sup>16</sup> It would have replaced a portion of the local property taxes with local income taxes and a statewide tax on nonresidential property and vacation homes; the bill also would have established a statewide teachers' contract and paid all teachers through state funds. This last provision, proposed by House Speaker Ralph Wright, would have guaranteed that the state contribution to education would equal at least the proportion of school budgets represented by teachers' salaries, which at that time was 53%.<sup>17</sup>

The bill underwent significant changes in the Republican-controlled Senate, where both the wealthy towns and the teachers' union teamed up to oppose the House plan. All three major provisions of the House plan were dropped and replaced with a "regional equity" approach. Property tax rates within a region would have been constant, but each region in the state could have imposed a different property tax rate. In conference, the House and Senate representatives were unable to find an acceptable compromise, and the legislature adjourned that year without enacting any school finance reform measure.<sup>18</sup>

Many state leaders blamed this failure to reach a compromise on partisanship. "The demise of the bill had more to do with political muscle

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attempts at education finance reform took on an increasingly partisan tone. Cillo also stated that the Governor's Commission reached a political impasse on issues involving proposed income tax increases, which the Governor strongly opposed, and finally issued a set of weak recommendations which "went nowhere." *Id.*

<sup>16</sup> 1994 Vt. H.R. 541.

<sup>17</sup> See Lonnie Harp, *Vt. House Clears Plan to Encourage Equity*, EDUC. WEEK, Jan. 26, 1994; William Mathis, *Interest Group Influences in Advancing and Inhibiting Educational Finance Reform: The Politics of Equity in Vermont's Act 60*, CIVIL SOCIETY IN THE UNITED STATES (forthcoming 2000) (manuscript at 12, on file with authors).

<sup>18</sup> Lonnie Harp, *Vt. School-Finance Bill Dies As Session Ends on Partisan Note*, EDUC. WEEK, June 22, 1994.

flexing then the substance of the issue," said Democratic Senator Jeb Spaulding. Democrats in the House accused the Republican-controlled Senate of appointing "an obstructionist panel of negotiators who would not bend."<sup>19</sup> Attorney Robert Gensburg noted that "Democrats were always supporting equalizing education funding, so Republicans were always opposing it."<sup>20</sup> One Republican, however, suggested that "Democrats were convinced that a statewide property tax was the way to go, while Republicans were flat out against it because it is inconsistent with local control."<sup>21</sup>

Determined to pass some reform measure the next year, the House proposed a new approach that was "designed to win approval from a Republican Senate and a reluctant Governor."<sup>22</sup> This proposed bill<sup>23</sup> relied exclusively on local property taxes, but it would have "power-equalized" local efforts by guaranteeing, through state aid that equal tax rates in any district would result in equal revenue yields.<sup>24</sup> The Senate, however, failed to vote on the measure and instead appointed a special committee to study the issue. The committee's report, "Challenge to Change," took a completely different direction; it proposed cutting the education budget by \$100 million by increasing the pupil/teacher ratio from 13:1 to the national average of 18:1. In the 1996 legislative session, this plan failed to even pass in the Senate.<sup>25</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> Telephone Interview with Robert Gensburg, Plaintiffs' Attorney in *Brigham v. State* (July 28, 2000)[hereinafter Gensburg Interview II]. A second factor in the bill's ultimate defeat may have been mobilized opposition to the statewide collective bargaining provision by the teachers union and by affluent districts and business interests.

<sup>21</sup> Telephone Interview with Walter E. Freed, Republican member of Vt. House of Representatives (Sept. 15, 2000).

<sup>22</sup> Mathis, *supra* note 17, at 14.

<sup>23</sup> 1995 Vt. H.R. 351.

<sup>24</sup> Cillo, *supra* note 11; Mathis, *supra* note 17, at 14.

<sup>25</sup> Cillo, *supra* note 11; Mathis, *supra* note 17, at 14.

In the 1996 elections, Vermont Democrats gained control of the Senate and retained control of the House. Some observers attributed the Republican defeat primarily to their position on education finance reform.<sup>26</sup> Democratic control of the state house and of both houses of the legislature significantly changed the political dynamic for education funding reform in the 1997 legislative session, as did the dramatic and largely unexpected decision of the state Supreme Court, which was handed down on February 5, 1997, early in that legislative session.

## II. THE LITIGATION

### A. Origins of the Suit

In late 1994, frustrated with the legislature's failure to correct what he perceived as longstanding educational inequities, Robert Gensburg, a resident of one of the state's poorest school districts of the state and a member of Vermont's American Civil Liberties Union (ACLU) chapter, recommended that the group bring a lawsuit challenging the state funding system.<sup>27</sup> The ACLU's board of directors agreed, and a team of six lawyers volunteered to take on the case. After researching the Vermont constitution's education and equal protection clauses, the attorneys decided to bring three separate claims: one on behalf of school children from property poor districts, one on behalf of taxpayers from property-poor districts, and one on behalf of the districts themselves.

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<sup>26</sup> Gensburg Interview II, *supra* note 20. See also Cillo, *supra* note 11 ("I was on a radio talk show with [Republican Senator] Sara Gear and people were just pounding her [for blocking education finance reform]").

<sup>27</sup> Telephone Interview with Robert Gensburg, Plaintiffs' Attorney in *Brigham v. State* (Sept. 1, 1999)[hereinafter Gensburg Interview I]; Robert Gensburg, *The Road to Equal Educational Opportunity for Vermont School Children*, 22 VT. L. REV. 1, 2 (1997)[hereinafter Gensburg, *The Road to Equal Educational Opportunity*].

Using as lead plaintiff a first-grader whose mother was a member of a local school board, the ACLU filed *Amanda Brigham et al. v. State of Vermont* on March 10, 1995.<sup>28</sup> The students' claim was that the education finance system "deprived them of their right under the Vermont and federal constitutions to the same educational opportunities as students who reside in wealthier school districts."<sup>29</sup> The taxpayers' claim was that the finance system "compel[led] them to contribute more than their just proportion of money to fund education."<sup>30</sup> Finally, the districts' claim was that they were deprived "of the ability to raise sufficient money to provide their students with educational opportunities equal to those afforded students in wealthier school districts, and compels them to impose disproportionate tax rates in violation of the United States and Vermont Constitutions."<sup>31</sup>

## B. The Legal Arguments: Equity Plus Implied Adequacy

In 1973, the United States Supreme Court, holding that education is not a fundamental interest under the federal Constitution, refused to invalidate Texas' education finance system, despite its acknowledged inequities.<sup>32</sup> Since education was primarily a state responsibility, advocacy attorneys then turned their attention to the state courts. Although plaintiffs proved successful in the initial litigations in states like California, New Jersey and West Virginia, by the early '80s, defendants were winning about

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<sup>28</sup> 692 A.2d 384 (Vt. 1997). Given the rapidity of the proceedings and final court decision in *Brigham*, it is somewhat ironic that the attorneys and advocates behind the suit sought a first grader as prime plaintiff because they wanted to insure that the case would not be mooted by the plaintiffs' graduation in the event of protracted court proceedings. Telephone Interview with Bill Mathis, Superintendent, Rutland Northeast Supervisory Union (Sept. 3, 1999).

<sup>29</sup> *Brigham v. State*, 692 A.2d 384, 386 (Vt. 1997).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

two-thirds of the state court litigations.<sup>33</sup> During the next decade, however, the outcome of these cases dramatically shifted, as the plaintiffs came to prevail in about two-thirds of the reported state highest court decisions.<sup>34</sup>

One of the prime explanations for this dramatic turnabout in litigation outcomes is that in the late '80s plaintiffs began to emphasize students' entitlement to an "adequate education" under clauses in state constitutions, which guaranteed students substantive rights to a "thorough and efficient" education or a "sound basic education," in contrast to the fiscal equity claims based on constitutional equal protection clauses that had predominated in the earlier litigations.<sup>35</sup> The adequacy approach, which parallels standards-based reform initiatives being undertaken by most state education departments, provided courts more manageable judicial standards for devising and monitoring remedies than the fiscal equity approach, which involved the courts in complex and often arcane property tax issues.<sup>36</sup>

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<sup>33</sup> Specifically, between 1979 and 1988, defendants prevailed in 9 of the 12 major decisions of the state highest courts. See Michael A. Rebell, *Fiscal Equity Litigation and the Democratic Imperative*, 24 J. EDUC. FIN. 23, 26.

<sup>34</sup> Between 1989 and 1999, plaintiffs prevailed in 17 of 26 decisions of the highest state courts. *Id.* at 27; MICHAEL A. REBELL, EDUCATION ADEQUACY LITIGATION AND THE QUEST FOR EQUAL EDUCATIONAL OPPORTUNITY, STUDIES IN JUDICIAL REMEDIES AND PUBLIC ENGAGEMENT (Campaign for Fiscal Equity, 1999) at 7 [hereinafter Rebell, EDUCATION ADEQUACY LITIGATION].

<sup>35</sup> Specifically, 15 of the 17 plaintiff victories in recent years have involved substantial or partial adequacy claims. Rebell, EDUCATION ADEQUACY LITIGATION, *supra* note 34, at 9.

<sup>36</sup> See *id.* at 7; Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of Fiscal Equity Litigation* in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88, 114 (Jay Heubert, ed., 1999); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform* 48 VAND. L. REV 101 (1995); Allen W. Hubsch, *The Emerging Right To Education Under State Constitutional Law*, 65 TEMPLE L. REV. 1325 (1992).

Plaintiffs' claims in *Brigham* were based on the Vermont Constitution's "Common Benefits Clause,"<sup>37</sup> which has generally been held to be coextensive with the Equal Protection Clause of the United States Constitution.<sup>38</sup> Plaintiffs also focused on the Constitution's Education Clause.<sup>39</sup> In contrast to pleadings in other recent state court litigations which invoked the state Constitution's education clause to bolster an adequacy claim, here the plaintiffs' primary purpose in relying on the education clause was to establish that education is a "fundamental interest" which should be entitled to a higher level of judicial scrutiny under standard equal protection analysis.<sup>40</sup>

In planning their litigation strategy, the plaintiffs deliberately avoided the adequacy issue "like the plague."<sup>41</sup> There were three basic reasons for this position. The first was plaintiffs' belief that there was a well-developed doctrine of equal protection law under the state constitution which could be used to good advantage in this case.<sup>42</sup> By way of contrast, they believed that adequacy claims represent:

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<sup>37</sup> The Common Benefits Clause states that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." VT. CONST., ch. I, art. 7.

<sup>38</sup> *Brigham v. Vermont*, 692 A.2d 384, 395 (Vt. 1997).

<sup>39</sup> The Education Clause states, in relevant part: "Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth." VT. CONST., ch. II, §68.

<sup>40</sup> Plaintiffs also brought a claim under the U.S. Constitution's Equal Protection clause. However, based on the U.S. Supreme Court's decision in *Rodriguez*, the trial judge dismissed this claim and the plaintiffs did not appeal. *Brigham v. State*, 692 A.2d 384, 386-87 (Vt. 1997).

<sup>41</sup> Gensburg, *The Road to Equal Educational Opportunity*, *supra* note 27, at 17.

<sup>42</sup> Interview with Robert Gensburg (Oct. 23, 2000).

bad equal protection law . . . . It is not an equal educational result that a person is entitled to, but it is the equal educational opportunity that the state or the federal government cannot take away . . . . So, if the State of Vermont provides an adequate education to the students going to school in Hardwick and provides a gold-plated education to students going to school in Killington, the state is not treating similarly circumstanced people equally [as equal protection requires].<sup>43</sup>

This view reflects an assumption that “adequacy” implies an unacceptably low, minimal level of education and that winning the right to an adequate education would be a pyrrhic victory. Frustrated by the historically inadequate levels of funding provided under Vermont’s foundation funding system, plaintiffs assumed that an “adequate” education was roughly equivalent to the unacceptably low foundation level that had existed in Vermont in recent years, and not to the “high minimum” levels that had been part of the remedies in adequacy cases in other states.<sup>44</sup> Related to this assumption was the general impression that Vermont had a relatively weak education clause.<sup>45</sup> Since they considered their equal

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<sup>43</sup> Gensburg, *The Road to Equal Educational Opportunity*, *supra* note 27, at 17-18.

<sup>44</sup> See e.g. Deborah A. Versteegen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education*, 24 J. EDUC. FIN. 51, 67 (1998) (“... the concept of an adequate education emerging from state courts invalidating school finance systems goes well beyond a basic or minimum educational program that was considered the acceptable standard two decades ago.”); William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC POL’Y 376 (1994).

Gensburg stated that such a “high minimum” level, rather than full equality, probably would have been an acceptable result for the plaintiffs: while “technically I do have a problem with wealthy districts being able to spend more [than other districts], personally I don’t really care . . . . We wanted poor districts to get enough to provide a good education for their children . . . . If the foundation plan had been working, and allocating money to kids, we probably would not have brought the suit.” Gensburg Interview II, *supra* note 20.

<sup>45</sup> The Assistant Attorney General who tried the case stated that: “[o]f all the various education clauses around the country, Vermont has one of the weakest.” Telephone Interview with Ronald Shems, Vt. Assistant Att’y General (July 31, 2000). See also Telephone Interview with Martha Heath, Chairperson of Vt. House of Representatives Educ. Comm. (August 4, 2000) (“Many felt the Vermont Constitution was not strong enough to win a lawsuit”);

protection claims to be more potent, plaintiffs wanted to limit the arguments to this issue.<sup>46</sup>

The second reason plaintiffs avoided an adequacy claim was that no one really knew whether or not children in Vermont were receiving an adequate education. Under the Voluntary Comprehensive Assessment System in effect at the time, there was no reliable data available on relative student performance levels. As plaintiffs' counsel noted, "there are no standardized tests that you can use in Vermont [to compare student outcomes]. We do have a portfolio system for measuring the progress of the students in the fourth and eighth grades [but] this score has more to do with the progress of the student than it does with comparing outcomes between students."<sup>47</sup> When asked if students in Vermont were receiving an adequate education, defense counsel replied that it depended on which benchmark one used. Under the Supreme Court's approach in *Rodriguez*, which called for preparing students to participate in the political process, or even under a higher standard, he believed that students were receiving an adequate education. He conceded, however, the state's concern that if the state standards were held to represent an adequate education, not all of the plaintiff districts would meet this test.<sup>48</sup>

This difficulty in defining an adequate education and then determining who was receiving it relates to the plaintiffs' third reason for avoiding

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Telephone Interview with Geoffrey Yudien, Vt. Assistant Att'y General (July 28, 2000)(Vermont Constitution contained "some of the weakest language pertaining to education relative to other state constitutions").

<sup>46</sup> Gensburg Interview II, *supra* note 20.

<sup>47</sup> Gensburg, *The Road to Equal Educational Opportunity*, *supra* note 27, at 16-17. In 1996, Vermont began a Comprehensive Assessment System (CAS) for testing in English and Math. However, this program was not fully operating until the 1997-98 school year.

<sup>48</sup> Yudien, *supra* note 45. Results from the preliminary CAS of 1996-97 indicated that only 18% of fourth graders were achieving the state standard or better in mathematical concepts, and only 59% were achieving the standard or better in basic reading comprehension. By 1998-99, those numbers had improved to 38% and 86% respectively. See VT. DEP'T OF EDUC., STATE OF VERMONT COMPLETE SCHOOL REPORT, <http://crs.uvm.edu/cfusion/schlprt99/vermont.cfm>.

adequacy issues: plaintiffs were not prepared for a long and complicated trial.<sup>49</sup> Plaintiffs knew they would need to bring in experts to define an adequate education and to evaluate districts around the state to determine whether or not the students were meeting the standards. "To prove inadequacy would be a six week trial instead of a one-week trial. How would I prove inadequacy? I do not know how to do it."<sup>50</sup>

Despite their initial impression that the Constitution did not give them much to work with,<sup>51</sup> plaintiffs' counsel developed an innovative argument to try to establish that education should be considered a "fundamental interest" entitled to strict scrutiny for purposes of equal protection analysis. Gensburg invoked the expansive 18th century notion of "virtue" in interpreting the first clause of the Common Benefits Provision to bolster his arguments that the language in the second clause, which required that "a competent number of schools ought to be maintained in each town," should be interpreted to imply substantive educational rights. He argued that these two provisions should be read together because the framers saw a connection between education and good citizenship.<sup>52</sup> This argument was expanded by the Vermont Supreme Court to become the basis for what turned out, in essence, to be a significant adequacy holding in its ultimate decision.

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<sup>49</sup> Gensburg Interview II, *supra* note 20. There were also some indications that plaintiffs lacked the resources to support a long trial.

<sup>50</sup> Gensburg, *The Road to Educational Opportunity*, *supra* note 27, at 18. Defense Counsel also were not eager to "have a trial with all the vignettes about kids using 20-year old textbooks etc." Yudien, *supra* note 45.

<sup>51</sup> See Gensburg, *The Road to Equal Educational Opportunity*, *supra* note 27, at 4 (1997) ("I felt my heart sink because this clause does not say very much"). After research and discovery, however, Gensburg "began to have a pretty high degree of confidence that the Vermont education funding system did violate the equal protection of the laws, and that the plaintiffs in this case were going to prevail." *Id.* at 11.

<sup>52</sup> See *Id.* at 3-5 (citing VT. CONST., ch. II, §68).

## C. The Supreme Court Decision: Adequacy Plus Equity

*Brigham v. State* never went to trial. After discovery, the state filed a motion for summary judgment. The trial court upheld the motion in part by 1) dismissing the plaintiffs' federal equal protection claim, 2) ruling that the Common Benefits Clause did not render education a "fundamental interest," and 3) holding that the Education Clause did not provide "any rights ... to Vermont citizens."<sup>53</sup> At the same time, however, the trial court denied summary judgment on the questions of whether the state's education finance system was rationally related to a legitimate governmental purpose, and whether the finance system compelled taxpayers in less affluent communities to contribute a disproportionate amount of their income to fund education. Both parties filed interlocutory appeals of this decision to the Vermont Supreme Court.

Although both sides decided to take the case up to the Supreme Court, defense counsel later acknowledged that they were "shocked" that plaintiffs agreed to do so. Defendants thought they would be better off with "a sanitized record" than with a trial transcript with vignettes about students having inadequate resources.<sup>54</sup> Plaintiffs sought an immediate appeal because they thought the statistical case on inequities was clean and strong,<sup>55</sup> and possibly because the lead counsel Gensburg, being a sole practitioner who took the case on a *pro bono* basis, could not afford a long trial.<sup>56</sup> In any event, the expectation was that the Supreme Court would likely set some clear standards and then remand the case for trial. There was little expectation that the Court would issue a final ruling on the merits of the

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<sup>53</sup> *Brigham v. State*, 392 A.2d 384, 387 (Vt. 1997)(emphasis in original).

<sup>54</sup> Yudien, *supra* note 45.

<sup>55</sup> Gensburg Interview I, *supra* note 27.

<sup>56</sup> Yudien, *supra* note 45.

case.<sup>57</sup>

In fact, the Supreme Court did enter a final declaratory judgment in favor of the student and school district plaintiffs, explicitly basing its decision on both the education and equal protection clauses of the state constitution.<sup>58</sup> The Court ordered the legislature to take appropriate actions to "make educational opportunity available on substantially equal terms,"<sup>59</sup> and authorized the trial court to retain jurisdiction until "valid legislation is enacted and in effect."<sup>60</sup>

The Supreme Court's ruling was surprising on two counts. First was the speed, strength, and unanimity of the decision. Issued only four months after initial filing, it invalidated the entire state education funding system on the basis of a motion for summary judgment. Gensburg attributed this result to the tradition of liberal Republicanism in Vermont, epitomized by Chief Judge Allen, combined with the public interest background of the younger judges.<sup>61</sup> Assistant Attorney General Yudien pointed to the "legislative gridlock that had prevented change" which, he believed, caused the Court to believe that it must act.<sup>62</sup> Second, the Court's decision emphasized the importance of the Education Clause not as a subsidiary aspect of the equal protection claim, but as a major substantive component

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<sup>57</sup> *Id.* Yudien put the odds that the supreme court would issue an outright decision at 10-15%.

<sup>58</sup> *Brigham*, 692 A.2d at 397. It sent only the taxpayer claims back to the trial court for further proceedings. *Id.* at 398. To date there have been no further proceedings on the taxpayer claims.

<sup>59</sup> *Id.* at 398. The Court declined to rule on the issue of whether the taxpayer plaintiffs had a right to tax-rate equity, instead remanding the issue for any further proceedings necessary. The Court also remanded the case so that jurisdiction could be retained until valid legislation had been enacted.

<sup>60</sup> *Id.*

<sup>61</sup> Gensburg Interview I, *supra* note 20.

<sup>62</sup> Yudien, *supra* note 45.

of the ruling; in doing so, the Court established an important precedent on some of the most significant education adequacy issues, which had been raised but never decided in the United States' Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.<sup>63</sup>

*Rodriguez* was a close 5-4 decision. In his dissenting opinion, Justice Thurgood Marshall had argued that education should be considered a fundamental interest because of "the close nexus between education and our established constitutional values with respect to freedom of speech and participation in the political process."<sup>64</sup> Justice Powell, writing for the majority, agreed that "the electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate."<sup>65</sup> He noted, however, that since no evidence had been presented to refute defendants' claim that every child in the state of Texas was receiving an adequate education, if "some identifiable quantum of education . . . is necessary . . . for full participation in the political process, [there] is no indication that the present levels of educational expenditure in Texas provide an education that fall short . . ." of that standard.<sup>66</sup>

*Brigham* was the first state supreme court ruling to explore in some depth the specific relationships between adequacy of education and full participation in the political process raised in *Rodriguez*. The Court began its discussion by stating that "in Vermont the right to education is so integral to our constitutional form of government and its guarantees of political and civil rights, that any statutory framework that impinges upon the equal enjoyment of that right bears a commensurate heavy burden of justification."<sup>67</sup> The Court then examined in detail the history of the

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<sup>63</sup> 411 U.S. 1 (1973).

<sup>64</sup> *Id.* at 115, n.74.

<sup>65</sup> *Id.* at 36.

<sup>66</sup> *Id.* at 1303.

<sup>67</sup> *Brigham*, 692 A.2d at 390.

education clause and its relationship to political rights and civic responsibilities.

The Court first noted the “remarkable” fact that the drafters of the constitution for the new state of Vermont in 1777 chose to include a right to public education as the only governmental service accorded constitutional stature at a time when there were relatively few state-supported schools in existence.<sup>68</sup> Vermont’s unique, if short-lived, history as an independent republic before becoming one of the United States rendered the fostering of civic virtues “not the empty rhetoric it often seems today [but] an urgent necessity – a matter literally affecting the survival of the new Republic.”<sup>69</sup> Building on plaintiffs’ analysis of the current education clause, the Court further explained that in 1786, the virtue and education clauses were combined to form a single section, an amalgamation that “was perfectly consistent with the commonly held view of the framers that virtue was essential to self-government and that education was the primary source of virtue.”<sup>70</sup> Based on this history, the Court rejected the contention that these clauses were meant to be “aspirational ideals”<sup>71</sup> and held that education is “essential to self-government.”<sup>72</sup>

Holding that the conceded sharp disparities in funding among the school districts in the state must be evaluated against this legal and historical

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<sup>68</sup> *Id.* at 391-392. University of Vermont Law Professor Peter Teachout disputed this statement. According to him, the original Vermont Constitution included 15 other services. Teachout argues further that the Vermont framers were not really “compelled to create an entirely new constitution” but rather took their constitution “lock, stock and barrel from the Pennsylvania Constitution of 1776.” Peter Teachout, *No Simple Disposition: The Brigham Case and the Future of Local Control Over School Spending in Vermont*, 22 VT. L. REV. 21, 41 (1997).

<sup>69</sup> *Brigham*, 692 A.2d at 392.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 394.

<sup>72</sup> *Id.* at 393.

background,<sup>73</sup> the Court did not dwell on the traditional equal protection arguments. It alluded briefly in a few paragraphs to the three-tiered equal protection analysis that usually consumes pages of analysis in fiscal equity decisions<sup>74</sup> and held that “[l]abels aside, we are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities evident from the record.”<sup>75</sup> The Court then concluded that because of the conceded broad disparities in funding available to students in property-poor and property-rich districts, no further trial was necessary in order to declare the existing system unconstitutional.

The Court’s expansive discussion of the importance of education to prepare students for political participation in democratic self-government established a substantive benchmark for analyzing the extent of the educational opportunities that must be made available to meet constitutional requirements in the 21st century. Since the case was not remanded for trial, however, there was no opportunity to determine the extent to which Vermont school districts were providing an education that met this standard or what level of resources would be necessary to do so.

The Court’s decision did, however, make clear that the level of adequacy germane to contemporary needs is more than a traditional minimum educational level.<sup>76</sup> It also emphasized the notion, first put forward by Justice Marshall in his dissent in *Rodriguez*, that there must be an egalitarian dimension to the amount of educational opportunity provided to all citizens in a democratic society.<sup>77</sup> Presumably, it was because the

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<sup>73</sup> *Id.* at 395.

<sup>74</sup> *Id.* at 396. For example, in *Rodriguez*, the discussion of the three-tiers consumed 27 pages of the majority decision and 7 of the dissent. 411 U.S. at 18-45, 117-125.

<sup>75</sup> *Brigham*, 692 A.2d at 396-97.

<sup>76</sup> “Yesterday’s bare essentials are no longer sufficient to prepare a student to live in today’s global marketplace.” *Id.* at 397.

<sup>77</sup> “To keep a democracy competitive and thriving, students must be afforded equal access to all that our education system has to offer.” *Id.* See also *Id.* at 396-7, quoting

“minimal level”<sup>78</sup> of opportunity provided to students under the foundation program then in effect was so far below the range permitted by this egalitarian criterion that the Court felt justified in issuing a final ruling without requiring the detailed analysis of actual education needs in relation to actual funding levels that would have been provided by a trial.

### III. THE RAPID REMEDIAL RESPONSE

The *Brigham* decision hit the legislature like an “atom bomb.”<sup>79</sup> Two days after the trial, plaintiffs’ counsel Robert Gensburg appeared before the House Democratic Caucus and received a standing ovation for breaking the political gridlock.<sup>80</sup> Within 4 months of the decision, the governor signed Act 60 into law.

Why was the legislature able to act decisively with such lightening speed? For one thing, the legislators were clearly poised for action. As discussed above, education finance reform had been a major pre-occupation of the legislature for years. Legislators had studied and debated the issue at length and were fully familiar with the concepts, the problems and the possibilities. As Paul Cillo, the House Majority leader at the time, put it:

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*Rodriguez*, 411 U.S. at 89 (Marshall, J. dissenting) (“The Equal Protection Clause is not addressed to . . . minimal sufficiency but rather to the unjustifiable inequalities of state action.”)

<sup>78</sup> *Brigham*, 692 A.2d at 397. The Court’s decision required “substantial equality of educational opportunity throughout Vermont,” but not “precisely equal per-capita expenditures.” *Id.* The Court further explained that “Equal opportunity does not . . . necessarily prohibit cities and towns from spending more on education if they choose, but it does not allow a system in which educational opportunity is necessarily a function of district wealth.” *Id.*

<sup>79</sup> Yudien, *supra* note 45.

<sup>80</sup> *Id.*; Mathis, *supra* note 28; Gensburg Interview II, *supra* note 20.

We had been studying [fiscal equity reform] since 1991 and the principles used by the Court were the exact principles that we were using in the design of our plans. We were ready . . . . It did not take us long to put together a plan that would survive the political climate and satisfy the *Brigham* decision.<sup>81</sup>

A second reason was that as a result of the 1996 election, the Democrats now controlled both houses of the legislature and were in a position to enact the bill on their own and overcome the political impasses of past sessions. Despite their domination of the entire legislature, the Democrats had not acted forcefully at the beginning of the session on fiscal equity reform, which had been a major issue in the election. Why, despite their control of the statehouse and both houses of the legislature, were the Democrats seemingly incapable of moving rapidly on the reform issue without a judicial mandate? The reason apparently was that although Democrats were eager for reform, there were serious intra-party differences on the form it should take. According to John Freiden, Vice-Chairman of the House Ways and Means Committee at the time, both the Governor and the Democratically-controlled Senate were influenced by real estate interests and were opposed to the extensive reforms favored by the House.<sup>82</sup>

Thus, even though one party controlled the executive and legislative branches, rapid reform also required the power and prestige of the Court. As Robert Gensburg put it, "There is also a great respect for the Court. There

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<sup>81</sup> Cillo, *supra* note 11. See also Freiden, *supra* note 14 ("We turned around in a week or two a completely different bill [which] testified to the degree of understanding and access to data and knowledge that had been developed on Ways and Means and in the legislature in general over the last four years.")

<sup>82</sup> Freiden, *supra* note 14. Paul Cillo also said that the Governor was not willing to push the property wealthy towns very hard before the Court decision. A bill being considered prior to *Brigham* would have involved \$10 million in wealth sharing between towns, compared with \$60 million shift which resulted from Act 60. Cillo, *supra* note 11. Martha Heath, Chair of the House Education Committee agreed that "Without the Supreme Court decision, we wouldn't have gotten a system as equitable as Act 60." Heath, *supra* note 45.

was an attitude that 'the Court has spoken, we will follow'"<sup>83</sup> The fact that the Court's decision was unanimous also probably had some influence on the dramatic turn of events. Indeed, despite their party's long aversion to the type of reform contained in Act 60, 9 of the 12 Republican Senators voted in favor of the bill.<sup>84</sup>

The new law significantly equalized education spending around the state by replacing local property taxes with a statewide property tax, and by establishing an "equalized yield provision" ensuring that all towns which choose to levy additional taxes to increase educational expenditures will have the same additional per pupil funds, regardless of the district's actual property wealth. The law does this by giving primary responsibility for education funding to the state,<sup>85</sup> and by providing for a flat-rate statewide property tax of \$1.10 per \$100 of property value.<sup>86</sup> Each school receives a per-pupil allocation called the general state support amount (\$5,010 in 1998).<sup>87</sup> Local districts that choose to impose a local property tax to permit spending above the basic state allocation must turn a percentage of the additional revenue over to a state education fund (the "sharing pool"), where it is redistributed to other districts. The percentage of funds going into the education fund and the percentage going directly to the local schools is determined by the commissioner of education based on the value of the

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<sup>83</sup> Gensburg Interview I, *supra* note 27. Assistant Attorney General Yudien opined that the legislation passed quickly because "people realized that there wasn't that much choice left to them and if they didn't act, they'd get a court-ordered solution." Yudien, *supra* note 45.

<sup>84</sup> The rapidity of events may have affected the Republicans' assessment of the the extent of opposition in some quarters to Act 60. According to Bill Mathis, "Many Republicans voted for Act 60. I think they underestimated the backlash that was to follow. When hit with the response of the gold towns, they readjusted their sails to catch the prevailing winds. Since then the issue has become very partisan." Mathis *supra* note 28.

<sup>85</sup> 16 V.S.A. §4025-28.

<sup>86</sup> 32 V.S.A. §5402(a).

<sup>87</sup> 32 V.S.A. §586(b).

property in the district.<sup>88</sup> The higher the average property value, the greater the percentage of additional revenue that goes into the state education fund.

The law also contains a homestead provision which provides that owners with household incomes of \$75,000 or less pay the lesser of 2% of household income, or the statewide tax based on the homestead value minus \$15,000.<sup>89</sup> This provision represents a compromise between House reformers, who wanted to base the entire finance system on an income tax, and the Governor, who vehemently opposed any increase in the income tax. As the chairman of the House conference committee said of this provision, "[It] wouldn't really look like an income tax, but, in fact, for most Vermonters it would be an income tax because there aren't that many people making more than \$75,000 per year."<sup>90</sup> In addition, the law provides a number of transition provisions designed to introduce new measures gradually over a three-year period.<sup>91</sup>

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<sup>88</sup> See 16 V.S.A. §4027.

<sup>89</sup> See 32 V.S.A. §5402(a).

<sup>90</sup> Freidin, *supra* note 14.

<sup>91</sup> In fiscal year 1999, the wealthiest districts (average property values in excess of \$15,000 per pupil) would pay 50% of revenues raised from nonresidential property into the state education fund. Below-average wealth districts received up to 75% of revenues raised from all its property taxed from the education fund, based on a sliding scale. Districts with property wealth between the statewide average and \$15,000 per pupil would contribute up to 50% of revenue raised from nonresidential property into the state fund, based on a sliding scale. 1997 Vt. Acts & Resolves 60, §24.

The second transition provision ensured that in districts facing the sharpest tax rate increases, the rate would only increase gradually over three years. The tax rate in districts with a 1995 rate of less than \$0.20 would see their taxes increase by only 1/3 of the difference between their 1995 rate and \$1.10. Districts with tax rates between \$0.20 and \$1.10 would see increases of \$0.30 until reaching \$1.10. And districts with tax rates greater than \$1.15 would be taxed at a rate of \$1.15. *Id.* §50.

The impact of Act 60 has been dramatic. Under the new law, 89% of Vermont residents were eligible for decreases in their property taxes.<sup>92</sup> A total of 229 districts received more money for their schools from the new education fund, while only 23 received less.<sup>93</sup> In the property-poor district of Rutland, for example, the school was able to update science textbooks for the first time since 1978, buy new computers with Internet access, and increase teacher salaries. Residents, meanwhile, enjoyed a 7.5% reduction in their property tax rate.<sup>94</sup>

In wealthy ski towns like Stowe, Winhall (Stratton) and Warren (Sugarbush), however, property taxes went up considerably, in some cases well over 100%.<sup>95</sup> To continue spending \$11,000 per student, the “gold town” of Winhall would have had to nearly quadruple its property taxes.<sup>96</sup> In Warren, despite increases in the tax rate from \$0.78 to \$1.10, per-pupil expenditures declined from \$8,229 to \$7,319 between 1998 and 1999. Expenditures were slated to be reduced by another \$560 per child the next year despite an anticipated 36% further tax hike.<sup>97</sup>

An interesting – and perhaps politically significant – aspect of Act 60 is that many of the property owners who have been detrimentally affected by the reforms live outside the state. The districts with high property wealth are centered almost exclusively around ski areas where much of the residential property consists of second homes owned primarily by out-of-state residents. Although these individuals may be strongly opposed to the

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<sup>92</sup> Mathis, *supra* note 17, at 22; Elinor Burkett, *Don't Tread on My Tax Rate*, N.Y. TIMES MAGAZINE, April 26, 1998 at 44.

<sup>93</sup> Sack, *supra* note 5.

<sup>94</sup> *Id.*

<sup>95</sup> Adam Lisberg, *Vermont Ski Towns Face A Major Tax Whack*, SNOW COUNTRY, Oct. 1997, at 34; *See also* Burkett, *supra* note 92, at 44.

<sup>96</sup> Burkett, *supra* note 92.

<sup>97</sup> WARREN SCHOOL BOARD, FIVE YEARS SCHOOL TAX COMPARISON (Feb. 17, 1999).

large tax increases they have had to absorb, they have limited influence on Vermont politics because they cannot vote in local or state elections.<sup>98</sup> The extent to which the out-of-state homeowner factor actually influenced passage of Act 60 is, however, debatable.<sup>99</sup>

#### IV. PUBLIC REACTION

Reaction to the passage of Act 60 was understandably mixed. Residents of Vermont's less affluent towns were obviously pleased to experience both greater resources and lower tax burden. Residents of the wealthy towns who saw their property taxes skyrocket, of course, tended to have an opposite response.

As the 1998-1999 school year approached -- the first school year under the new finance system -- reactions intensified. Prominent author John Irving, a resident of wealthy Dorset, called the new finance system "Marxist," removed his kindergarten-aged son from the public schools, and founded his own private school. A school principal resigned in protest

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<sup>98</sup> However, out-of-state homeowners have had some impact on local politics through the extensive campaign contributions that they made in recent elections -- primarily to Republican candidates opposed to Act 60. These contributions were actively solicited by the Vermont Republican Party. *See, e.g.*, Letter to Out Of State Vermont Property Owner (February, 1998) (Act 60 "penalizes most harshly those who don't have a vote . . . . We need your financial help now."); These contributions have been credited with defeating at least two of the strongest legislative advocates of fiscal equity reform, Majority leader Cillo and Rep. Freiden, and with increasing the Republican presence in the Senate in the 1998 elections. Cillo, *supra* note 11; Freiden, *supra* note 14.

<sup>99</sup> Legislators were certainly aware of the existence of these vacation homes in property-wealthy districts. As noted above, the 1994 House bill included an explicit provision taxing only nonresidential and vacation homes. Similar proposals were proposed and rejected in 1997, however, apparently because the legislators were swayed by arguments that such provisions would be unconstitutional, or that they would destroy the vacation industry that is an essential part of the Vermont economy. Heath, *supra* note 45. *See also* Yudien, *supra* note 45 ("I really don't think the impact of the law on out-of staters was a big factor in the passage of Act 60.")

against Act 60. A station wagon once owned by one of Act 60's chief sponsors was brought to the state capitol and destroyed by passers-by, who were urged to vent their anger using sledgehammers. Republicans made Act 60 an important campaign theme in the 1998 elections and channeled large amounts of money into defeating some of the law's architects.<sup>100</sup>

Some "gold towns" took a more organized approach. Dover, Searsburg, and Whitingham, for example, withheld \$648,000 in property taxes from the state education fund and tried to organize a state-wide civil disobedience campaign to withhold taxes related to the new law.<sup>101</sup> The Attorney General had to go to court to compel the districts to turn the funds over to the state.<sup>102</sup> In Stowe, another gold town, a local citizens' group filed an unsuccessful lawsuit challenging the constitutionality of the Act.<sup>103</sup> Many of the gold towns have at least partially circumvented the "sharing pool" by asking local citizens to make tax-deductible contributions to a school fund; these contributions have been matched by the Freeman Foundation, a private foundation that strongly opposes Act 60.<sup>104</sup> This contribution circumvention has resulted in approximately \$26 million of lost tax revenue (out of

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<sup>100</sup> Sack, *supra* note 5. See also Burkett, *supra* note 92, at 43 (One realtor classified Act 60 as "[t]he great rape . . . I think there will be blood in the streets."); Cillo, *supra* note 11; Freidin, *supra* note 14.

<sup>101</sup> Dan Seufert, *Sherbourne Voters OK Plan of Act 60 Defiance*, RUTLAND HERALD, June 2, 1998 at A1.

<sup>102</sup> Joetta L. Sack, *News in Brief: Vt. Sues 'Gold Towns' Over Finance Law*, EDUC. WEEK, Jan. 20, 1999.

<sup>103</sup> *Stowe Citizens for Responsible Gov't v. Vermont*, 730 A.2d 573 (Vt. 1999).

<sup>104</sup> Sack, *supra* note 5. See also Kathleen Burge, *Vermont Towns Protest School Tax Plan; Law Forces Sharing of Property Levies*, BOSTON GLOBE, March 3, 1998 (Stowe Education fund raised \$50,000 seed money and is hoping for \$5 million in private funds to donate to the public schools without being subject to Act 60 sharing provision); Stephen Greene, *Big Fund Hits Nerve in Vermont*, CHRONICLE OF PHILANTHROPY, April 22, 1999 (Discussing \$15 million commitment of Freeman Foundation to education in wealthy Vermont towns).

approximately \$ 800 million).<sup>105</sup>

Mary Fulton, a policy analyst with the Education Commission of the States, described the reaction in Vermont as the most intense response by citizens to a change in school finance law that she has ever seen. "Folks were very put off by the perceived lack of input at the local end," she said.<sup>106</sup> According to the *New York Times Magazine*, approval ratings of Governor Dean plummeted from 62% to 47% in the year following the passage of Act 60.<sup>107</sup>

Proponents of the law, however, have expressed little sympathy for residents of the wealthier communities. "What [the gold towns] are going through now is what 90 percent of towns have gone through for years and years - having to make choices," said Diane Wolk, chairwoman of the state school board. "They'll still have a quality education."<sup>108</sup> George Hooker, a biology teacher at Rutland High School, expressed similar sentiments. "We've bit the bullet all these years. Now, if they have to bite it a little bit, they'll see what it feels like."<sup>109</sup>

Other Act 60 supporters organized the Concerned Vermonters for Equal Educational Opportunity, which attempted to counter arguments made by Act 60 opponents. However, as John Freidin, one of the architects of Act 60, put it, the group probably "didn't have a lot of effect. Playing defense in the political world is hard, and the opponents to Act 60 have been very

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<sup>105</sup> Gensburg Interview II, *supra* note 20. Gensburg, analogizing this stratagem to attempts by Southern school districts to circumvent the impact of *Brown v. Board of Education*, had considered mounting a legal challenge to the Freeman Foundation's actions, but he let the Attorney General talk him out of it because not all of the grants were going to wealthy districts. *Id.*

<sup>106</sup> Sack, *supra* note 5.

<sup>107</sup> Burkett, *supra* note 92.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

effective.”<sup>110</sup> Paul Cillo faulted the Dean administration for not doing a good job of explaining the purpose and mechanisms of the new law to the public. The legislature approved a large appropriation for public education on the bill, but it took months for the administration to do anything with the money.<sup>111</sup> Acknowledging that the opposition groups have been much more effective than the Act’s proponents in their publicity campaigns, Cillo referred to Machiavelli’s insight that major changes make the losers really angry, but elicit only lukewarm support from the beneficiaries because most people fundamentally don’t trust change.<sup>112</sup>

Perhaps the most objective measure of the overall reaction to Act 60 was the 1998 election results. Governor Dean’s challenger, Ruth Dwyer, made Act 60 a central campaign issue by promising to fight for its repeal if elected. Governor Dean continued to express support for the new law, though he also expressed a willingness to consider changes. The governor ultimately won reelection by a substantial 56% to 41% margin.<sup>113</sup> Democrats also retained control of both the House and the Senate.<sup>114</sup> Furthermore, only 10 out of 300 school budget measures were defeated in the year following passage of Act 60, despite an average increase of 6% in school budgets. In previous years, an average of 27 out of 300 budgets had been defeated.<sup>115</sup>

It is still too early to assess the ultimate impact of Act 60. Some observers feel that the opposition is “slowly evaporating as people gain

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<sup>110</sup> Freidin, *supra* note 14.

<sup>111</sup> Cillo, *supra* note 11.

<sup>112</sup> *Id.*

<sup>113</sup> See *The 1998 Elections*, NY TIMES, Nov. 5, 1998, at B5.

<sup>114</sup> As noted above, two of the central figures in the passage of Act 60, Representatives Paul Cillo and John Freidin did, however, lose their seats to Republican challengers.

<sup>115</sup> Mathis, *supra* note 17, at 25.

experience with [the law].”<sup>116</sup> From this perspective, the opposition to Act 60 may represent a very vocal minority with the money and the connections to make their voices heard, while the overwhelming majority of people are happy with the new law.<sup>117</sup> Proponents say that the opposition has been blown out of proportion by a national media whose editors have vacation homes in the state and are upset that taxes have gone up as a result of Act 60.<sup>118</sup> Moreover, “the law is now the status quo. It has an impact on one hundred aspects of Vermont law; you can’t easily undo it.”<sup>119</sup>

On the other hand, opposition to Act 60 clearly remains a formidable political issue. The Republican party continues to call for its repeal,<sup>120</sup> and influential Democratic politicians are actively considering major modifications. For example, Governor Dean recently proposed that the sharing pool be eliminated.<sup>121</sup> According to a recent newspaper account, although Governor Dean still believes that the design of Act 60 was a sound one, “it was confusing to people and many simply haven’t accepted it after

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<sup>116</sup> Gensburg Interview II, *supra* note 20. See also Telephone Interview with Gar Anderson, Vice President, Vermont Association of Realtors (Aug. 10, 2000) (stating that after being initially opposed to Act 60, he now sees that it has been very helpful to a lot of people); Yudien, *supra* note 45 (“people are still angry about Act 60, though less so than a couple of years ago”).

<sup>117</sup> Rep. Cillo claims that 97% of the money raised by Republicans in the 1998 election came from out of state residents, and that this money was strategically spent to defeat Act 60 proponents such as him. Cillo, *supra* note 11.

<sup>118</sup> Gensburg Interview II, *supra* note 20.

<sup>119</sup> Mathis *supra* note 28.

<sup>120</sup> Telephone Interview with Richard Marron, Republican Member of House Education Committee (September 15, 2000).

<sup>121</sup> Christopher Graff, *Governor to Propose Changes to Act 60*, RUTLAND HERALD, July 14, 2000.

three years." The Governor said it was "time to recognize the law's political problems and search for ways to modify it . . . ." <sup>122</sup>

Moreover, Vermonters have not yet felt full impact of the law. Various transition devices have put off what may be an ultimate day of reckoning, once the Freeman Foundation's matching grant program comes to amend. As Gar Anderson of the Stowe Realtors Association describes it, "the Freeman Foundation has taken the edge off of the real problem that the wealthier communities are going to face. But they have announced that they are pulling out in a year or so. It's clear that taxes will double or triple then [in order for some districts to maintain current spending levels]. The reaction [to Act 60] so far is nothing compared to what you'll see in a few years unless some modifications are made." <sup>123</sup>

## V. PUBLIC ENGAGEMENT: CONCLUSARY PERSPECTIVES

Vermont at the end of the twentieth century retained much of its classical New England political orientation toward town government:

The basic unit of governance is the town. A geographically small state, Vermont nevertheless has 252 autonomous towns. With 'a little democracy at every crossroads,' a typical town has

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<sup>122</sup> Jack Hoffinan, *The Endless Act 60 Debate*, RUTLAND HERALD, July 30, 2000, at Sunday Magazine section. One proposal the Governor is considering would eliminate both the sharing pool and all local property taxes for education. The statewide property tax would be increased to finance school budgets. *Id.* According to Paul Cillo, this was the approach the Governor originally advocated at the time of the *Brigham* decision. Cillo, *supra* note 11. Another proposal currently under consideration is a modified sharing pool proposal, advocated by Republican Representative Richard Mallary, which would establish a uniform statewide tax for all nonresidential property and permit local taxes to be levied only on residential property. Hoffinan, *supra*. Other observers speak of the possibility of statewide income tax increases eventually substituting for some or all of the sharing pool revenues. Gensburg Interview I, *supra* note 27; Anderson, *supra* note 116.

<sup>123</sup> Anderson, *supra* note 116.

about 38 square miles and 2400 citizens. In addition to an elected select board (town council) and elected school board, the New England town meeting still thrives. In this annual event, townsfolk get together to practice direct democracy on school budgets, town budgets and items of special interest.<sup>124</sup>

Given this considerable experience with participatory democracy, it is ironic that the political atmosphere surrounding the implementation of Vermont's fiscal equity reform has been one of the most confrontational in the nation. In states like Kentucky and Washington, broad-based civic coalitions brought together parents, teachers, education advocates, business leaders and other community representatives to hammer out solutions to educational and funding issues in a manner that did not directly challenge the wealthy districts.<sup>125</sup> By way of contrast, in Vermont Act 60 was a partisan bill, and the interests of the "gold towns" and the business groups which supported them were largely ignored and outvoted. Although the sharing pool arrangement clearly benefitted the large majority of Vermont voters, it was also virtually inevitable that this type of "Robin Hood" solution would provoke formidable resistance from a small but politically and economically powerful opposition coalition. As William Clune concluded after studying similar "recapture" schemes enacted in other states, ". . . wealthier districts have proved the most determined foes of fiscal neutrality in constitutional litigation. Much of the delay and uncertainty in reaching stable legislative solutions has revolved around rich districts."<sup>126</sup>

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<sup>124</sup> Mathis, *supra* note 17, at 4-5.

<sup>125</sup> Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485 (1999); Diane W. Cipollone, *DEFINING A BASIC EDUCATION: EQUITY AND ADEQUACY LITIGATION IN THE STATE OF WASHINGTON, STUDIES IN JUDICIAL REMEDIES AND PUBLIC ENGAGEMENT* (Campaign for Fiscal Equity, Inc., Dec. 1998). See also Michael A. Rebell and Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O'Neill - and A Proposed Solution*, 29 CONN.L.REV. 1115, 1143-1158 (1997) (discussing use of public engagement techniques in fiscal equity litigations).

<sup>126</sup> William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN L. REV 721, 731 (1992). Few states have adopted recapture provisions,

Alternative solutions based on a higher state-wide property rate or the income tax might have satisfied the *Brigham* decision and avoided the incendiary sharing pool mechanism. Indeed, such alternatives are seriously being considered at the present time. Why weren't these approaches examined seriously in the Act 60 debates?<sup>127</sup> Why were representatives of the gold towns and the business groups not actively involved in the remedial discussions?

The most likely answer to these questions is that one-party control of the executive and legislative branches, together with the dramatic impact of an unexpected Supreme Court decision, led to a rapid partisan response that precluded the usual legislative compromising opportunities, as well as potential public engagement activities. Democrats and Republicans in Vermont never truly reached an agreement on how to reform education financing. The final passage of Act 60 was not the result of hard fought negotiations, but rather was a reform package that the Democrats agreed upon in the wake of the euphoria over the judicial breakthrough. Republicans described the passage of Act 60 as Democrats "just railroading it through the legislature," heedless of Republican objections.<sup>128</sup> Although Democratic leaders claimed to have reached out to the opposition when they were drafting Act 60, it was clear that the direction had been set and there

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which directly shift funds from rich to poor districts. Such a system was in effect for a number of years in Wyoming before being invalidated by the decision in *Campbell County School Dist. v. State*, 907 P.2d 1238 (Wyo. 1995). In Texas, districts having more than \$280,000 in property wealth per student are afforded a range of options, including partial or full consolidation with poor districts, educating students from poorer districts and making payments to a central state fund. See *Edgewood Indep. Sch. Dist. v. Kirby*, 893 S.W.2d 450 (Tex. 1995)

<sup>127</sup> John Freiden has acknowledged that the "sharing pool" concept was "in your face" about increasing the property taxes in the wealthy districts. He stated that "if the uniform property tax that had been initially passed [in the House] was adopted, Act 60 would have been less inflammatory." Freiden, *supra* note 14.

<sup>128</sup> Freed, *supra* note 21. When asked why the legislature had been unable to find a compromise measure before the court opinion was handed down, Freed responded, "That's just politics. Everyone has their reasons."

was little room for serious negotiation and compromise.<sup>129</sup>

In contrast to some states where solutions to the different fiscal equity problems were the subject of extensive public deliberation through public engagement processes, this avenue for building a base for compromise also was never really traveled in Vermont. As soon as the fiscal equity issue arose in the state, it immediately became a prime legislative agenda item.<sup>130</sup> The development of independent positions on fiscal equity reform by strong interest groups, and the germination of new ideas and coalition building outside the legislative domain, was therefore much more limited in Vermont than in some other states.<sup>131</sup>

There were, of course, extensive legislative hearings, meetings with interest groups and advocacy organizations, and educational forums throughout the years that the Legislature was wrestling with this problem. These forums served to educate people about the inequities of the finance

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<sup>129</sup> Martha Heath, Chair of the House Education Committee stated that "We tried to reach out to wealthy communities when drafting the bill; we invited people in. But they weren't willing to talk about alternatives [that] we thought would meet the Supreme Court standard. The Ways and Means committee finally and just [passed the bill they wanted]." Heath, *supra* note 45.

<sup>130</sup> Vermont's small population and the fact that each legislator represents only 3,000 people may explain why fiscal equity reform became quickly and exclusively lodged in the legislative process. As Robert Gensburg put it, "The Legislature in Vermont is very open. A representative wouldn't dare not listen to what a constituent wanted." Gensburg Interview II, *supra* note 20.

<sup>131</sup> For example, several of our interviewees stressed the significance of the fact that when the fiscal equity issue first became salient in 1991, representatives from the Vermont National Education Association (NEA), the Vermont League of Cities and Towns, the Superintendent's Association, and the School Boards Association met with a small group of legislators to discuss the purposes of education, the history of taxation, and possible reform approaches. The group called itself 'The Little Tax Group.' Their aim was not aimed at passing legislation immediately. Instead the group's objective was "to be ready when the opportunity presented itself." Cillo, *supra* note 11; Freiden, *supra* note 14; Mathis, *supra* note 17, at 11-12.

system at that time.<sup>132</sup> But there was no extensive public deliberation about solutions.

It was clear that the realistic solutions that were being proposed came from legislators.<sup>133</sup> While the legislators listened to concerns and opinions of the people attending these events, they "were real clear on what we thought was right. We didn't know any better way to achieve all the goals that we had set . . . . We wanted to hear people's questions, but we thought we had the answers to making the system work."<sup>134</sup>

## CONCLUSION

In sum, then, the rapidity of the remedial response in Vermont was a two-sided sword: it resulted in what has been the most prompt and arguably the most equitable remedy to a court's fiscal equity decision -- but it also engendered one of the most intense, confrontational oppositional stances. However, the final chapter on the implementation of Act 60 has not yet been written. The law still may prove durable and effective. Or Vermont's strong tradition of direct democracy may yet bring together the warring sides in post-passage legislative compromises or public engagement deliberations that may achieve greater consensus on a modified approach. Clearly, the ongoing saga of fiscal equity reform in the state of Vermont bears watching.

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<sup>132</sup> Cillo, *supra* note 11; Freidin, *supra* note 14; Heath, *supra* note 45; Anderson, *supra* note 116.

<sup>133</sup> Anderson, *supra* note 116. *See generally* Mathis, *supra* note 17. Some newspapers sponsored write-in campaigns, encouraging readers to propose their own legislative solutions. Most of these proposals, however, suffered from a lack of any data as to the revenues generated and the side effects on businesses of proposals like a 10-cent increase in the sales tax.

<sup>134</sup> Freidin, *supra* note 14.