Article

Localism, Pretext, and the Color of School Dollars

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INTRODUCTION

Public schools are as racially isolated now as they were in the 1970s when school desegregation began in earnest.[1] Likewise, even after decades of reform efforts, school districts serving

1. Erica Frankenberg, Jongyeon Ee, Jennifer B. Ayscue & Gary Orfield,

predominantly poor and minority students still operate on thousands of dollars less per pupil than their peers.[2] Most states have made matters worse over the last decade by substantially reducing their overall financial commitment to education.[3] Those cuts exacerbate widespread funding inequity for districts that cannot make up the difference.[4] These racial and economic trends only widen existing achievement gaps for disadvantaged students.[5]

While advocates have challenged these inequities from various angles, the linchpin maintaining inequity remains largely hidden and unchallenged: the assignment of educational responsibility to individual school districts.[6] Racial isolation, for instance, primarily exists between school districts, not within them.[7] Similarly, the most significant funding inequalities exist

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Harming Our Common Future: America's Segregated Schools 65 Years After Brown, C.R. PROJECT 4 (May 10, 2019), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf [https://perma.cc/DS95-MWW8].

2. Ivy Morgan & Ary Amerikaner, *Funding Gaps: An Analysis of School Funding Equity Across the U.S. and Within Each State*, THE EDUC. TR. 4 (Feb. 2018), https://files.eric.ed.gov/fulltext/ED587198.pdf [https://perma.cc/R33D-X8X6].

3. Danielle Farrie & David G. Sciarra, *$600 Billion Lost: State Disinvestment in Education Following the Great Recession*, EDUC. L. CTR., https://edlawcenter.org/research/$600-billion-lost.html [https://perma.cc/7594-TCJB].

4. *Id.*

5. *See, e.g.*, Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1355–56 (2004) ("Students from poor, uneducated families do worse in school."); C. Kirabo Jackson, Cora Wigger & Heyu Xiong, *Do School Spending Cuts Matter? Evidence from the Great Recession* 13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24203, 2018) (finding that "the reductions in school spending during the Great Recession . . . coincided with declines in [National Assessment of Educational Progress] scores"); Geoffrey D. Borman & Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TCHRS. COLL. REC. 1201, 1201–02 (2010) (finding that "fully 40% of the differences in achievement can be found between schools").

6. *See* Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 NW. U. L. REV. 945, 945 (2017) (arguing for the abolition of school districts and "bestow[al of] control over schools on general governments").

7. *See, e.g.*, Frankenberg et al., *supra* note 1, at 26 (describing "extreme segregation between districts"); *see also* Ann Owens, Sean F. Reardon & Christopher Jencks, *Income Segregation Between Schools and School Districts*, 53 AM. EDUC. RSCH. J. 1159, 1160 (2016), https://journals.sagepub.com/doi/10.3102/0002831216652722 [https://perma.cc/4DK4-4BYP] (documenting trends in income segregation between schools and school districts).

between school districts, not within them.[8] Property-poor districts can exert herculean efforts and never come close to generating the resources necessary to meet their students' needs, while other districts generate more than enough.[9] These trends are so acute in metropolitan areas that a scholar framed school district lines as facilitating the racial monopolization of high-quality schools.[10]

The inequity that follows from completely independent school districts was not part of the original intent of public education.[11] To the contrary, state constitutional conventions adopted provisions to assign educational responsibilities to the states, not local districts.[12] They intended states to elevate educational opportunity in communities that needed help and to build statewide systems of schools where people from different stations in life would come together for a common experience.[13] During Reconstruction, states even intended public schools to serve as engines of racial equality.[14] Such education systems

8. Morgan & Amerikaner, *supra* note 2.

9. *See, e.g.*, Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 25, 2016), https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333 [https://perma.cc/2L4J-APQM] (discussing how public school districts are "run by local cities and towns and are funded by local property taxes").

10. Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2387 (2021).

11. *See, e.g.*, Greencastle Township v. Black, 5 Ind. 557, 565 (1854) (striking down a local tax as violating the state constitutional requirement of a uniform system of schools).

12. *See* Silver v. Halifax Cnty. Bd. of Comm'rs, 821 S.E.2d 755, 756 (N.C. 2018) ("[T]he State—and not a board of county commissioners—is solely responsible for guarding and preserving the right . . . to receive a sound basic education pursuant to the North Carolina Constitution."); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 216 (Ky. 1989) ("[T]he *sole responsibility* for providing the system of common schools lies with the General Assembly."); Op. of the Justs., 765 A.2d 673, 676 (N.H. 2000) ("The State may not shift any of this constitutional responsibility to local communities."); McDuffy v. Sec'y of the Exec. Off. of Educ., 615 N.E.2d 516, 548 (Mass. 1993) (asserting that the state's power to delegate educational responsibilities "does not include a right to abdicate the obligation imposed on [the state] . . . by the Constitution"); Abbott *ex rel.* Abbott v. Burke, 693 A.2d 417, 435 (N.J. 1997) ("The State . . . cannot shirk its constitutional obligation under the guise of local autonomy.").

13. *See* DEREK W. BLACK, SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY 57–64, 113–33 (2020) (explaining the legal and constitutional commitment to education at the nation's founding and during Reconstruction).

14. *Id.* at 113–33.

were understood to be the foundation upon which republics are built.

This original intent is, unfortunately, too often lost on modern policymakers because segregation buried education's original vision and replaced it with one that normalized school segregation and inequality.[15] Courts have only compounded the problem. While the Supreme Court overturned formal segregation,[16] it never appreciated the fundamental connection between segregation and facially neutral local school funding and decision-making policies. Even worse, the Court later conceptualized individual school district autonomy as more important than states' responsibility for education.

In two seminal cases rejecting a remedy for educational inequalities, the Court articulated a localism narrative premised on the assumption that local control is the historical foundation of public education.[17] Without bothering to seriously engage education history, the Court simply proclaimed that, "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."[18] Then, with no empirical support, the Court reasoned that locally financed education and autonomous school districts are indispensable to local control.[19] Many state supreme courts similarly have failed to probe the historical merits of localism under their state constitutions' education clauses and instead simply repeated the U.S. Supreme Court's narrative.[20]

A concept so central to courts' holdings demands far more attention. This Article deconstructs educational localism

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15. *See generally id.* at 135–56 (explaining how southern constitutional conventions sought to reverse the course of public education).

16. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

17. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49–50 (1973); Milliken v. Bradley, 418 U.S. 717, 741 (1974).

18. *Milliken*, 418 U.S. at 741; *see also Rodriguez*, 411 U.S. at 49–50 (opining that local control is "vital to continued public support of the schools" and "of overriding importance from an educational standpoint as well" (quoting Wright v. Council of Emporia, 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting))).

19. *Rodriguez*, 411 U.S. at 49–50; *Milliken*, 418 U.S. at 741.

20. *See, e.g.*, Comm. for Educ. Rts. v. Edgar, 672 N.E.2d 1178, 1193 (Ill. 1996) ("The analysis applied by this court in assessing equal protection claims is the same under both the United States and Illinois Constitutions."); McDaniel v. Thomas, 285 S.E.2d 156, 162 (Ga. 1981) (providing an account of the court's constitutional analysis); Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758, 788 (Md. 1983) ("It is evident from the history of public education in this State that Maryland shares [the Supreme Court's] view.").

through a historical and constitutional lens. It argues that localism is a pretext for ignoring inequality rather than a legitimate constitutional justification for it. First, it demonstrates that the sole constitutional obligation to provide public education has long rested with the state, not local communities.[21] As early as 1780, state constitutions required states to provide for public education.[22] Local communities were, of course, vital to providing that education, but local taxes and funding were a means to an end rather than an end in themselves.[23] States authorized and relied on local taxes and funding, not because of some normative value of localism, but because property taxes were new to most citizens.[24] State leaders believed that the prevalent anti-tax sentiments might initially be best navigated at the local level.[25] Thus, localism arose, contrary to courts' assumption, as an extension or delegation of states' education duty. It is little surprise that the modern term "school district" rarely even appears in the text of state constitutions.[26]

Second, this Article reveals that localism's resurgence in the South during the late 1800s was a means to segregate and defund Black education. During Reconstruction, southern states had constitutionalized states' public education duty to ensure that all persons, including African Americans and poor whites, received an education that prepared them to participate as full citizens.[27] State leadership transitioned schooling from a randomly occurring phenomenon in individual communities to an expanding system of education.[28]

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21. *See supra* note 12 and accompanying text.

22. *See, e.g.*, MASS. CONST. of 1780, ch. 5, § 2 ("[I]t shall be the duty of legislatures and magistrates . . . to cherish the interests of literature and the sciences, and all seminaries of them.").

23. *See, e.g.*, JOHANN N. NEEM, DEMOCRACY'S SCHOOLS: THE RISE OF PUBLIC EDUCATION IN AMERICA 88 (2017) ("[L]ocal taxes for schools improved property values and the cultural and civic life of a community, so all voters had an incentive to support them.").

24. *Id.*

25. *Id.*

26. *See* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343–48 (1992) (listing state constitutional provisions, which rarely include reference to districts).

27. Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 815 (2018).

28. *Id.*

After Reconstruction, public education became, alongside voting rights, the primary target of those aiming to reduce African Americans to second-class citizenship.[29] States amended their constitutions and laws to require school segregation. At the same time, they fundamentally altered how they funded and managed education.[30] Fearing that segregated school taxes and funds at the state level would draw federal intervention, state leaders sought to achieve the same practical result and avoid federal oversight by moving more funding and decision-making to the local level.[31] While formal school segregation is clearly unconstitutional, many aspects of Jim Crow's local funding scheme remain, accounting for continuing disparity and inequality.[32]

These historical insights reveal that localism is not nearly as normative as the Supreme Court assumed and now requires an entirely different constitutional analysis. First, Southern states' original discriminatory intent to localize funding raises significant equal protection questions about current local funding practices. The Supreme Court has held that the taint of discriminatory motive does not simply vanish with the passage of time and, in some contexts, has presumed that current racial disparities are the result of decades-old discrimination.[33]

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29. *See* discussion *infra* Part IV.

30. *See* discussion *infra* Part IV.

31. *See, e.g.*, DOROTHY O. PRATT, SOWING THE WIND: THE MISSISSIPPI CONSTITUTIONAL CONVENTION OF 1890, at 114–18 (2018) ("[T]he race issue shifted the question to how much the state was obliged to pay to support the education of African American students."); CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973, at 49–68 (2018) (arguing that "separate [or] supposedly 'color-blind' taxation . . . was deployed by all-white school boards and excise boards to ensure that black schools received a tiny fraction of the resources due to them").

32. *See, e.g.*, Kamina A. Pinder & Evan R. Hanson, *De Jure, De Facto, & Déjà Vu All over Again: A Historical Perspective of Georgia's Segregation-Era Equalization Program*, 3 J. MARSHALL L. REV. 165, 166 (2010) (comparing "Georgia's historic attempt to preserve de jure segregation" to "current levels of funding in Georgia's mostly de facto segregated schools"); Zachary L. Guyse, Note, *Alabama's Original Sin: Property Taxes, Racism, and Constitutional Reform in Alabama*, 65 ALA. L. REV. 519, 534 (2013) ("[T]he 'Radical Reconstruction' Constitution of 1868 . . . established the political and civil equality of freed slaves, but not social equality."); WALSH, *supra* note 31.

33. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 210–11 (1973) ("If the actions of school authorities were to any degree motivated by discriminative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'"); Hunter v. Underwood, 471 U.S. 222, 233 (1985) ("Without deciding

Second, the history of local school funding is directly relevant to provisions in all fifty state constitutions that guarantee students' access to public education.[34] The difference between winning and losing school funding challenges under these provisions—or securing an effective remedy—frequently rests on judicial assumptions regarding localism.[35] The more deference courts afford to localism, the lower the likelihood of a remedy.[36] This deference, however, rests on the false assumption that localism is necessarily a legitimate government interest.

States that relied on localism to achieve racist ends cannot fairly defend today's inequalities with the notion that localism is a normatively legitimate, much less important, state interest.[37]

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whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect."); United States v. Fordice, 505 U.S. 717, 729–30 (1992) ("If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices.").

34. *See generally* DAVID C. THOMPSON, R. CRAIG WOOD & DAVID S. HONEYMAN, FISCAL LEADERSHIP FOR SCHOOLS: CONCEPTS AND PRACTICES 282–86 (1994) (cataloguing states' education articles); Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 10–18 (2016) (finding all fifty state constitutions protect education and synthesizing the requirements of those provisions).

35. *See, e.g.*, DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) (focusing on "the educational needs of the individual districts" and the need to promote local control); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993) ("Those jurisdictions finding no equal protection violation in a system based on district wealth generally uphold the system of funding by finding a legitimate state purpose in maintaining local control."); Comm. for Educ. Rts. v. Edgar, 672 N.E.2d 1178, 1193 (Ill. 1996) ("We conclude that the question of whether the educational institutions and services in Illinois are 'high quality' is outside the sphere of the judicial function."); McDaniel v. Thomas, 285 S.E.2d 156, 162 (Ga. 1981) (recognizing that "the citizens will support adequate education but that under the Constitution it must be potentially equal, though not perfect . . . . The solution . . . is undoubtedly political and the Court will leave it so.").

36. *See generally* Gregory C. Malhoit & Derek W. Black, *The Power of Small Schools: Achieving Equal Educational Opportunity Through Academic Success and Democratic Citizenship*, 82 NEB. L. REV. 50, 67–72 (2003) (analyzing judicial deference at the remedial stage of education clause litigation).

37. Courts, even when applying rational basis review, are highly skeptical of post-facto attempts to claim a legitimate constitutional goal under these circumstances. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–32 (1996) (commenting that the "sheer breadth" of the law at issue belied the reasons offered for it); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446–50 (1985) (rejecting

States without this racist history will not necessarily fare better. The question in these states remains whether, in light of history, localism actually serves a sufficiently important end to justify inequality and inadequacy—a tall order given that a constitutional duty or right is at stake.[38] History does not support the proposition that localism is an important or compelling government interest.[39] Moreover, current data reveals local school funding is counterproductive to the delivery of equal and adequate education.[40]

The foregoing, however, is not meant to exclude localism from any role whatsoever in education but to emphasize that its place is narrower and must be carefully managed. Several state constitutional conventions sought to ensure that the state discharged its duty without negating positive education efforts at the local level.[41] Their goal was to ensure that the state brought disadvantaged communities up to the level necessary to provide quality education to all students.[42] They had no desire to push any community down.[43] Thus, so long as the state discharged its

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numerous proffered reasons for upholding a discriminatory zoning ordinance); Plyler v. Doe, 457 U.S. 202, 230 (1982) (disallowing the denial of public education to the children of undocumented immigrants); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 535–36 (1973) (rejecting the government's rationale in its effort to deny food stamps to those households with an unrelated occupant); *see also* Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385, 1441–42 (2019) (discussing the Supreme Court's application of rational basis review in these cases).

38. *See generally* Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 246–54 (2017) (listing and explaining the various levels of scrutiny courts have applied in education clause litigation).

39. *See* discussion *infra* Part III.B.

40. *See infra* notes 56–58.

41. *See, e.g.*, Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758, 770–74 (1983) (providing a history of the Maryland Constitutional Convention of 1867); 7 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 679–80 (Benjamin Singerly ed., 1873) [hereinafter PENNSYLVANIA CONSTITUTION DEBATES] (discussing the role of local taxes in the state's duty to educate its citizens).

42. *See, e.g.*, *Hornbeck*, 458 A.2d at 770 (discussing the state constitutional requirement to establish "a thorough and efficient" system of free public schools); PENNSYLVANIA CONSTITUTION DEBATES, *supra* note 41 (debating whether a statewide or local tax scheme would more equitably distribute the burden of funding schools).

43. Some have speculated that the judicial imposition of strict equity in California inadvertently led to lowered education spending. Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did* Serrano *Really Cause Proposition 13?*, 50 UCLA L. REV. 801, 807–08 (2003) (discussing the speculation).

duty, the localism that created other variations was of no concern.[44] Unfortunately, it is all too common for states to wash their hands of the critical responsibility of assisting struggling districts under the premise of not interfering with other districts. This Article demonstrates the fallacy of this inverted and dangerous logic.

This Article proceeds in five parts. Part I details the current extent of school funding inequality and inadequacy in our nation's schools. It reveals that states' heavy reliance on local school funding is a primary cause. Part II examines the Supreme Court's development of its localism narrative, how it justified inequality, and how state courts replicated it. Part III deconstructs the Court's localism narrative with the historical development of states' constitutional and legal obligations in public education, from the nation's founding through the 1800s. Part IV examines the resurgence of localism in the South as a means of ensuring segregated and unequal education. Part V analyzes this history's relevance to federal equal protection claims and state constitutional education clauses.

I. THE SOURCE OF FUNDING INEQUALITY: DISTRICT-LEVEL RESPONSIBILITY

A. THE FUNDING GAPS

School funding inequalities are staggering on multiple accounts—race, wealth, and geography—and only get worse during economic downturns. On average nationally, schools serving predominantly students of color receive nearly $2,000 less per student than schools serving predominantly white schools.[45] Similarly, schools serving predominantly low-income students receive about $1,000—or 7%—less per pupil than schools serving predominantly middle-income students.[46] Several states' gaps are even larger. A 2021 analysis by the Education Law Center ranked ten states as earning an "F" for funding equity, meaning they spent substantially less in schools serving predominantly

44. *Hornbeck*, 458 A.2d at 777 ("The court said that because the legislative scheme for financing public education bore a reasonable relation to providing for the maintenance and support of a 'thorough and efficient' system of public schools, it had fulfilled its constitutional duty."); PENNSYLVANIA CONSTITUTION DEBATES, *supra* note 41 (discussing the state's duty regarding public education).

45. Morgan & Amerikaner, *supra* note 2, at 4.

46. *Id.*

low-income students.[47] Nevada and New Hampshire spent 32% and 26%, respectively, less per pupil in those schools.[48]

These gaps, however, understate the full extent of the problem. Decades of research shows that low-income students require more, not fewer, resources than their peers to achieve basic education outcomes.[49] Taking that need into account, a recent nuanced study assessed the funding levels students would need to achieve "average" outcomes.[50] Using that metric, it found funding shortfalls in excess of $10,000 per pupil in the highest poverty districts in eight different states.[51] And regardless of how one calculates funding levels, the consensus research finding is that funding cuts and inequities negatively impact stu-

47. Danielle Farrie & David G. Sciarra, *Making the Grade: How Fair Is School Funding in Your State?*, EDUC. L. CTR. 8 (2021), https://edlawcenter.org/research/making-the-grade-2021.html [https://perma.cc/U8LA-5Q8Z] (awarding Texas, Arkansas, Alabama, Oklahoma, Tennessee, Florida, Mississippi, North Carolina, Nevada, Idaho, Utah, and Arizona an "F" for their funding levels, and awarding Maine, Alabama, Florida, Pennsylvania, Rhode Island, Connecticut, Missouri, Illinois, New Hampshire, and Nevada an "F" for the funding disparities between districts).

48. *Id.* at 11.

49. *See* Thomas B. Parrish, Christine S. Hikido & William J. Fowler, Jr., *Inequalities in Public School District Revenues*, NAT'L CTR. FOR EDUC. STAT. 62 (1998), https://nces.ed.gov/pubs98/98210.pdf [https://perma.cc/4MBA-7YHY] (identifying forty percent as the appropriate adjustment for low-income students); Ross Wiener & Eli Pristoop, *How States Shortchange the Districts That Need the Most Help*, THE EDUC. TR. FUNDING GAPS 5, 6 (2006), https://edtrust.org/wp-content/uploads/2013/10/FundingGap2006.pdf [https://perma.cc/K7KC-KZVS] (surveying scholars who estimate the additional cost as being thirty percent to sixty percent).

50. Bruce D. Baker, Mark Weber, Ajay Srikanth, Robert Kim & Michael Atzbi, *The Real Shame of the Nation: The Causes and Consequences of Interstate Inequity in Public School Investments*, RUTGERS UNIV. & EDUC. L. CTR. 1 (2018), https://www.shankerinstitute.org/sites/default/files/The%20Real%20Shame%20of%20the%20Nation.pdf [https://perma.cc/AR72-BPD4].

51. *Id.* at Appendix C (finding these funding shortfalls in Alabama, Arizona, California, Georgia, Mississippi, New Mexico, Texas, and Washington).

dent achievement,[52] accounting for as much as half of the Black-white graduation gap in some instances.[53]

B. THE CAUSES: LOCAL FUNDING AND STATE DERELICTION

School funding gaps are a function of several systemic interrelated problems. First, states leave local districts to finance substantial portions of the cost of education themselves. Only two states take full—or nearly full—responsibility for funding education and alleviate local communities from any significant funding burden.[54] As Figure 1 below shows,[55] most states require local districts to finance more than half of the cost of public education.

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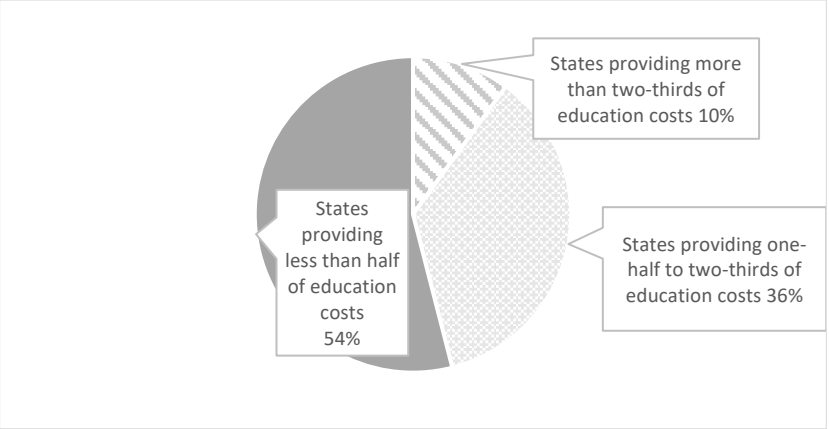
52. *See, e.g.*, Jackson et al., *supra* note 5, at 19 ("In sum, the analysis provides compelling evidence that the achievement losses associated with recessionary public school spending cuts were disproportionately experienced by those in high poverty districts."); Bruce Baker, *Revisiting that Age-Old Question: Does Money Matter in Education?*, ALBERT SHANKER INST. 18 (2012), https://files.eric.ed.gov/fulltext/ED528632.pdf [https://perma.cc/M94B-TTR5] ("[I]n the aftermath of deep cuts to existing funding, schools are unable to do many of the things they need to do in order to maintain quality educational opportunities.").

53. C. Kirabo Jackson, Rucker Johnson & Claudia Persico, *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes* 15–17 (Nat'l Bureau of Econ. Rsch., Working Paper No. 20118, 2014), https://gsppi.berkeley.edu/~ruckerj/Jackson_Johnson_Persico_SFR_LRImpacts.pdf [https://perma.cc/6M9X-JLYX] (finding that school funding litigation had reduced school funding inequalities). Funding variances, if maintained over time, equate with nearly a year's worth of learning for low-income students. *Id.*; *see also* Gannon v. State, 390 P.3d 461, 493 (Kan. 2017) (quoting Kansas's own legislative study of school funding in the state); *Cost Study Analysis: Elementary and Secondary Education in Kansas: Estimating the Costs of K–12 Education Using Two Approaches*, STATE OF KAN., LEGIS. POST AUDIT COMM. 46 (2006), https://www.kslpa.org/wp-content/uploads/2019/08/r-05-19.pdf [https://perma.cc/AH9R-C3CB] (finding that "a 1.0% increase in district performance outcomes was associated with a 0.83% increase in spending").

54. *See Revenues for Public Elementary and Secondary Schools, by Source of Funds and State or Jurisdiction: 2013–14*, NAT'L CTR. FOR EDUC. STAT. (July 2016) [hereinafter *NCES Data*], https://nces.ed.gov/programs/digest/d16/tables/dt16_235.20.asp [https://perma.cc/5T2D-VHB3] (showing that Hawaii and Vermont derive less than five percent of their funding from the local level and fund over eighty-five percent from state sources).

55. This chart is based on data from the National Center for Education Statistics. *Id.*

Figure 1. State Fiscal Support for Education



Second, reliance on local school funding is inherently regressive. Districts with low real estate values and other tax-base limitations cannot raise the funds necessary to cover the cost of adequate education, while others—typically in suburbs—easily raise their share and more.[56] In forty-six of fifty states, local school funding drives more funding to middle-income students than poor students.[57] New Jersey and Connecticut are the worst, with local revenues generating $3,460 and $3,025 more per pupil for districts serving predominantly middle-income students.[58]

Third, the actual amount of funding from the state is woefully inadequate to counteract local funding. State funds tend to be modest and/or only mildly progressive.[59] As a result, raw funding gaps remain in twenty-two states even after states send additional funds to low-income districts.[60] Illinois, for instance, sends $562 more per pupil to high-poverty districts, but that only

56. Emma Brown, *In 23 States, Richer School Districts Get More Local Funding than Poorer Districts*, WASH. POST (Mar. 12, 2015), https://www.washingtonpost.com/news/local/wp/2015/03/12/in-23-states-richer-school-districts-get-more-local-funding-than-poorer-districts [https://perma.cc/J6H2-6TGN].

57. Matthew Chingos & Kristin Blagg, *School Funding: Do Poor Kids Get Their Fair Share?*, URB. INST. (2017), https://apps.urban.org/features/school-funding-do-poor-kids-get-fair-share [https://perma.cc/9GLT-WM6A].

58. *Id.*

59. *Id.*

60. *Id.* That number would be even worse if accounting for the fact that low-income students have higher needs.

offsets about a third of the funding gap that local funds create.[61] Bruce Baker further estimates that the gap between what students need in Illinois's highest poverty districts and what they receive was $7,820 per pupil in 2015.[62]

Fourth, states do not maintain these already insufficient state funds across time. Following the Great Recession, school districts suffered enormous cuts in state aid. For instance, between 2008 and 2014, state aid in Arizona and Alabama fell by 23% and 21%, respectively.[63] In thirteen other states, it fell by 10% to 17%.[64] Many of those cuts remained in place well after the economy had fully rebounded. As late as 2017, nearly half of states were still funding public education, in real dollars terms, below pre-Recession levels.[65] One study calculates that "students across the U.S. lost nearly $600 billion from the states' disinvestment in their public schools" in the decade following the Recession.[66] The problem, as Figure 2 demonstrates, is that all but five states were exerting less fiscal effort (in relationship to their gross domestic product) than they did a decade earlier.[67]

61. *Id.*

62. Baker et al., *supra* note 50, at 46.

63. Michael Leachman, Nick Albares, Kathleen Masterson & Marlana Wallace, *Most States Have Cut School Funding, and Some Continue Cutting*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 25, 2016), https://www.cbpp.org/research/state-budget-and-tax/most-states-have-cut-school-funding-and-some-continue-cutting [https://perma.cc/Q9B9-D9SF].

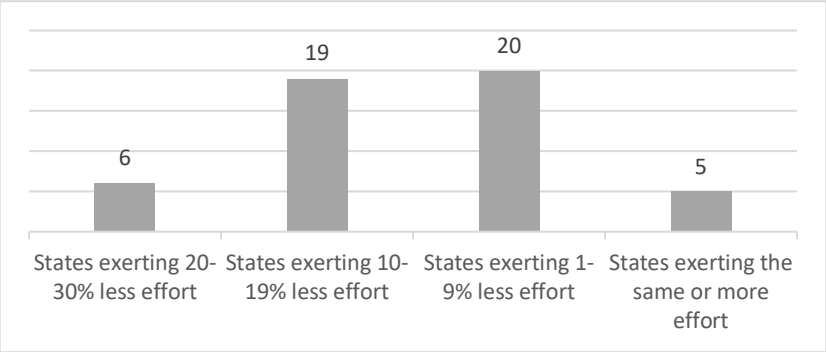
64. *Id.*

65. Michael Leachman, *K–12 Funding Still Lagging in Many States*, CTR. ON BUDGET & POL'Y PRIORITIES: OFF THE CHARTS (May 29, 2019), https://www.cbpp.org/blog/k-12-funding-still-lagging-in-many-states [https://perma.cc/Y2TA-U88M].

66. Farrie & Sciarra, *supra* note 3.

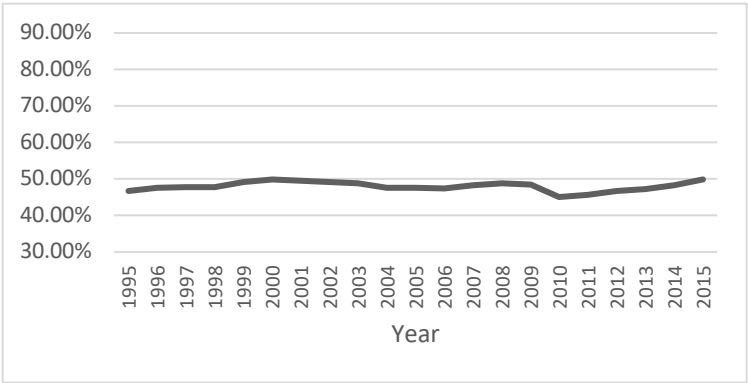
67. *Id.*

Figure 2. State Fiscal Effort for Education Since Recession



None of this, however, is to suggest states were exerting sufficient effort before or during the Recession. As Figure 3 demonstrates, state aid persistently accounts for less than half of total school funding, ranging from 46 to 49% between 1995 and 2015.[68] States hit their high mark of 49% in 2000 but have fallen short of that level in all but one year since then.[69]

Figure 3. Percentage of School Funding from State



In sum, these seemingly intractable funding gaps that depress student achievement in districts serving predominantly low-income students hinge on the intersection of state and local school funding. Heavy reliance on local school funding drives

68. Data downloaded from Matthew Chingos & Kristin Blagg, *How Has Education Funding Changed over Time?*, URB. INST. (2017), https://apps.urban.org/features/education-funding-trends [https://perma.cc/9AYL-SU8C].

69. *Id.*

school funding *inequality*, and low state aid drives overall school funding *inadequacy*, particularly in those districts suffering inequality. Larger funding gaps tend to occur in the states most heavily reliant on local funding, and smaller gaps tend to occur in states least reliant on local funding.[70]

II. THE JUDICIAL NORMALIZATION OF LOCALISM

If the negative impact of local school funding is so empirically obvious, why does the practice remain so dominant? The answer lies in the normalization of local school funding as a neutral, if not desirable, concept. Local school funding is far from new; it has almost always been a component of school finance. The Supreme Court, however, constructed a narrative in which local school funding is a well-intentioned, necessary component of public education, and the inequities it produces are incidental. Even further, the Court reasoned that localism is of such paramount value that other constitutional values must succumb to it. When these concepts arose in state constitutional litigation, state courts, rather than engaging in independent analysis of their own state's education history, too often simply parroted and adopted the Supreme Court's narrative. The subsections below detail each of these trends.

A. *SAN ANTONIO V. RODRIGUEZ*: LOCAL CONTROL, GOOD INTENTIONS, AND INEVITABLE INEQUALITY

The Court's opinion in *San Antonio v. Rodriguez* is best known for holding that the U.S. Constitution does not protect a fundamental right to equal school funding.[71] While an abundance of scholarship has challenged the rationale of that holding,[72] the key underlying premise and narrative in *Rodriguez*—

70. A more detailed analysis can be had by comparing Morgan & Amerikaner, *supra* note 2, at 3, with Farrie & Sciarra, *supra* note 47, at 2.

71. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37–38 (1973).

72. *See, e.g.*, Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 586–90 (1992) (discussing the historical tradition of the government providing public elementary and secondary education); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 392–99 (2006) (describing attempts "to strengthen the ideal of nationhood arising from the creation of a new polity composed of 'citizens of the United States'"); Black, *supra* note 27, at 756 ("Since *Rodriguez*, numerous scholars have contested the Court's conclusions."); Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L.

that local funding and control are inherently necessary aspects of public education—have gone largely unexamined. The oversight was not lost on Justice Marshall. In his dissent, he pointed out that "no one in the course of this entire litigation has ever questioned the constitutionality of the local property tax as a device for raising educational funds."[73] That uncontested point allowed the Court to build a lore around the school district and its purported inherent value.

The Court built its narrative around three basic principles. First, local control over education is a preeminent value that defines American education.[74] To make its point, the Court, ironically, drew on a school desegregation opinion, *Wright v. Council of the City of Emporia*, that had displaced local control.[75] The *Rodriguez* opinion, however, focused on language in *Wright* that was facially sympathetic to the district, emphasizing that *Wright* had recognized "[t]he merit of local control" in education, which "is strongly felt in our society."[76] But after citing to the *Wright* majority, the Court in *Rodriguez* adopted the *Wright* dissenters' perspective on localism. Quoting that dissent, the *Rodriguez* Court wrote: "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well."[77]

Second, the *Rodriguez* Court linked the importance of local control to local funding, treating them as a single concept. According to the Court, "local control means . . . the freedom to devote more money to the education of one's children [and] . . . determin[e] how those local tax dollars will be spent."[78] The Court then posited that state aid might even diminish local control: "plac[ing] more of the financial responsibility in the hands of the State" may "result in a comparable lessening of desired local autonomy."[79] The Court buttressed this logic with a cursory and

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REV. 1323, 1327 (2007) ("The *Rodriguez* Court had difficulty discerning a limiting principle in guaranteeing educational rights under the Equal Protection Clause."); Robyn K. Bitner, Note, *Exiled from Education:* Plyler v. Doe*'s Impact on the Constitutionality of Long-Term Suspensions and Expulsions*, 101 VA. L. REV. 763, 785 (2015) (describing "the question left open by *Rodriguez* of when, if ever, a state's exclusion of students warrants judicial intervention").

73. *Rodriguez*, 411 U.S. at 132.

74. *Id.* at 49.

75. *Id.* (discussing Wright v. Council, 407 U.S. 451 (1972)).

76. *Id.*

77. *Id.*

78. *Id.* at 49–50.

79. *Id.* at 52.

selective history lesson, simply stating that local education funding in Texas dates back to 1883.[80] That policy, according to the Court, is the longstanding conventional wisdom in Texas, the educational community, and "virtually every other State" too.[81]

Third, the Court discounted any negative impacts of local funding, emphasizing that state education funds can and have counterbalanced local funding inequities.[82] Balancing is inevitable because "no perfect alternatives" exist in the "continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children."[83] Thus, it is entirely appropriate for the state to allow local communities to exercise their desire to spend locally. After that, the state can rebalance, to some extent, the baseline of resources available in disadvantaged districts.[84]

In the Court's appraisal, that is precisely what Texas does.[85] Texas requires every district to exert fiscal effort so as to "permit[] and encourag[e] a large measure of participation in and control of each district's schools at the local level," but Texas also "assur[es] a basic education for every child in the state" through the state's foundational education financing program.[86] The empirical results of this system, however, are largely beside the point. Such a system, the Court writes, inherently involves some level of "arbitrary" line drawing that will necessarily produce some level of "discriminatory impact."[87] Any negative impact of that arbitrary line drawing is an unintentional, inevitable result of random variations in local wealth that the state cannot control.[88]

These premises normalized local funding, effectively moving its mechanisms beyond dispute and framing any interference

80. *Id.* at 6–7.

81. *Id.* at 48, 55.

82. *Id.* at 8, 45 (indicating the state has been increasing funds for poor districts).

83. *Id.* at 41, 49.

84. *Id.* at 45–49 (emphasizing the steady increase in state funding to the Edgewood school district).

85. *Id.* at 49 ("The Texas system of school finance is responsive to these two forces.").

86. *Id.*

87. *Id.* at 41, 54.

88. *Id.* at 54.

with them as abnormal. Local funding itself becomes a legitimate, if not an exceedingly important, governmental interest. And its practical effect—inequality—is simply an unavoidable, incidental consequence of pursuing the important goal. The Court need not overly trouble itself with such an inherent aspect of education. It is enough that states like Texas have "acknowledged [their] shortcomings and ha[ve] persistently endeavored—not without some success—to ameliorate the differences in levels of expenditures without sacrificing the benefits of local participation."[89]

B. *MILLIKIN V. BRADLEY*: DIVORCING LOCAL DISTRICTS FROM THE STATE

One year later in *Milliken v. Bradley*,[90] the Court took *Rodriguez*'s premises and did something more aggressive. It reversed a desegregation remedy to which students otherwise would have been entitled.[91] Whereas the plaintiffs in *Rodriguez* had asked the Court to recognize a new right to education, the *Milliken* plaintiffs simply asked the Court to enforce an existing desegregation right.[92] The plaintiffs had proven that both local and state officials had intentionally segregated schools in Detroit.[93] The plaintiffs also demonstrated that the only effective remedy for that segregation was integration across school district lines.[94] The inter-district remedy, the lower courts explained, was appropriate given that districts are but agents of the state and that the state directly participated in segregation itself.[95]

Reversing the lower courts and diverging from existing Supreme Court precedent required the *Milliken* Court to make an

89. *Id.* at 55.

90. Milliken v. Bradley, 418 U.S. 717, 721 (1974).

91. *Id.* at 753.

92. *Id.* at 785–86 (pointing out that the constitutional violation found here was "the purposeful, intentional, massive, *de jure* segregation of the Detroit city schools, which . . . justifies 'all-out desegregation'").

93. Bradley v. Milliken, 484 F.2d 215, 221 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974) ("[T]he policies of the Detroit Board of Education (and State Board of Education) concerning school construction in some instances had the purpose of segregating students . . . ."); *id.* at 242 ("The record in this case amply supports the findings of . . . unconstitutional actions by public officials at both the local and State level.").

94. *Milliken*, 418 U.S. at 765.

95. *Bradley*, 484 F.2d at 242.

enormous leap beyond even *Rodriguez*.[96] In *Rodriguez*, the Court had not gone so far as to frame local districts as independent entities detached from the state and its policies. Rather, the Court in *Rodriguez* simply deferred to Texas's policy judgment regarding funding for its local school districts.[97] Thus, the Court afforded deference to the state, not local districts per se.[98] But in *Milliken*, the state, its policies, and some of its districts were all implicated in a constitutional violation.[99] Thus, limiting desegregation required the Court to sever local districts from the state and afford them their own normative weight and interest independent of those of the state.

The Court made that shift in three parts. First, the Court in *Milliken* elevated local school districts to a preeminent interest or value. That elevation was obvious when the Court wrote:

> the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.[100]

Second, the Court effectively divorced districts from the state. Conspicuously absent is any reference to the state or its creation of a statewide system of education through school districts. Instead, the Court situated districts as detached from the state and each other.[101] Each district, the Court emphasized, had

96. Most notably, the Court's prior decisions in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 3 (1971) (upholding metropolitan wide desegregation remedies), and *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973) (presuming intentional discrimination in all schools once plaintiffs demonstrated segregation in a core area, would have justified the integration remedy the lower court had ordered).

97. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40–41 (1973) (emphasizing the need to not interfere with the state's judgment).

98. *Id.* at 40 (admonishing against "interferences with the State's fiscal policies").

99. *Bradley*, 484 F.2d at 242 ("The record in this case amply supports the findings of the District Court of unconstitutional actions by public officials at both the local and State level.").

100. Milliken v. Bradley, 418 U.S. 717, 741–42 (1974).

101. *Id.* at 742–45 (calling them "independent," "separate," and "autonomous" units).

its own independent corporate body, interests, and student bodies.[102] The Court repeatedly framed the issue before it as involving "85 outlying school districts" that "were not parties to the action" and against whom "no claim . . . of constitutional violations" had been made.[103] The only seeming connection between them is geographic proximity.

Third, because districts are distinct, the Court argued that one district's malfeasance—or the state's for that matter—could not justify intruding into the operations of another district.[104] Each district has its own unique systems and practices, all of which are worthy of respect.[105] A "metropolitan remedy would require, in effect, consolidation of 54 independent school districts historically administered as separate units into a vast new super school district."[106] The Court was most concerned with how a super district would undercut existing local school finance and authority.[107] The Court imagined a litany of unacceptable problems: the displacement of currently elected school boards, jurisdictional lines, taxing authority, long-term bonds, and curricula decisions.[108] The Court afforded these local interests a surprisingly high level of respect, commensurate with the respect it had afforded state interests in *Rodriguez*.[109]

The Court used these three points to invert the question before it from how best to remedy the proven constitutional violation of segregation to whether it was appropriate to impose an education remedy that involves "more than a single school district."[110] The assumption in that frame, of course, is that courts

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102. *Id.* at 742 n.20.

103. *Id.* at 717, 748.

104. *Id.* at 744–45 ("Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.").

105. *Id.* at 742 ("[L]ocal control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973))).

106. *Id.* at 743.

107. *Id.*

108. *Id.* (raising each issue in a series of questions).

109. *See Rodriguez*, 411 U.S. at 40 (rejecting the Court's "intru[sion] in an area in which it has traditionally deferred to state legislatures").

110. *Milliken*, 418 U.S. at 741.

should only direct remedies at individual districts. Save the most extraordinary circumstances, school district boundaries are sacrosanct and beyond judicial reach.[111] Combined with *Rodriguez*, that means a freedom to hoard resources within those boundaries as well.[112] Yet the Court reached this result without ever seriously inquiring in *Rodriguez* or *Milliken* as to districts' legal status or how they came to be—other than that they were adopted one hundred years ago under neutral principles. Instead, the Court implicitly and explicitly conveys the notion that individual districts are an inherent and normatively neutral aspect of education that do not require any justification.

C. STATE COURTS' PASSIVE ADOPTION OF THE *RODRIGUEZ-MILLIKEN* MYTHOLOGY

Public schools, as formal creations of state law, arose at various times under different circumstances in different states.[113] These details would have presumably warranted serious attention when education advocates, after *Rodriguez*, asserted claims under education clauses in their respective state constitutions. Many state courts, however, were quick to parrot the Supreme Court's localism narrative with relatively little attention to their own histories.

Those state courts rejecting state constitutional claims regularly relied on *Rodriguez* and *Milliken*'s logic for three suppositions.[114] First, they relied on *Rodriguez* and *Milliken* for the gen-

111. *Id.* at 744 (excepting violations of the Fourteenth Amendment); *see also* Daniel Kiel, *No Caste Here? Toward a Structural Critique of American Education*, 119 PENN ST. L. REV. 611, 620 (2015) (indicating *Milliken* "strengthened the idea of district sovereignty" and "impenetrable fences between schools").

112. *See generally* Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467, 500 (2014) (concluding the combination of the cases "more closely resemble *Plessy*'s doctrine of 'separate but equal' than *Brown* and *Brown*'s progeny's conclusion that separate is inherently unequal") (citations omitted).

113. *See generally* STUART G. NOBLE, A HISTORY OF EDUCATION 153–64 (1938) (outlining education reforms from the 1830s to 1860s in New England, the Mid-Atlantic states, the Old Northwest, and the South).

114. *See, e.g.*, Comm. for Educ. Rts. v. Edgar, 672 N.E.2d 1178, 1193–94 (Ill. 1996) (summarizing *Rodriguez*); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981) (acknowledging that "any challenge to the Georgia system under the equal protection clause of the U.S. Constitution is foreclosed by" *Rodriguez*); Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758, 788 (Md. 1983) (discussing *Milliken*). Some would argue this problem is exactly why higher courts should not engage in general commentary. Judith M. Stinson, *Preemptive Dicta: The Problem Created by Judicial Efficiency*, 54 LOY. L.A. L. REV. 587, 591 (2021)

eral idea of localism as a paramount education value,[115] even if no state law had ever claimed it as such.[116] The Ohio Supreme Court went so far as to quote from the dissent in *Wright v. Council of Emporia* (as *Milliken* had).[117] Second, these state courts often unquestioningly accepted *Rodriguez*'s assertion that "the governmental body supplying the funds, despite initial protestations to the contrary, ultimately directs how the funds shall be spent."[118] Thus, any limitations on local funding would spell the end of local control.[119] Third, several state courts endorsed *Rodriguez*'s claim that local funding and control are essential to "experimentation, innovation, and a healthy competition for educational excellence."[120] Based on these three premises, several state courts held that localized funding decisions are constitutionally rational and not for courts—even state courts—to interrupt.[121]

("[B]ecause judicial efficiency dicta are most likely to cut off debate, stunt the natural progression of the law, and become binding, this 'preemptive dicta'—dicta espoused for the purpose of judicial efficiency—is, in fact, a very troublesome form of dicta.").

115. Bd. of Educ. of the City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813, 821–22 (Ohio 1979); *Hornbeck*, 458 A.2d at 788.

116. Olsen v. State, 554 P.2d 139, 146 (Or. 1976) ("While this objective [local control] has not been stated explicitly in Oregon laws, we believe it has been apparent from the beginning of statehood."); *see also* Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1022 (Colo. 1982) ("[T]he General Assembly has not expressly declared what the objective of the school finance system is; however, appellants and intervenor-appellants advance the argument that the objective is that of local control.").

117. *Walter*, 390 N.E.2d at 821–22 (quoting Wright v. Council of Emporia, 407 U.S. 451, 478 (1972)).

118. *Olsen*, 554 P.2d at 146; *see also McDaniel*, 285 S.E.2d at 167–68 (accepting local control).

119. *Edgar*, 672 N.E.2d at 1195–96 ("Liberty is enhanced when localities or families have the autonomy to determine what proportion of their resources they wish to devote to the education of their youth."); *Hornbeck*, 458 A.2d at 789 ("Any legislative attempt to make uniform and undeviating the educational opportunities offered by the several hundred local school districts . . . would inevitably work the demise of the local control of education available to students in individual districts." (quoting Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 367 (N.Y. 1982))); *McDaniel*, 285 S.E.2d at 167–68 (finding relation between local funding and local control); *see also Lujan*, 649 P.2d at 1023 (arguing that local districts should have right the to make funding decisions).

120. *Lujan*, 649 P.2d at 1023; Marrero *ex rel.* Tabales v. Commonwealth, 709 A.2d 956, 965 n.19 (Pa. Commw. Ct. 1998); *Walter*, 390 N.E.2d at 822; *Hornbeck*, 458 A.2d at 788.

121. *See, e.g.*, *Hornbeck*, 458 A.2d at 789 ("We hold that Maryland's system of school finance satisfies the rational basis test."); Thompson v. Engelking, 537

More surprising is the effect *Rodriguez* appears to have on state courts that rule in favor of education plaintiffs. While these courts reject the notion that school funding is beyond constitutional scrutiny, they often still accept more subtle aspects of *Rodriguez*'s analysis that elevate local control and school districts as independent units.[122] First, courts typically assume the validity of the existing structure of school districts.[123] They rarely, if ever, imagine a world with fewer districts or a different organizational structure. The status quo in which districts are the proper measure of analysis simply goes unnoticed.

Second, these courts often reiterate the Supreme Court's narrative regarding the importance of local control. While it is not always clear what level of review courts are applying under education clauses,[124] state courts have effectively treated local control as a presumptively weighty goal that they must balance against the plaintiffs' claims. The Arizona Supreme Court, for instance, termed local control as "an important part of our culture,"[125] and a concurring justice accepted "the idea that local control of education through local districts is a compelling state interest."[126] Ruling for the plaintiffs, the Tennessee Supreme Court similarly wrote that it "cannot reasonably be disputed" that local control is "beneficial, indeed essential."[127] The implicit suggestion of references of this sort is that, even when a court

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P.2d 635, 645 (Idaho 1975) ("Using [a rational basis] analysis, we find that the Legislature . . . has acted rationally and without unconstitutional discrimination in setting up a system of financing, wherein a large portion of revenues for the public schools are levied and raised by and for the local school districts."); *McDaniel*, 285 S.E.2d at 168 (finding that "the system does bear some rational relationship to legitimate state purposes and is therefore not violative of state equal protection").

122. Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 774–75 (1992) (outlining courts' reliance on *Rodriguez* to maintain local control of funding).

123. *See, e.g.*, DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) (focusing on need to promote local control); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993) ("There is no doubt that county and school district officials collectively control, in the management sense, the educational resources within a school district.").

124. Weishart, *supra* note 38, at 220–21 (noting that courts have "abandoned the tiers of scrutiny altogether or ceased to actually apply them, paying only lip service to their guidance").

125. Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 815 (Ariz. 1994).

126. *Id.* at 817 (Feldman, C.J., concurring).

127. *McWherter*, 851 S.W.2d at 155 (internal citations omitted).

finds a constitutional violation, the court must minimize or prevent intrusions into local control. The Arkansas Supreme Court was clear on this point, writing that its holding "does not in any way dictate that local control must be reduced."[128]

D. THE NORMALIZING EFFECT OF JUDICIAL NARRATIVES

Regardless of where courts fall on the question of whether school funding inequities are constitutional, nearly all accept local funding as a substantial baseline component of school funding.[129] Those siding with the state laud the virtues of local funding and frame inequities as a random and unintended fact of life.[130] Those striking down inequities may deride local funding on some level, but they aim their derision more at local funding's effects than at the practice itself.[131] Therein lies the important nuance that the localism narrative sustains: a state's school funding system may be unconstitutional, but local school funding can remain a centerpiece of the system. States do not necessarily have to take primary responsibility for financing education, change the baseline premise of school district taxing authority and autonomy, or shift to some fundamentally different way of funding schools.[132] Typically, all a state needs to do is counteract the unequalizing effects of its local school funding system.[133] In other words, a state can keep a system that imposes wildly different tax burdens on school districts and generates

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128. *DuPree*, 651 S.W.2d at 93.

129. Briffault, *supra* note 122, at 773 ("[C]ourts and commentators generally assume that local control of education exists, that it is a basic organizational principle of American public elementary and secondary education, and a norm that must be taken into account when the existing school finance system is challenged.").

130. *See, e.g.*, Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1023 (Colo. 1982) (indicating that differences in wealth can lead to fewer resources but that a finance system need not be perfect).

131. *McWherter*, 851 S.W.2d at 156 (finding that the failure was for the state's policies to achieve their desired effects); *Bishop*, 877 P.2d at 815–16 (finding the state had good intentions but the law was ineffective).

132. Rose v. Council for Better Educ., 790 S.W.2d 186, 216 (Ky. 1989) (addressing current problems with local property taxes but not challenging them as a continued centerpiece); Horton v. Meskill, 376 A.2d 359, 376 (Conn. 1977) ("[P]roperty tax is still a viable means of producing income for education . . . .").

133. *See Rose*, 790 S.W.2d at 214 (emphasizing that the trial court was not "direct[ing] the General Assembly to enact any *specific legislation*, including raising taxes"); *Meskill*, 376 A.2d at 376 (refraining from requiring a specific remedy or absolute equity or restrictions on local control).

wildly different funds, so long as the state provides some additional funds to districts at the lower end of the spectrum.[134]

These courts, in effect, capitulate to the inherent problem of school funding as being, in *Rodriguez*'s words, the "continual struggle between" the desire to educate all students, and individual families' and communities' desire to preference their own children.[135] That struggle, in the Court's estimation, requires a district-based financing structure that capitulates to local communities' desire for fiscal autonomy.[136] The Illinois Supreme Court later put it in more concrete terms, positing that its state education clause and its mandate of a statewide system of schools might have never made its way into the constitution had the framers understood it to place limits on local communities' desires.[137] Thus, the task of the court is not simply to vindicate students' constitutional right to an education, but to "strike a balance between the competing considerations of educational equality and local control."[138] Stated differently, local funding is a predicate aspect of school funding, even in a state system of school funding.

III. EDUCATION STRUCTURE AS DEFINED BY STATE CONSTITUTIONS

The Supreme Court's localism narrative grossly misconstrues the history and development of public education, creating the impression that public education rests on local initiative, not state responsibility. That narrative comes from an extremely thin and skewed reading of education history. That narrative,

134. Leandro v. State, 488 S.E.2d 249, 259 (N.C. 1997) (requiring a sound, basic education but rejecting the notion that "substantially equal educational opportunities be offered in each of the school districts of the state"). Joshua Weishart offers a thorough analysis of the fallacious notion that states can achieve adequacy without equity. *See generally* Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477 (2014).

135. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49 (1973); Bd. of Educ. of the City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813, 820 (Ohio 1979); Kukor v. Grover, 436 N.W.2d 568, 581 (Wis. 1989); Comm. for Educ. Rts. v. Edgar, 672 N.E.2d 1178, 1195 (Ill. 1996).

136. *Rodriguez*, 411 U.S. at 49–50 (comparing local control to the federal system of American politics).

137. *Edgar*, 672 N.E.2d at 1196 ("As noted earlier, several members of the education committee of the Sixth Constitutional Convention voiced strong support for the preservation of local control.").

138. *Id.*

moreover, is effectively devoid of any appreciation of states' constitutional structure for education.

State law and history reveal a far more nuanced story that is often inapposite to the localism narrative. First, the constitutional responsibility for education, including the control and financing of it, rests squarely in one place—with the state.[139] Second, while local interests are an important part of education history, the state commitment to public education extends back to the Founding Era.[140] Third, the evolution of the state constitutional right to education and expansion of state power is a product of the realization that localized education and financing were incapable of delivering education on a statewide basis.[141] The following subsections address these major points and subsidiary arguments in detail.

A. THE CONSTITUTIONAL STRUCTURE OF EDUCATION

1. The Right and Duty at Stake Rests Exclusively with the State

The primary state constitutional obligation to provide education rests exclusively with the state.[142] The state, not local districts, has a constitutional duty to guarantee and deliver public education.[143] When a local district fails to deliver a constitutionally adequate education, for instance, it is ultimately the state's

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139. *See infra* Part III.A.1.

140. *See infra* Part III.B.1.

141. *See infra* Part III.B.5.

142. Rose v. Council for Better Educ., 790 S.W.2d 186, 216 (Ky. 1989) ("[T]he *sole responsibility* for providing the system of common schools lies with the General Assembly."); Op. of the Justs., 765 A.2d 673, 676 (N.H. 2000) ("The State may not shift any of this constitutional responsibility to local communities . . . ."); Abbeville Cnty. Sch. Dist. v. State, 767 S.E.2d 157, 164 (S.C. 2014), *amended by* 777 S.E.2d 547 (S.C. 2015), *order superseded by* 780 S.E.2d 609 (S.C. 2015) ("[T]he South Carolina Constitution mandates the General Assembly to 'provide for the maintenance and support of a system of free public schools open to all children in the state.'"); McDuffy v. Sec'y of the Exec. Off. of Educ., 615 N.E.2d 516, 548 (Mass. 1993) ("While it is clearly within the power of the Commonwealth to delegate some of the implementation of the duty [to educate] to local governments, such power does not include a right to abdicate the obligation imposed on [state] magistrates and Legislatures placed on them by the Constitution."); Abbott *ex rel.* Abbott v. Burke, 693 A.2d 417, 435 (N.J. 1997) ("The State . . . cannot shirk its constitutional obligation under the guise of local autonomy.").

143. *Rose*, 790 S.W.2d at 193 ("An adequate school system must also include . . . state intervention if necessary."); Abbott *ex rel.* Abbott v. Burke, 495 A.2d

constitutional duty to rectify the situation.[144] The state cannot defend on the notion that local districts are inept, have mismanaged their resources, or have adopted ineffective policies.[145] Districts are so relatively insignificant at the constitutional level that few constitutions reference them.[146] Those constitutions that do reference districts do not elevate them to the level of the state but simply acknowledge their existence and limited role.[147] One scholar, though for different reasons, has argued that districts "need not exist at all."[148]

Save those few constitutions that name districts, school districts do not possess any independent authority. The only power and financing authority that local districts possess is that which the state delegates to them.[149] School districts are just the agents and instrumentalities of the state.[150] As the Michigan Supreme

376, 386 (N.J. 1985) (rejecting the state's attempt to raise "numerous failures of local administrators" as a defense); *Abbeville*, 767 S.E.2d at 179 (concluding that the state's arguments regarding local maladministration "ring hollow").

144. *Abbeville*, 767 S.E.2d at 175 ("The constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests with the [State].").

145. *Id.* (finding that the state violated its constitutional duty even though districts failed to spend resources effectively).

146. *See* Hubsch, *supra* note 26, at 1343–48 (listing state constitutional provisions, which rarely include reference to districts).

147. *See, e.g.*, KAN. CONST. art. VI, § 5 ("Local public schools [are] under the general supervision of the state board of education . . . ."); WIS. CONST. art. X, § 3 (requiring the legislature to "provide . . . for the establishment of district schools"). A couple of state constitutions, however, would seem to assign some affirmative responsibility or power to districts. ME. CONST. art. VIII, pt. 1, § 1 ("[T]he Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools . . . ."); COLO CONST. art. IX, § 15 (directing the state to form and organize districts and indicating the districts' boards of education "shall have control of instruction in the public schools of their respective districts"); *see also* Bd. of Educ. of Sch. Dist. No. 1 v. Booth, 984 P.2d 639, 648 (Colo. 1999) (finding certain aspects of education to be a shared responsibility).

148. Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830, 1846 (1999).

149. *Id.* at 1847 ("Notwithstanding the policy of local delegation, however, school district authority is contingent on a state grant of power."); *see also* Minsinger v. Rau, 84 A. 902, 903 (Pa. 1912) ("The commonwealth has the power to designate its agencies in connection with school taxes, and the school districts are the agents in this respect.").

150. *See, e.g.*, Indep. Sch. Dist. No. 65 v. State Bd. of Educ., 289 P.2d 379, 381 (Okla. 1955) ("[O]ur Legislature has plenary power with respect to the establishment and change of school districts . . . ."); Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 501 (Tex. 1992)

Court wrote, a school district is "a legal division of territory, created by the State for educational purposes, to which the State has granted such powers as are deemed necessary to permit the district to function as a State agency."[151]

2. Local Interests Cannot Be Balanced Equally with State Interests

Courts that fail to clearly situate the state as the locus of responsibility for education incorrectly deem it appropriate to balance state and local interests in education.[152] Doing so assumes a local interest independent of the state and, even worse, implies a false equivalency between state and local education interests.[153] While a state might discretionarily accommodate local interests within the context of discharging its constitutional responsibility, the accommodation is not legally or constitutionally compelled.[154] And the fact that a state exercises discretion and accommodates local interests does not elevate the constitutional significance of those local interests. Local interests and districts, even when accommodated, remain confined within that overall state system and constitutional duty, not balanced against them.

This principle is evident in any number of different education policies. States, for instance, dictate the parameters of what schools teach, who can teach, the terms under which schools can dismiss a teacher, the mandatory school year, graduation requirements, district boundaries, and much more.[155] The extent to which a local district has discretion in these areas is entirely

(emphasizing that local education taxes are still state taxes); W. Orange-Cove Consolidated I.S.D. v. Alanis, 107 S.W.3d 558, 578 (Tex. 2003) (same); Thompson v. Engelking, 537 P.2d 635, 648 (Idaho 1975) (emphasizing that the state sets taxing power).

151. Bd. of Educ. v. Elliott, 29 N.W.2d 902, 908 (Mich. 1947).

152. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49 (1973) (affirming the shared authority of the state and district and balancing those interests).

153. *See* Briffault, *supra* note 122, at 777 ("Local governments have no rights against their states; nor do the residents of local governments have any inherent right to local self-government.").

154. *Id.* ("Ultimately, a local government is an agent of the state, exercising specific, limited powers at the local level on behalf of the state.").

155. Chiras v. Miller, 432 F.3d 606, 611 (5th Cir. 2005) (highlighting state curricular authority); S.C. CODE ANN. § 59-65-10 (2022) (establishing compulsory school attendance); *Number of Instructional Days/Hours in the School Year*, EDUC. COMM'N OF THE STATES (2013), https://www.ecs.org/clearinghouse/01/06/68/10668.pdf [https://perma.cc/4SJ7-Z24K] (collecting state statutes on the minimum number of days and hours in the school year).

a function of what the state has chosen to leave open to the district. Thus, state policy determines what occurs at the local level, even in those instances when local officials have the power to exercise discretion.[156] As the next subsection explains, school funding is conceptually no different.

3. Local School Funding Operates Within a Statewide Scheme of Funding

Local districts' ability to tax local wealth for the benefit of schools is an exercise of state power, not local power.[157] Even where the state grants local taxing power, the extent of that local tax power remains constrained by state power.[158] States, for instance, mandate a range within which districts must tax and spend, typically setting both a minimum and maximum amount.[159] Thus, it is not the case that local districts tax and spend at their discretion. For that matter, it is not the case that states tax and spend fully at their own discretion either.

State constitutions directly constrain certain aspects of states' school funding systems. Some state constitutions, for instance, dictate that the state public education budget be in the first appropriation of each year's budget, meaning the state can fund nothing else prior to education.[160] State constitutions also

156. Op. of the Justs., 765 A.2d 673, 676 (N.H. 2000) ("The State may not shift any of this constitutional responsibility to local communities . . . ."); TEX. CONST. art. VII, § 3 (granting the legislature power to delegate taxing authority to school districts); Campbell Cnty. Sch. Dist. v. State, 907 P.2d 1238, 1272 (Wyo. 1995) (indicating that the state has the power to delegate authority to districts); Briffault, *supra* note 122, at 777 ("A local government is a delegate of the state, possessing only those powers that the state has chosen to confer upon it."); Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 390 (2012) (explaining the ways in which states allow local districts to exercise discretion).

157. TEX. CONST. art. VII, § 3 (granting the legislature power to delegate taxing authority to school districts); Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758, 762 (Md. 1983) (discussing statutes under which states regulate and mandate local education taxes).

158. *See Hornbeck*, 458 A.2d at 762 (discussing a state funding scheme that determines the limits of local taxes); Thompson v. Engelking, 537 P.2d 635, 648 (Idaho 1975) (same).

159. *See, e.g.*, *Engelking*, 537 P.2d at 658 (setting limits between $5 million and $10 million in property taxes).

160. PA. CONST. art. III, § 11 (requiring education in the first general appropriation); NEV. CONST. art. XI, § 6 (requiring appropriations for education "before any other appropriation"); *Hornbeck*, 458 A.2d at 784 (discussing the Maryland Constitution's rigid regulation of the education appropriation).

typically reserve certain revenues—those from public lands, specific state fees, taxes, and other miscellaneous public resources—exclusively for public schools.[161] And regardless of the source of the revenues, roughly half of state constitutions prohibit states from directing public education funds toward private education.[162] In 1874, Pennsylvania's Constitution went so far as to dictate the precise minimum amount the state had to allocate for public education, which at the time was a 40% increase over the prior year.[163] More recently, the Colorado Constitution was amended to dictate the precise minimum annual rate of increase in state public education funds.[164]

State constitutions place school funding responsibility on the state (and regulate that responsibility in certain respects) in large part to resolve the failures, uncertainties, and burdens that result from local funding. While many local communities have long invested funds to support education, local school funding never produced a "system" of education capable of serving all students.[165] Rather, localized funding produced public schools in some places and none in others.[166] And even where those schools existed, the burden of supporting them—and their baseline of

161. *See, e.g.*, NEV. CONST. art. XI, § 3 (revenue from public lands); N.C. CONST. art. IX, § 6 (sale of swamp lands); ALA. CONST. §§ 257–60 (estates of intestate decedents).

162. Preston C. Green III & Peter L. Moran, *The State Constitutionality of Voucher Programs: Religion Is Not the Sole Determinant*, 2010 BYU EDUC. & L.J. 275, 294–305 (collecting and categorizing state constitutional provisions relating to vouchers).

163. *See* PA. CONST. of 1874, art. X, § 1 (mandating at least one million dollars per year); *see also* William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 423 (Pa. 2017) (discussing the provision).

164. COLO. CONST. art. IX, § 17.

165. For a repeated discussion of the failure of the prior local system to serve all students and communities and the constitutional response, see 7 PENNSYLVANIA CONSTITUTION DEBATES, *supra* note 41; 2 PENNSYLVANIA CONSTITUTION DEBATES, *supra* note 41, at 436, 468; 8 PENNSYLVANIA CONSTITUTION DEBATES, *supra* note 41, at 82; Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758, 771 (Md. 1983) ("Prior to 1864, the legislature's efforts to establish a statewide public school system were ineffective. Under the 1825 Act, Baltimore City maintained its own system and a number of counties voted not to establish public schools.").

166. *Hornbeck*, 458 A.2d at 771 (noting the uneven presence of public schools in Maryland); WILLIAM PRESTON VAUGHN, SCHOOLS FOR ALL: THE BLACKS AND PUBLIC EDUCATION IN THE SOUTH, 1865–1877, at 52 (1974) ("During the Civil War the rudimentary Southern school systems disintegrated . . . .").

quality—varied dramatically.[167] By constitutionalizing state responsibility for schools, states intended to ameliorate the uneven burden that local funding imposed on communities, improve the quality of schools, and ensure that a true system of schools served all students regardless of where they lived.[168]

4. Independent Localized Funding Undermines States' Constitutional Duty

Local funding schemes are, in terms of a statewide system of education, counterproductive. States, of course, have the capacity to offset the counterproductive nature of local funding, but once a state incorporates local funding, it has but two choices: tolerate stark inequality (and likely inadequacy) that may very well violate the constitution or take steps to counteract local funding's effect. The heavier the reliance on local funding, the more effort the state must exert to counteract it.[169] If the state, for instance, covers the entirety of the cost of an adequate education, it need not counteract anything. But if its base commitment is substantially less than the full cost, some districts will inevitably struggle to raise adequate funds while others will raise funds far in excess of an adequate education.[170] The point here is local funding may inevitably cause inadequacy and inequality, but local funding itself is not an inevitable aspect of funding.[171] Thus, states are making a choice regarding inequality and inadequacy when they incorporate local funding.

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167. 7 PENNSYLVANIA CONSTITUTION DEBATES, *supra* note 41 (focusing on the unequal and sometimes oppressive tax burdens across communities).

168. *Id.*; Robinson v. Cahill, 303 A.2d 273, 290 (N.J. 1973) (discussing the state constitution's concern with unequal tax burdens); McDuffy v. Sec'y of the Exec. Off. of Educ., 615 N.E.2d 516, 548 (Mass. 1993) (noting that the state has the duty to provide for the rich and poor in every city); ALA. CONST. of 1868, art. XI, § 6 (establishing education for "all the children of the State"); ARK. CONST. of 1868, art. IX, § 1 (same).

169. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 45 (1973) (noting a sixty-two percent increase in state funding to the disadvantaged district, which was still not enough to even out funding); Abbott *ex rel.* Abbott v. Burke, 575 A.2d 359, 378 (N.J. 1990) (analyzing the state's failed equalization efforts).

170. *See, e.g.*, *Rodriguez*, 411 U.S. at 45–46 (noting disparities in local funding); Horton v. Meskill, 376 A.2d 359, 366–68 (Conn. 1977) (detailing the vastly differential access to resources in a state where local funds accounted for seventy percent of school funding).

171. Hawaii operates one statewide school district. *Hawaii State Department of Education*, STATE OF HAW. BD. OF EDUC., https://boe.hawaii.gov/About/Pages/Department-of-Education.aspx [https://perma.cc/8L4W-65NL].

Equally important is the care with which the state structures its chosen preferences. State aid can actually have perverse results. In *Rodriguez*, for instance, Texas's school funding formula purported to counterbalance the effects of local funding,[172] but the net result was to provide slightly more aid per pupil to one of the wealthiest districts in the state than it did to one of the poorest in the state, which also had a high-need student population.[173] Texas is not alone. A similar perverse effect has continued to occur in other states.[174] And, as of today, no more than just a handful of states counterbalance local funding enough to meet student need and ensure adequate education in low-income districts.[175] Thus, courts that laud states based on the mere fact of redirecting funds toward poor districts misframe the issue.[176] State efforts are sometimes regressive and are only necessary in the first instance because the state prioritizes local funding.

When the state tells poor districts to pay their own way knowing they cannot, the state is abdicating its own constitutional fiscal responsibility, not promoting local control.[177] As a few courts have acknowledged, "local control [i]s a 'cruel illusion'" in poor districts.[178] The only districts that really exercise

172. *Rodriguez*, 411 U.S. at 9–10 ("The districts' share, known as the Local Fund Assignment, is apportioned among the school districts under a formula designed to reflect each district's relative taxpaying ability.").

173. *Id.* at 12–13 (showing that a poor district received $222 per pupil in foundation aid while a wealthy district received $225).

174. *See* Comm. for Educ. Rts. v. Edgar, 672 N.E.2d 1178, 1182 (Ill. 1996) ("[T]he provision of a minimum grant—equal to 7% of the foundation level—to even the wealthiest school districts is counterequalizing."); Chingos & Blagg, *supra* note 57 (revealing that only about half of states provided enough counterbalancing funds to cancel out the raw inequity of local funding).

175. Bruce D. Baker, Danielle Farrie & David Sciarra, *Is School Funding Fair? A National Report Card*, EDUC. L. CTR. 9, 11 fig.2 (Feb. 2018), https://edlawcenter.org/assets/files/pdfs/publications/Is_School_Funding_Fair_7th_Editi.pdf [https://perma.cc/8SP7-DWFC] (revealing that only three states provide at least thirty percent in additional funds in high poverty districts and that about half actually afford low-income districts fewer resources than others).

176. *See, e.g.*, *Rodriguez*, 411 U.S. at 55 (crediting Texas for "persistently endeavor[ing]—not without some success—to ameliorate the differences in levels of expenditures").

177. Serrano v. Priest, 557 P.2d 929, 948 (Cal. 1976) ("Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.") (internal citation omitted).

178. DuPree v. Alma Sch. Dist., 651 S.W.2d 90, 93 (Ark. 1983); *Serrano*, 557 P.2d at 948; Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993).

local control over educational quality are those with ample resources. Others simply make do, choosing among a narrow set of choices, all of which may result in subpar education.[179] In this context, local control is but the rhetoric by which the state rationalizes the abdication of its duty.[180]

B. THE HISTORICAL EVOLUTION OF STATES' CONSTITUTIONAL ROLE IN PUBLIC EDUCATION

States' historical path to the foregoing constitutional structure contradicts the Supreme Court's narrative regarding the tensions between state and local education. The following sections reveal that the state role in education is far older than the Court cared to acknowledge and that the early local education to which some courts vaguely alluded was not necessarily what we would call public education today. When local communities transitioned toward public education, it was typically a product of state policy. The heavy reliance on local communities in that transition was more about capacity and political strategy than a value choice. States had to navigate a political minefield shaped by skepticism toward taxes, regardless of who imposed them. The overall lesson that emerges from this history is not that localism holds some inherent sway in public education, but that state government has long been the driver of education policy and has used local communities, where appropriate, to achieve its ends.

1. State Responsibility for Education Began in the Founding Era

Though far from uniform, state responsibility for public education is, in fact, as old as the republic. The Massachusetts Constitution of 1780, which predated the U.S. Constitution by seven years, proclaimed that "it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of . . . public schools and grammar schools in the

179. *Serrano*, 557 P.2d at 948 ("The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide.") (internal citation omitted).

180. Abbott *ex rel.* Abbott v. Burke, 693 A.2d 417, 435 (N.J. 1997) ("The State, however, cannot shirk its constitutional obligation under the guise of local autonomy.").

towns."[181] New Hampshire included that same mandate in its 1784 constitution.[182] Other states, though less forceful in their precise language, made similar moves during the founding era.[183] Georgia's 1777 Constitution, for instance, provided: "Schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out."[184] Vermont's 1786 and 1793 constitutions included analogous language.[185] To be clear, however, less than half of initial state constitutions referenced education.[186] Not until post-Civil War Reconstruction did education clauses uniformly appear in state constitutions.[187] The point here is simply that state responsibility for public education involves a long tradition that stretches back to the Founding Era.

2. Local Education Was Not Fully Public

States without an education clause during the Founding Era still exercised state leadership, but their histories are more complex. No simple answer exists to whether state or local education came first or what state and local education even means. In the colonial and early republic period, the first schools tended to be a function of local initiative.[188] Those early schools, however, do

181. MASS. CONST. of 1780, ch. 5, § 2; *see also* Shoked, *supra* note 6, at 963–64, 964 n.119 (discussing Massachusetts's and other states' early public education laws).

182. N.H. CONST. of 1784, pt. II ("Knowledge and learning, generally diffused through a community, . . .[is] essential to the preservation of a free government . . . .").

183. *See* John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education: 1776–1900*, 42 AM. J. LEGAL HIST. 1, 10–11 (1998) (listing several instances of more tempered language in state constitutions).

184. GA. CONST. of 1777, art. LIV. That provision, however, did not make its way into the post-Revolutionary War constitution. The 1777 constitution was never formally ratified, and the 1789 constitution did not provide for education. GA. CONST. of 1789; *see* Lavere W. Hill & Melvin B. Hill, *Georgia Constitution*, NEW GA. ENCYC. (Sept. 29, 2020), https://www.georgiaencyclopedia.org/articles/government-politics/georgia-constitution [https://perma.cc/NY6Q-258Q] (outlining the historical development of Georgia's constitution).

185. VT. CONST. of 1786, ch. II, § 38; VT. CONST. of 1793, ch. II, § 41.

186. Eastman, *supra* note 183, at 3.

187. Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1094 (2019).

188. LAWRENCE CREMIN, AMERICAN EDUCATION 155 (1980) (describing local authorities as the "prime agents" of early education and highlighting lack of statewide unity between schools).

not fit squarely into the modern dichotomy of state and local. These early schools arose randomly and organically based on a multitude of factors that were neither local nor state. They arose based on variations in geography, population density, economy, and religion.[189] More important, these schools tended to be a product of private action, not state or local government action.[190]

These historical nuances, in part, explain the second way in which they evade modern conventions. These schools were not public schools in the modern sense. They were not open to all, free, or a part of some formal system of schools.[191] Instead, these early schools depended heavily on tuition.[192] As a result, many communities had no schools at all.[193] To say that local control was the dominant force behind early education is inaccurate or misleading; those schools were private local schools rather than public local schools.[194]

Schooling did not shift toward the modern concept of "public" schools until the 1820s and 1830s in the North and after the Civil War in the South.[195] This shift came in the form of common

189. *See* Jurgen Herbst, *Nineteenth-Century Schools Between Community and State: The Cases of Prussia and the United States*, 42 HIST. EDUC. Q. 317, 319, 325 (2002) (discussing variation in education and schooling in the colonies and then the states).

190. *See id.* at 325 (writing that America preferred its "private venture" schools during the early 1800s).

191. Nancy Kober & Diane Stark Rentner, *History and Evolution of Public Education in the US*, CTR. ON EDUC. POL'Y 1–2 (2020), https://files.eric.ed.gov/fulltext/ED606970.pdf [https://perma.cc/BQN9-9J3E]; CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780–1860, at 35 (Eric Foner ed., 1983) (highlighting the limited scope of early-nineteenth century schools); NEEM, *supra* note 23, at 73–74 (noting that academies could not serve all students and discussing the absence of free schools open to all in the South).

192. Kober & Rentner, *supra* note 191; NEEM, *supra* note 23, at 64, 66.

193. *See, e.g.*, Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 594–95 (2004) (describing nineteenth century schools' reliance on local resources).

194. NEEM, *supra* note 23, at 64, 66.

195. *See generally* KAESTLE, *supra* note 191, at 215 (describing a tax-supported system of schooling in the Midwest in the 1860s but none in the South); NOBLE, *supra* note 113, at 149–60, 164 (marking and surveying the rise of common schools in the 1830s in the North and the major turning point in the South in 1868); *see also* Allan E. Parker, Jr., *Public Free Schools: A Constitutional Right to Educational Choice in Texas*, 45 SW. L.J. 825, 829–30 (1991) (acknowledging that early schools were private schools that became public).

schools.[196] They served the students within their district lines, operated within a regulatory regime that could mandate student attendance, and fell under the purview of public officials, such as state and local superintendents.[197] Some common schools did hold onto the practice of charging some form of tuition,[198] but they, unlike academies, were funded by state and local taxes designated precisely for them.[199] And the reliance on tuition faded with the increase in direct state support and change in state law.[200] In fact, some states, and localities soon prohibited tuition altogether.[201] In sum, notwithstanding local schooling initiatives in the early 1800s, the schools they produced were not actually part of a system of public education.

3. Local Education Was a Function of State Policy

Regardless of how one conceptualizes the early forms of local education, it did not exist in a vacuum, nor was it purely local. The creation and steady growth of academies, common schools, and district schools was a function of state law. While some communities wanted public schools, many did not.[202] Some believed that schooling was generally unnecessary, while others objected that the cost of education was too high and thought families who

196. *See, e.g.*, Frank F. Mathias, *Kentucky's Struggle for Common Schools, 1820–1850*, 82 REG. KY. HIST. SOC'Y 214, 222–23 (1984) (discussing the initial creation of Kentucky's system of governmentally funded public schools); CREMIN, *supra* note 188, at 151 (mentioning the then-Governor of New York's appointment of a commission to organize and establish common schools).

197. *See, e.g.*, Mathias, *supra* note 196 (discussing the appointment of a superintendent of schools by the governor); CREMIN, *supra* note 188, at 153 (describing Massachusetts's early practices of school districting and requiring a certain amount of schooling).

198. Nancy Beadie, *Tuition Funding for Common Schools: Education Markets and Market Regulation in Rural New York, 1815–1850*, 32 SOC. SCI. HIST. 107, 108 (2008).

199. *See generally* NEEM, *supra* note 23, at 68–69 (describing the transition from "subscription schools" to "district schools"); ADOLPHE E. MEYER, AN EDUCATIONAL HISTORY OF THE WESTERN WORLD 395 (Harold Benjamin ed., 2d ed. 1972); CREMIN, *supra* note 188, at 138.

200. *See, e.g.*, O'Brien & Woodrum, *supra* note 193, at 640 ("[I]n choosing to mandate the creation of a [system] of common schools, the constitutional framers rejected the idea of simply subsidizing the existing diverse, parent-initiated and tuition-based schooling arrangements in favor of creating state organization and oversight.").

201. NEEM, *supra* note 23, at 178; NOBLE, *supra* note 113, at 161.

202. NEEM, *supra* note 23, at 86–87 (discussing the division among communities over public education).

wanted to educate their children should pay for it themselves.[203] The prevalence of these sentiments meant that common schools and their resources would not expand at an acceptable rate if left to local prerogative.[204] As Johann Neem explains, "increasing access to common schools was not spontaneous. It relied on nudges and ultimately mandates from state legislatures."[205]

State leaders, consistent with the ideology of the nation's Founding Era, believed that public education was a necessity of republican government and that states had a responsibility to fund and expand it.[206] Public education served the entire democracy, as well as its individual citizens who needed it.[207] On this basis, states enacted legislation to ensure the growth of schools. States, early on, dedicated land, authorized lotteries, increased state subsidies, and aggressively increased the number of public-private education partnerships they were chartering.[208] States' approach to common schools and districts was even stronger. State law created districts and bequeathed them the taxing power they would need to generate resources.[209]

Not only did states grant districts taxing power, but they also heavily incentivized and later mandated that local communities exercise it. A common state strategy was to authorize new funds for districts, but only those districts that raised local tax

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203. *Id.*; *see also* NOBLE, *supra* note 113, at 167 (discussing the gradual acceptance of taxes for education); Warren F. Hewitt, *Samuel Breck and the Pennsylvania School Law of 1834*, 1 PENN. HIST. 63, 74–75 (1934) (recounting the historical concern over the cost of schooling and paying for other people's children).

204. NEEM, *supra* note 23, at 70 ("Local control reflected the scale and tempo of small town and rural American life. It allowed schooling to be cheap . . . ."); NOBLE, *supra* note 113, at 168 (noting the common school argument that adequate education "could not be provided in the private institutions, pauper schools, or in the public schools dependent upon voluntary local taxation").

205. NEEM, *supra* note 23, at 70.

206. KAESTLE, *supra* note 191; Black, *supra* note 187, at 1089–90; *see also* NOBLE, *supra* note 113, at 150–51 (describing the push for public schools in the mid-nineteenth century as a "middle-class humanitarian crusade" to extend literacy to poor Americans).

207. NOBLE, *supra* note 113, at 150–51, 168–69 (noting the democratic and the individual argument for common schools).

208. NEEM, *supra* note 23, at 63–67, 70–72.

209. *Id.* at 70–72; NOBLE, *supra* note 113, at 168–69 (laying out the steps in the process of expanding schools and taxation).

funds could access matching state funds.[210] Other states either directly or indirectly forced districts to use their taxing power. For instance, states that mandated that districts operate a common school or hire teachers were indirectly mandating that they exercise their taxing power.[211] More directly, other states required districts to raise and spend specific amounts on public schools.[212]

Generating resources for education was not easy, particularly not for a statewide system of schools, but states' desire for expanding schooling prompted changes in government revenue generation itself. In the late 1700s and early 1800s, states sold land, natural resources, and even ran lotteries to generate resources to spur education growth.[213] Yet those resources were never enough to support a statewide system of schools.[214] For that, states needed consistent and substantial annual tax revenues.[215] It was for the express purpose of schools that states took the gargantuan step of imposing statewide taxes.[216] To be clear, new taxes were rarely popular, states were slow to impose them,

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210. NEEM, *supra* note 23, at 71–72 (indicating that New York required local communities to raise funds equal to those of the state and Pennsylvania required locals to raise twice as much as the state); *see also* Hewitt, *supra* note 203, at 71–73 (providing the legislative history of Pennsylvania's law). For an overview of state education tax laws, see Billy D. Walker, *The Local Property Tax for Public Schools: Some Historical Perspectives*, 9 J. EDUC. FIN. 265, 272–76 (1984).

211. NEEM, *supra* note 23, at 71–72; *see also* An Act to Provide for the Instruction of Youth, and for the Promotion of Good Education, 1789 Mass. Acts 416 (requiring the hiring of teachers in towns of a certain size).

212. NEEM, *supra* note 23, at 71 (discussing an 1825 Ohio requirement that communities spend one twentieth of their general taxes on education).

213. O'Brien & Woodrum, *supra* note 193, at 593; Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 25–26 (1992).

214. *See, e.g.*, O'Brien & Woodrum, *supra* note 193, at 594; NOBLE, *supra* note 113, at 166–68 (indicating that the common school funds financed by land were insufficient, and states had to transition to general taxes).

215. NOBLE, *supra* note 113, at 166–68; *see also* ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY 13 (1919) (recounting states' initial struggles with funding schools).

216. NOBLE, *supra* note 113, at 115, 122 (showing that New Yorkers were not yet ready to acknowledge the right of the state to tax and that there was a general aversion to taxes everywhere); NEEM, *supra* note 23, at 90–92 (discussing the controversial nature of taxes); O'Brien & Woodrum, *supra* note 193, at 608 (discussing tax opposition).

and after imposing them, some retracted or altered them.[217] But the larger lesson is that the growth of common schools is tied to the growth of state taxes, and statewide redistributive taxes were politically plausible because they were in support of schools. Likewise, schools in many areas were plausible only because state resources and policies made them so.

States' role in starting, supporting, and encouraging schools reframes the relative importance of localism. As Neem writes, "localism was a tactic for state building" in education.[218] Through the first half of the nineteenth century, most states had yet to build the bureaucracy necessary to start, run, or oversee schools.[219] Building a state system of education required the state to leverage the capacity of local communities to run schools.[220] Similarly, while states offered start-up funds and incentives, states believed it would be effective and more tolerable for local communities to generate substantial school funds, too.[221] This second point and the tension it raises goes to the heart of the historical matter in school financing.

4. Tax Policy, Not Localism, Was the Defining Issue

A commitment to public schooling is necessarily a commitment to substantial taxes. Communities, however, never welcome new taxes, regardless of their form, and can even be hostile them.[222] During education's formative period, local school funding practices were as much, if not more, about threading the needle of tax policy as they were substantive education policy. States' primary education objective was to drive school expansion and bring schools under the umbrella of state law. Local school taxes were the strategy for achieving the states' substantive goals without unnecessarily provoking anti-tax sentiments.[223] That schooling, as the most resource-intensive function of state and local government, has generally managed to

217. *See generally* Walker, *supra* note 210, at 273 (describing the process of imposing taxes as halting); KAESTLE, *supra* note 191, at 187 (discussing the repeal of school taxes in Illinois).

218. NEEM, *supra* note 23, at 70.

219. *Id.*; NOBLE, *supra* note 113, at 171–72 (discussing the growth of state education officers and their interaction with local officials).

220. NEEM, *supra* note 23, at 70.

221. *Id.* at 87–91.

222. *E.g.*, NOBLE, *supra* note 113, at 115, 122, 168–69; KAESTLE, *supra* note 191, at 34–35; O'Brien & Woodrum, *supra* note 193, at 607–09.

223. NEEM, *supra* note 23, at 87–91.

outweigh tax avoidance across time is a testament to public education's perceived virtue.[224]

Tax aversion, however, never fully receded. It remained embedded in education history at every turn. States' first education expansion schemes eschewed general tax policy altogether, opting for privately managed schools that relied heavily on tuition and philanthropy.[225] When states shifted from tuition toward taxes, they immediately faced opposition that had nothing to do with whether state or local governments would levy the tax.[226] In addition to the general concerns noted above about the basic cost and redistributive nature of taxes was the fear that the power to tax, even if for good purposes, was prone to oppression.[227]

States assuaged these fears by constraining education taxing power at the same time they were granting it.[228] For instance, when Maryland's constitution first authorized state tax power for education, it also constitutionally prohibited the legislature from imposing "any additional school-tax upon particular counties, unless such county express by popular vote its desire for such tax."[229] The assurance that local communities could exercise a check against tax oppression made it possible to transition from tuition-based education to tax-based education.[230]

The other mechanism for reducing anxieties was to raise and spend taxes locally.[231] A local community was unlikely to overtax itself—or if it did, the remedy was quicker and easier.[232] At the very least, a local community could not stick its hands into the pocket of another community, and the tax burden would

224. NOBLE, *supra* note 113, at 168–69, 175–76 (laying out the competing arguments and discussing the financial success of the common school movement, which was based on values).

225. *See supra* notes 202–224 and accompanying text.

226. NEEM, *supra* note 23, at 87–91.

227. NEEM, *supra* note 23, at 87; NOBLE, *supra* note 113, at 169.

228. *See, e.g.*, Thompson v. Engelking, 537 P.2d 635, 647 (Idaho 1975) ("[Constitutional] delegates were actually concerned with excessive *direct* taxation of the citizenry to support public education and not with an absolute prohibition on the raising of school revenues by *local* taxation.").

229. Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758, 771 (Md. 1983) (quoting Maryland's 1864 constitution).

230. *Id.*

231. NEEM, *supra* note 23, at 88–89.

232. *See, e.g.*, Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1024 (Colo. 1982) (outlining limitations on localities' ability to levy excessive education taxes).

be palatable if the community could see the fruits of its effort rather than question the administration of a distant government official. To be clear, however, aversion was so high that local taxation faced its own challenges.[233] Local education tax collectors regularly faced violence—from guns and clubs to stones and scalding water.[234] Over time, however, states' local strategy muted the resistance and successfully expanded education.[235]

5. State Funding and Responsibility Was the Cure for the Failure of Localism

While localism helped navigate tax aversion, localism failed to ensure a statewide system of schools for all, the states' overarching goal. Pennsylvania, for instance, passed major legislation to give districts taxing power in 1834 and offered relatively high-quality education in many locations,[236] but a statewide system of education failed to emerge.[237] Forty years later, many rural communities still had not opened their first school.[238] Other communities, though potentially taxing themselves at rates multiple times higher than the cities,[239] lacked the resources to construct facilities or pay teachers reasonable salaries.[240] In 1872, at least 75,000 children in the state were not receiving the benefit of public education.[241] In the South, where anti-tax senti-

233. KAESTLE, *supra* note 191, at 186–91 (discussing tax resistance at the local level, the failure of some communities to impose the taxes, and the gradual shift over time towards acceptance of those taxes).

234. NEEM, *supra* note 23, at 91.

235. *Id.* ("[A]reas that relied on local taxes expanded public support for education more quickly.").

236. *See* PA. DEP'T OF PUB. INSTRUCTION, 100 YEARS OF FREE PUBLIC SCHOOLS IN PENNSYLVANIA 2–3 (1934) ("The history of education in the Commonwealth during the hundred years since the passage of the Free School Act indicates that Pennsylvania has built worthily upon [its goal to maintain efficient public schools]."); PENNSYLVANIA CONSTITUTION DEBATES, *supra* note 41, at 692 (giving a direct account of the Pennsylvania constitution framers' commitment to accessible education).

237. *See infra* note 241 and accompanying text.

238. *See infra* note 241 and accompanying text.

239. William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 424 (Penn. 2017) (describing nineteenth century school funding concerns in Pennsylvania).

240. *See, e.g.*, *Correspondence. Educational.*, PITT. WKLY. GAZETTE, Dec. 23, 1872 (highlighting a debate about teacher's salaries).

241. *Governor's Message*, AM. VOLUNTEER, Jan. 11, 1872 (publishing the Pennsylvania governor's speech to the state legislature, recounting deficiencies in the state schooling system). That would have been about eight percent of the eligible population. *See* Thomas D. Snyder, *120 Years of American Education: A*

ment ran higher,[242] schooling was even more sporadic, and student enrollment rates were only half that of the North prior to the Civil War.[243] The problem, states recognized, was that many communities found it "impossible . . . to raise a sufficient amount of money by [property] taxation . . . to maintain the school in such district for the time required by law."[244]

These local funding failures and limitations were the predicate for states to take far more definitive steps toward uniform systems of statewide education.[245] During the first half of the nineteenth century, states had pushed education nearly as far as they could through local effort and, in the process, large swaths of the population grew accustomed to education taxes and accepted the need for a uniform system of education.[246] States' own bureaucratic expertise had also grown. These factors paved the way for states to transition away from pure localism toward a state system of education.

Very concrete aspects of the transition began in the early and mid-nineteenth century, depending on the state. First, states took on substantially larger fiscal responsibility for education.[247] Second, states began abolishing tuition and fees in common schools, eliminating a major source of local revenue.[248] Some eliminated tuition by statute while others embedded the change in their constitutions, mandating "free" education for

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Statistical Portrait, NAT'L CTR. FOR EDUC. STAT. 42 (Jan. 1993), https://files.eric.ed.gov/fulltext/ED355277.pdf [https://perma.cc/TMT2-TWEF] (indicating a total enrollment of approximately 834,000 from 1870–71).

242. NEEM, *supra* note 23, at 91–92 (describing the South's low tax rates).

243. Sun Go & Peter Lindert, *The Uneven Rise of American Public Schools to 1850*, 70 J. ECON. HIST. 1, 4 (2010) (contrasting school enrollment patterns in the North and South). Illiteracy rates in the South were significant. *E.g.*, STEPHEN B. WEEKS, U.S. BUREAU OF EDUC., HISTORY OF PUBLIC SCHOOL EDUCATION IN ARKANSAS 57 (1912) (showing a twenty percent illiteracy rate in Arkansas in 1840). Weeks also notes that relatively few counties self-imposed taxes in the South. *Id.* at 57 (noting Arkansas's school tax practices).

244. Thompson v. Engelking, 537 P.2d 635, 650 (Idaho 1975).

245. *See, e.g.*, PENNSYLVANIA CONSTITUTION DEBATES, *supra* note 41, at 692.

246. NEEM, *supra* note 23, at 87–91 (describing states' gradual acceptance of tax funded schools).

247. *See, e.g.*, Go & Lindert, *supra* note 243, at 6 (showing states' increased education funding over time).

248. NEEM, *supra* note 23, at 178.

"all."[249] During Reconstruction, new Southern constitutions almost uniformly mandated free schools for all.[250]

Third, state constitutions directly placed fiscal responsibility on states. In fact, Georgia's 1868 constitution efficiently mandated all the foregoing fiscal concepts into one clause: "The *General Assembly*, at its first session after the adoption of this constitution, *shall provide* for a thorough system of General Education to be forever *free* to *all* children of the State."[251] The strongest fiscal statement, however, was in Pennsylvania's 1874 constitution. As noted above, it dictated the precise minimum annual state appropriation for education.[252] Other state constitutions took less specific but more durable approaches to cementing the state's financial responsibility for public schools, dictating the precise timing in which the state must take up education appropriations.[253] Fourth, state constitutions brought various aspects of education management under state control, placing responsibilities on state superintendents and state boards of education rather than local officials.[254]

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249. *See, e.g.*, ALA. CONST. of 1868, art. XI, § 6 (establishing education for "all the children of the State"); ARK. CONST. of 1868, art. IX, § 1 (requiring "free schools, for the gratuitous instruction of all persons in this State"); FLA. CONST. of 1868, art. VIII, § 1 (requiring "education of all the children residing within its borders"); GA. CONST. of 1868, art. VI, § 1 (mandating that public education "be forever free to all children of the State"); LA. CONST. of 1868, tit. VII, art. 135 ("All children of this State [of suitable age] shall be admitted to the public schools . . . without distinction of race . . . ."); N.C. CONST. of 1868, art. IX, § 2 (mandating an education system "free of charge to all the children of the State"); *see also* David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South, 1867–1954*, *in* DAVID TYACK, THOMAS JAMES & AARON BENAVOT, LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954, at 145 (1987) (surveying the presence of various provisions in Reconstruction-era constitutions) (citing FRANKLIN B. HOUGH, CONSTITUTIONAL PROVISIONS IN REGARD TO EDUCATION IN THE SEVERAL AMERICAN STATES OF THE AMERICAN UNION (1875)).

250. Black, *supra* note 27, at 746 (recounting the establishment of a right to education in Southern constitutions).

251. GA. CONST. of 1868, art. VI, § 1 (emphasis added).

252. PA. CONST. of 1874, art. X, § 1.

253. *E.g.*, LA. CONST. of 1868, tit. VII, art. 139 (describing the mode by which Louisiana would fund its education system).

254. JOHN MATHIASON MATZEN, STATE CONSTITUTIONAL PROVISIONS FOR EDUCATION: FUNDAMENTAL ATTITUDE OF THE AMERICAN PEOPLE REGARDING EDUCATION AS REVEALED BY STATE CONSTITUTIONAL PROVISIONS, 1776–1929, at 36–52 (1931) (compiling the effect of states' constitutional delegations of power to superintendents); Black, *supra* note 27, at 812.

In sum, the notion of local school funding as a preeminent value does not hold up as a matter of constitutional law or history. Fiscal responsibility for education plainly rests with states. Local funding only exists as a delegated power within states' overall constitutional obligation. Thus, it has no inherent normative value and is often, as a practical matter, directly at odds with the states' constitutional responsibilities. Localism is more properly understood as a practical state strategy for navigating tax aversion, not an end in itself. Moreover, that strategy, despite certain strengths, failed to achieve the states' goals and precipitated stronger constitutional assignments of responsibility to states.

IV. LOCALISM AS A STRATEGY TO UNDERMINE RACIAL EQUITY IN EDUCATION

The expansion of state responsibility did not always move in a straight line. Most of the nuances of that movement are beyond this Article's scope, but one divergence warrants serious attention: the South's reversal of various aspects of state educational responsibility during the Jim Crow Era in order to subvert educational opportunity for Black people. Public education in the South lagged far behind the North throughout the first half of the nineteenth century[255] and sometimes included active resistance to public education.[256] Though some Southern states took small steps toward a system of common schools before the Civil War,[257] the general rule remained a region devoid of firm constitutional and financial commitment to public education.

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255. PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION, AND REDEMPTION, 1860–1902, at 201–02 (2017) (indicating the South lacked "effective public education" before Reconstruction); EDGAR W. KNIGHT, PUBLIC EDUCATION IN THE SOUTH, at vii–viii, 263–67 (1922) (discussing weak Southern school systems before 1860).

256. VAUGHN, *supra* note 166, at 52 (indicating public education advocates "met bitter opposition" in the South prior to the Civil War); B. JAMES RAMAGE, LOCAL GOVERNMENT AND FREE SCHOOLS IN SOUTH CAROLINA 29 (Herbert B. Adams ed., 1883) ("[T]he Southern people are opposed to the entire system of common school education."); Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137, 1155 (1993) (indicating that elites, "principally wealthy property and slave owners," had blocked public education prior to the Civil War).

257. *See, e.g.*, EDGAR WALLACE KNIGHT, THE INFLUENCE OF RECONSTRUCTION ON EDUCATION IN THE SOUTH 9–17 (Lawrence A. Cremin ed., reprt. ed., 1969) (describing North Carolina's school system before 1860); RAMAGE, *supra*

During Reconstruction, public education became a central component of refashioning the South into a working democracy.[258] Using its constitutional power to guarantee a republican form of government in the states, Congress required Southern states to rewrite their state constitutions and provide for public education in them.[259] Southern states complied, shifting fiscal and decision-making responsibility to the state.[260] But during the Jim Crow Era, Southern states aimed to reverse those Reconstruction Era efforts. This meant more than just segregating schools; it meant making them fiscally unequal. They determined that could be best achieved by shifting responsibility to local districts. The following sections detail both the rise of state education and the reversion to local education.

A. THE RISE OF STATE-FINANCED AND CONTROLLED EDUCATION IN THE SOUTH

1. Taxes and Funding

Southern states' constitutionalization of public education entailed state responsibility for education and a series of supporting policy developments. Most notable was the incorporation and strengthening of centralized state funding and taxing schemes.[261] States were already using their federal land grants and other state property revenues for education,[262] but during Reconstruction, state constitutions formalized those commitments and placed additional protections around those funds to ensure they could not be diverted away from public schools.[263]

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note 256, at 35 (describing South Carolina schools prior to 1850).

258. For an older but still helpful bibliography of state-specific educational history works covering Reconstruction, see KNIGHT, *supra* note 255, at 381–82, 434–35.

259. Black, *supra* note 27, at 778–83 (explaining how the Southern establishment of education systems was an implicit condition of Reconstruction).

260. *Id.* at 783–90 (cataloguing Southern states' Reconstruction-era constitutional changes).

261. To be sure, some states incorporated features of both centralized funding and control before Reconstruction (whether constitutionally or statutorily), with "tendencies toward centralization" of education existing since the Revolutionary War. RICHARD G. BOONE, EDUCATION IN THE UNITED STATES: ITS HISTORY FROM THE EARLIEST SETTLEMENTS 83 (William T. Harris ed., 1889). But the Reconstruction constitutions systematized and guaranteed these features. *Id.* at 357 (celebrating developments in Southern public education).

262. KNIGHT, *supra* note 257, at 96 (describing states' school funding systems).

263. *See, e.g.*, ALA. CONST. of 1868, art. XI, § 10; ARK. CONST. of 1868, art.

More significant, however, was Southern states' adoption of "a uniform system of taxation for school support."[264] State poll taxes and state property taxes formed the primary basis of these new tax schemes.

Prior to 1868, only one confederate state[265] constitutionally imposed a poll tax for education.[266] But by 1870, all ten confederate states seeking readmission to the Union amended their constitutions to require or authorize "state poll taxes" for education.[267] Two Reconstruction constitutions (Alabama's and North Carolina's) went a step further, expressly authorizing local poll taxes for education as well.[268]

Alongside poll taxes were property taxes. Prior to Reconstruction, only two confederate states authorized *state* property

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IX, § 4; FLA. CONST. of 1868, art. VIII, § 4; GA. CONST. of 1868, art. VI, § 3; LA. CONST. of 1868, tit. VII, art. 139; MISS. CONST. of 1869, art. VIII, § 6; N.C. CONST. of 1868, art. IX, § 4; S.C. CONST. of 1868, art. X, § 11; TEX. CONST. of 1869, art. IX, § 6; VA. CONST. of 1870, art. VIII, §§ 8, 10; *see also* KNIGHT, *supra* note 257, at 90–96 (comparing pre- and post-Civil War education provisions).

264. KNIGHT, *supra* note 257, at 99; *cf. id.* at 95–96 (describing Southern states' many approaches to education funding before Reconstruction).

265. Confederate states, for the purposes of this Article, refers only to those ten Southern states that formally seceded from the Union and were later subject to the Reconstruction Act of 1867. While Tennessee seceded, it reentered the Union early and was not subject to the Act.

266. VA. CONST. of 1864, art. IV, § 22.

267. ALA. CONST. of 1868, art. IX, § 1; ARK. CONST. of 1868, art. IX, § 4; FLA. CONST. of 1868, art. XII, § 6; *id.* art. VIII, § 4; GA. CONST. of 1868, art. VI, § 3; *id.* art. I, § 29; LA. CONST. of 1868, tit. VII, art. 141; *id.* tit. VI, art. 118; MISS. CONST. of 1869, art. VIII, § 7; N.C. CONST. of 1868, art. V, §§ 1–2; S.C. CONST. of 1868, art. X, § 5; TEX. CONST. of 1869, art. IX, § 6; VA. CONST. of 1870, art. X, § 5; *id.* art. VIII, § 8. The terms "state" and "local" poll taxes are sometimes misleading. Some states created clearly "state" or "local" poll taxes, but others created less clear systems, such as *state* poll taxes for *local* retention. *See, e.g.*, ALA. CONST. of 1875, art. XI, § 1; *see also* ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 223 (2006) (noting, in the context of state and local property taxes, that "th[e] distinction tended to blur in practice").

268. *See* ALA. CONST. of 1868, art. XI, § 12 (authorizing the legislature to enable school districts to impose poll taxes for education); N.C. CONST. of 1868, art. V, §§ 1–2 (requiring a portion of county poll tax funds to be used for education); *cf.* FLA. CONST. of 1868, art. VIII, § 4 (outlining a broad scope of applicable education taxes). North Carolina had already moved in that direction via statute one year prior to its constitution. EDGAR W. KNIGHT, PUBLIC SCHOOL EDUCATION IN NORTH CAROLINA 224–25 (1916) (noting that North Carolina's legislature had "authorized towns to levy and collect a poll-tax . . . to be wholly appropriated to the use of the public schools" in its 1866–67 session).

taxes for education.[269] During Reconstruction, eight states adopted state property taxes.[270] Similarly, while some states had authorized local education property taxes prior to Reconstruction,[271] nine states newly required or authorized local property taxes to implement the general education mandate in their Reconstruction constitutions.[272] In addition to general poll and property taxes, most states devised other, more targeted business taxes, fines, fees, and estate rules to support education.[273]

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269. *See* KNIGHT, *supra* note 257, at 90–92 (showing that Arkansas and Louisiana maintained property taxes, even before Reconstruction). Knight also notes that Tennessee required a state property tax before 1868. *See id.* at 96.

270. *See* FLA. CONST. of 1868, art. VIII, § 5 (requiring an education tax on all taxable property); GA. CONST. of 1868, art. VI, § 3 (authorizing a general property tax for education); S.C. CONST. of 1868, art. X, § 5 (requiring an education tax on all taxable property); VA. CONST. of 1870, art. VIII, § 8 (requiring an education tax on all taxable property); WEEKS, *supra* note 243, at 57 (noting legislative taxes that were used to support schools); Leon O. Beasley, A History of Education in Louisiana During the Reconstruction Period, 1862–1877, at 139 (1957) (Ph.D. dissertation, Louisiana State University) (noting legislative tax); JAMES WILFORD GARNER, RECONSTRUCTION IN MISSISSIPPI 365–66 (1901) (noting an 1873 legislative tax to implement constitutional education requirement); Morris Eugene Gilliom, The Development of Public Education in North Carolina During Reconstruction, 1865–1876, at 126–28 (1962) (Ph.D. dissertation, Ohio State University) (noting the development of 1872 and 1873 legislative taxes in North Carolina); *see also* Tyack & Lowe, *supra* note 249, at 145 (noting that all Reconstruction constitutions had some form of state taxation).

271. *See* KNIGHT, *supra* note 257, at 90–96 (outlining various features of state education laws in nine states prior to 1868).

272. ARK. CONST. of 1868, art. IX, § 7 (requiring the legislature to remedy school districts' insufficient funds if necessary "by levying such tax upon all taxable property . . . as may be deemed proper"); FLA. CONST. of 1868, art. IX, § 8 & art. XIII, § 6 (requiring counties to partially match state education funds by taxation); TEX. CONST. of 1868, art. IX, § 7 (requiring the legislature to grant school taxing power); VA. CONST. of 1870, art. VIII, § 8 & art. X, § 5 (permitting counties and school districts to impose property taxes for education); *see also* KNIGHT, *supra* note 257, at 91–96 (evaluating changes in school-related laws in the nine states); WEEKS, *supra* note 243, at 53–54, 57 (discussing legislative acts of 1871 and 1873 that, *inter alia*, provided a "local or district tax"); DOROTHY ORR, A HISTORY OF EDUCATION IN GEORGIA 202 (1950) (discussing a proposed Georgia law allowing a state board, as opposed to county boards, to determine the amount of taxes necessary to fund schools); JOE G. TAYLOR, LOUISIANA RECONSTRUCTED 1863–1877, at 461 (1974) (allowing Louisiana parishes to levy school taxes at the local level in addition to funds provided by state taxes); Gilliom, *supra* note 270, at 121 (discussing North Carolina taxes); Stephen B. Thomas & Billy Don Walker, *Texas Public School Finance*, 8 J. EDUC. FIN. 223, 229–31 (1982) (discussing Reconstruction's effect on school funding).

273. *See, e.g.*, ALA. CONST. of 1868, art. XI, § 13; GA. CONST. of 1868, art. VI, § 3; MISS. CONST. of 1868, art. VIII, § 6; ARK. CONST. of 1868, art. IX, § 4; FLA.

A handful of state constitutions went even deeper, regulating these taxes and revenues through a precise input formula or need-based standard. Alabama's constitution was the most specific, setting the precise percent of taxes that schools were to receive at "one-fifth of the aggregate annual revenue of the State."[274] Texas required that a "one dollar" poll tax and "one fourth of the annual revenue derivable from general taxation" go to public schools.[275] Others were more general, requiring the state to appropriate "so much of the ordinary revenue of the State *as may be necessary* . . . for establishing and perfecting" public schools.[276] In short, the foregoing taxes in the collective represent a singular trend—Southern states taking on substantial fiscal responsibility and accountability so as to ensure the stability and growth of public education, which local communities had been unable or unwilling to bear.

2. Educational Leadership and Control

During Reconstruction, Southern states also created and used centralized systems of state education control to improve public education. The precise methods could vary by state and year, but the intent across Southern states to establish state leadership and control in education was clear. At least four different policy trends represent that intent. First, states, not local communities, made the decision of whether students should attend school. Five Reconstruction constitutions included provisions related to compulsory school attendance.[277]

Second, state constitutions specified exactly who could and should attend school. Reconstruction constitutions uniformly provided that the schools would be open to all students.[278] "All"

CONST. of 1868, art. IX, § 4; LA. CONST. of 1868, tit. VII, art. 139; S.C. CONST. of 1868, art. X, § 11; VA. CONST. of 1870, art. VIII, § 7; N.C. CONST. of 1868, art. IX, § 4.

274. ALA. CONST. of 1868, art. XI, § 11.

275. TEX. CONST. of 1869, art. IX, § 6.

276. N.C. CONST. of 1868, art. IX, § 4 (emphasis added); ARK. CONST. of 1868, art. IX, § 4.

277. ARK. CONST. of 1868, art. IX, § 6; N.C. CONST. of 1868, art. IX, § 17; S.C. CONST. of 1868, art. X, § 4; TEX. CONST. of 1869, art. IX, § 5; VA. CONST. of 1870, art. VIII, § 4. The existence of a provision requiring attendance did not, however, mean that the objective was achieved in fact. KNIGHT, *supra* note 257, at 90–94.

278. Black, *supra* note 27.

was an antidiscrimination concept.[279] South Carolina's constitution, for instance, provided that the public schools "shall be free and open to all the children and youths of the State, without regard to race or color."[280] Louisiana's provided that "[t]here shall be no separate schools or institutions of learning established exclusively for any race" and no local communities could "make any rules or regulations contrary" to that provision.[281] Though less radical in import, several also mandated that the state provide education to all students through a particular age.[282]

Third, all ten Reconstruction constitutions named a state officer to head and direct the system of public education.[283] While most Southern states had a state superintendent prior to Reconstruction,[284] the position was an inferior statutory one. Elevating the superintendent to constitutional officer put the officer on the very highest constitutional plane, meaning that on a variety of matters the superintendent, not the governor or legislature, had the final word.[285] Fourth and relatedly, six Reconstruction constitutions constitutionalized a state board of education.[286] Two gave the board legislative powers that would have otherwise

279. *Id.* (detailing Senator Sumner's original call for schools to be open to all, regardless of race).

280. S.C. CONST. of 1868, art. X, § 10.

281. LA. CONST. of 1868, tit. VII, arts. 135–36.

282. LA. CONST. of 1868, tit. VII, art. 135; ARK. CONST. of 1868, art. IX, § 1.

283. *See* ALA. CONST. of 1868, art. XI, § 2 (providing for elected state superintendent); ARK. CONST. of 1868, art. IX, § 2 & art. VI, § 1 (providing for elected state superintendent); FLA. CONST. of 1868, art. IX, § 3 & art. VI, § 17 (providing for appointed state superintendent); GA. CONST. of 1868, art. VI, § 2 (providing for appointed state superintendent); LA. CONST. of 1868, tit. VII, art. 137 (providing for elected state superintendent); MISS. CONST. of 1869, art. VIII, § 2 (providing for elected state superintendent); N.C. CONST. of 1868, art. IX, § 7 & art. III, §§ 1, 13 (providing for elected state superintendent); S.C. CONST. of 1868, art. X, § 1 (providing for elected state superintendent); TEX. CONST. of 1869, art. IX, § 2 (providing for elected state superintendent); VA. CONST. of 1870, art. VIII, § 1 (providing for state superintendent elected by legislature).

284. *See* KNIGHT, *supra* note 257, at 95, 95 n.10 (stating that only South Carolina and Virginia did not legally provide for a superintendent). Of those, only three were noted in pre-Reconstruction constitutions. *See* Eastman, *supra* note 183, at 28–29.

285. *See, e.g.*, Coyne v. Walker, 879 N.W.2d 520, 524–26, 533, 544–46 (Wis. 2016). In some states, the superintendent was ultimately accountable solely to the people by election. MATZEN, *supra* note 254, at 36–52.

286. ALA. CONST. of 1868, art. XI, §§ 1, 5; FLA. CONST. of 1868, art. IX, § 9; MISS. CONST. of 1869, art. VIII, § 3 (creating board of education with limited duties); N.C. CONST. of 1868, art. IX, §§ 7, 9; S.C. CONST. of 1868, art. X, § 2; VA. CONST. of 1870, art. VIII, § 2.

been reserved to the general assembly, including power over state education funds in one state.[287]

In sum, Reconstruction radically reshaped and expanded education in the South. State constitutions and the responsibility they shifted to state government drove that progress. States instituted statewide tax schemes to support education and appointed state officers to steward over the system. Those state policies had enormous implications for both state and local government, taking certain matters out of both of their discretions to ensure schools were funded and students could enter them on an even playing field.

B. LOCALISM AS SUPPRESSION OF BLACK EDUCATION

Many whites objected to the resources that this state-controlled and more egalitarian system of education demanded. When Reconstruction stalled and ended, state funding and leadership were prime targets for change.[288] Local control and funding became the means for achieving segregation, discrimination, and inequality.

First, Southern states reversed the trend toward centralized state education funding. All but North Carolina imposed or included new constitutional provisions for establishing *local* property taxes for education.[289] Some of these local taxes were not entirely new, but what was new was that these taxes remained in the local districts in which they were raised rather than going

287. ALA. CONST. of 1868, art. XI, §§ 1, 5 (creating board of education with "full legislative powers in reference to the public educational institutions of the State"); N.C. CONST. of 1868, art. IX, §§ 7, 9 (creating board of education with "full power to legislate . . . in relation to free public schools and the educational fund of the State").

288. *See* HERRON, *supra* note 255, at 208 tbl.6.2 (summarizing education-related changes in Redemption constitutions).

289. ALA. CONST. of 1901, art. XIV, § 269 (authorizing counties to impose tax); ARK. CONST. of 1874, art. XIV, § 3 (authorizing legislature to enable school districts to impose tax); FLA. CONST. of 1885, art. XII, § 10 (authorizing school district taxes in addition to existing county property taxes); GA. CONST. of 1877, art. VIII, § 4 (authorizing counties and municipal corporations to impose "local taxation" for education); LA. CONST. of 1898, art. 254 (enabling parishes to impose tax for education); MISS. CONST. of 1890, art. VIII, § 206 (authorizing counties and "separate" school districts to impose tax); S.C. CONST. of 1895, art. XI, § 6 (requiring counties to impose property tax for education); TEX. CONST. of 1876, art. VII, § 3 (amended 1883) (enabling school districts to impose property taxes); VA. CONST. of 1902, art. IX, § 136 (authorizing local authorities to impose property taxes in addition to other previously constitutionally authorized taxes for education).

to the state first.[290] Some states went a step further in localism by allowing local communities to keep *state* taxes, too. During Reconstruction, state poll taxes had normally gone to the state, which then redistributed them among districts; but Alabama, Louisiana, Mississippi, and South Carolina amended their constitutions to require that the state poll taxes would remain at the local level and never reach the state coffers.[291] Two other states did the same through legislation.[292] This localization of funding, of course, promoted inequality between counties.

Second, having moved more funding to the local level, some states literally segregated local dollars by race.[293] At least five states passed legislation to ensure that white taxes only went to white schools and Black taxes went to Black schools.[294] An 1879

290. *Compare* ALA. CONST. of 1868, art. XI, §§ 1, 5, *with* ALA. CONST. of 1901, art. XIV, § 269 (allowing counties to retain the tax revenue they impose); *compare* FLA. CONST. of 1868, art. IX, § 9, *with* FLA. CONST. of 1885, art. XII, § 10 (taking some taxing power from state board of education and granting it to local school districts).

291. *See* ALA. CONST. of 1901, art. XIV, § 259; FLA. CONST. of 1885, art. XII, § 9; LA. CONST. of 1898, arts. 231, 252; MISS. CONST. of 1890, art. VIII, § 206 & art. XII, § 243; S.C. CONST. of 1895, art. XI, § 6.

292. *See* WEEKS, *supra* note 243, at 61 (noting an 1875 Arkansas law creating a local school poll tax); ORR, *supra* note 272, at 225 (suggesting that Georgia localized its poll tax in 1875).

293. *See, e.g.*, Tyack & Lowe, *supra* note 249, at 150, 150 n.40 (noting attempts "to divide the school fund according to the poll tax or real estate taxes paid by the two races, thereby creating a racially distinct tax base") (citing Gladys T. Peterson, *The Present Status of the Negro Separate School as Defined by Court Decisions*, 4 J. NEGRO EDUC. 351, 366–67 (1935)); CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973, at 17–18 (2018); VAUGHN, *supra* note 166, at 72 (discussing Virginia's 1868 constitutional convention and noting an unsuccessful attempt at a "separate school provision which also divided poll tax receipts on a racial basis"); Eastman, *supra* note 183, at 26 (discussing Texas's 1866 constitution); HOUGH, *supra* note 249, at 107.

294. *See, e.g.*, WEEKS, *supra* note 243, at 117–18 (noting that an 1879 law that required "all poll and local taxes [to] be expended in the school district by the race which paid them"); *id.* at 127–29 (noting that an unsuccessful constitutional amendment proposed in 1893 sought to permit districts to impose property taxes permitting color-coded use of funds); Pinder & Hanson, *supra* note 32, at 172 n.42 (suggesting that 1874 legislation attempted "[t]o ensure that white tax dollars were not used to support black schools" by "requiring separate tax returns" for both races); Frenise A. Logan, *Legal Status of Public School Education for Negroes in North Carolina, 1877–1894*, 32 N.C. HIST. REV. 346, 347–55 (1955) (tracing North Carolina's gradual development of color-coded school funding system); Jonathan Pritchett, *North Carolina's Public Schools: Growth and Local Taxation*, 9 SOC. SCI. HIST. 277, 280 (1985) (explaining that

Alabama statute, for instance, explicitly required that "all poll and local taxes [shall] be expended in the school district by the race which paid them."[295] Legislation of this type was so brazen that some state leaders acknowledged that a federal court might declare it unconstitutional.[296] But they thought they could evade constitutional scrutiny and achieve the same result at the local level. Thus, several states afforded local officials the power and discretion to perpetuate funding discrimination themselves (where state constitutions now required segregated education).[297]

For instance, state laws gave local officials the power to distribute school funds "as they may deem just and equitable," which, as a practical matter, meant racially inequitable divisions of money.[298] And as a check against the possibility that localism might afford Black-controlled counties and communities the opportunity to better themselves, some states required districts to obtain state approval prior to increasing school revenues or

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white taxpayer money only funded white schools); Mikal Watts & Brad Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771, 807, 807 nn.188 & 190 (1990) (explaining statutes designed to result in separate but equal funding of segregated schools).

295. WEEKS, *supra* note 243, at 117–18.

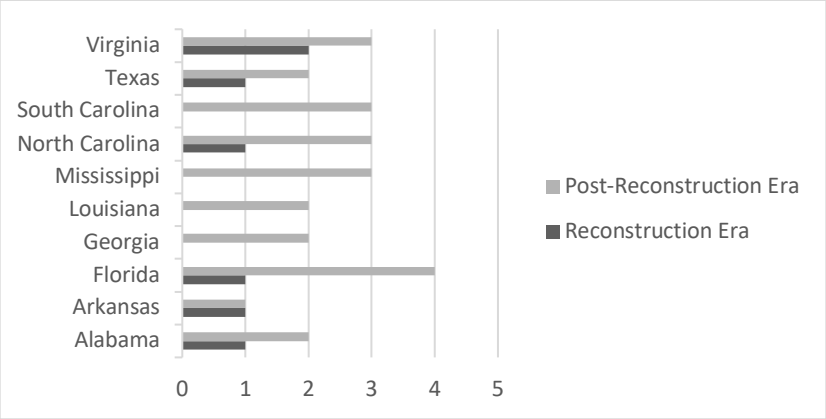
296. JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI 304, 373 (1890) (referring issues regarding the constitutionality of color-coded funds to the judiciary committee); PRATT, *supra* note 31, at 117–18 (discussing the convention's concerns); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA HELD IN 1875, at 130, 137–38 (1875) (recording an unsuccessful amendment offered for color-coded funds). Others, however, insisted that if school segregation was constitutional, so was the segregation of school funding and that they ought to include funding segregation in the constitution too. JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 731–35 (1901).

297. *See* ALA. CONST. of 1901, art. XIV, §§ 256, 270; FLA. CONST. of 1885, art. XII, § 12; GA. CONST. of 1877, art. VIII, § 1; LA. CONST. of 1898, art. 248; MISS. CONST. of 1890, art. VIII, § 207; N.C. CONST. of 1876, art. IX, § 2; S.C. CONST. of 1895, art. XI, § 7; TEX. CONST. of 1876, art. VII, § 7; VA. CONST. of 1902, art. IX, § 140.

298. MALCOLM C. MCMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798–1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM 317–18 (1955); *see also* FLA. CONST. of 1885, art. XII, § 11 (stating school taxes "may be expended in the district where levied . . . so that the distribution among all the schools of the district be *equitable*") (emphasis added); WALSH, *supra* note 31, at 17–18 (describing systems where "funds were assigned to white local officials to allocate as they wished"); Tyack & Lowe, *supra* note 249, at 135, 150 (noting that white county officials had wide legal authority "to pour the money into white schools and to give tiny sums to the black ones").

simply capped how much education revenues a local community could raise.[299] The chart below provides a snapshot of the overall dramatic changes that occurred during this period regarding local funding.

Figure 4. Number of Constitutional Provisions for Local Funding or Retention



Finally, states amended their state constitutional provisions governing state superintendents and state boards of education.[300] In the process, some added local educational offices.[301]

299. *See, e.g.*, Lynch *ex rel.* Lynch v. Alabama, No. 08-S-450-NE, 2011 WL 13186739, at *233–34 (N.D. Ala. Nov. 7, 2011), *aff'd in part, vacated in part, remanded sub nom.* I.L. v. Alabama, 739 F.3d 1273 (11th Cir. 2014) (indicating that "property tax restrictions were intended to prevent the possibility that taxes could again be levied on the property of Alabama Planters in an onerous amount for the purpose of educating blacks"); Guyse, *supra* note 32, at 534 (discussing Alabama's cap on municipal takes from the 1868 state constitution); WEEKS, *supra* note 243, at 60 (summarizing ARK. CONST. of 1874, art. XIV, § 3); THOMAS E. COCHRAN, HISTORY OF PUBLIC-SCHOOL EDUCATION IN FLORIDA 57 (1921) (noting limitations on local property taxation for education); ORR, *supra* note 272, at 225 (discussing GA. CONST. of 1877, art. VII, § 4).

300. *Compare* ALA. CONST. of 1901, art. XIV, *and* ALA. CONST. of 1875, art. XII, *with* ALA. CONST. of 1868, art. XI, §§ 1, 5 (removing state board); *compare* Act of Dec. 7, 1875, No. 46, § 13, 1875 Ark. Acts 54, 60, *with* Act of July 23, 1868, No. 52, § 74, 1868 Ark. Acts 163, 188 (halving superintendent's salary); *compare* FLA. CONST. of 1868, art. IX, § 3 & art. VI, § 17, *with* FLA. CONST. of 1885, art. XII, § 2 (changing superintendent from appointment to election); *compare* TEX. CONST. of 1876, art. VII, *with* TEX. CONST. of 1869, art. IX, § 2 (removing reference to superintendent); *compare, e.g.*, VA. CONST. of 1902, art. IX, § 130, *with* VA. CONST. of 1870, art. VIII, § 2 (altering composition of state board).

301. *See, e.g.*, FLA. CONST. of 1885, art. XII, § 10 (discussing school trustees);

The precise changes to these offices varied by state. But the overall point appeared to be to divest power from state officials who previously could pursue progressive education policy or to create new local officials to balance out that power. While not a single Reconstruction Era constitution provided for both local funding and local education officers in their constitutions, half of the post-Reconstruction constitutions did, substantially reversing both the balance of power and resources in those states.[302]

C. RACIAL MOTIVES FOR LOCALISM

To the extent that some of the foregoing statutes and constitutions were facially neutral, the debates and public sentiment surrounding them evinced an explicit hostility toward the Reconstruction system that supported Black education and a desire to change it for that reason. Whites openly rejected the basic principle that the state as a whole—or whites more specifically—were responsible for the education of Black children. As an Arkansas paper argued, the Reconstruction constitution is a "miserable document" because it created racially equitable schools and taxed the white man to pay for them.[303] Similarly, *The Weekly Constitutionalist* charged that because Blacks did not possess enough taxable property or pay enough poll taxes to support their schools, the state had imposed "a uniform *ad valorem* tax upon all of the property of the whites."[304] These sentiments

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LA. CONST. of 1879, art. 225 (granting individual parishes the ability to appoint a local superintendent); S.C. CONST. of 1895, art. XI, § 6 (discussing county boards and district trustees); VA. CONST. of 1902, art. IX, § 133 (discussing district trustees).

302. Calculated based on data collectively found in KNIGHT, *supra* note 257, at 91–96; Eastman, *supra* note 183, at 32; HOUGH, *supra* note 249, at 110–11; HERRON, *supra* note 255, at 208 tbl.6.2.

303. *The Constitution*, DES ARC WKLY. CITIZEN, Feb. 22, 1868; *see also* Orval T. Driggs, Jr., *The Issues of the Powell Clayton Regime, 1868–1871*, 8 ARK. HIST. Q. 1, 11, 41 (1949) (noting that "Conservatives attempted to exploit a racialist line of attack" through fear of mandatorily mixed schools and citing contemporaneous newspapers).

304. Albus, *The Situation: Number IX*, WKLY. CONSTITUTIONALIST, Mar. 11, 1868; *see also* Albus, *The Situation: Number VII*, WKLY. CONSTITUTIONALIST, Feb. 26, 1868 [hereinafter *Number VII*] (suggesting that, under the "constitution proposed," "the whites will never cease paying for educating" Black students); B. H. Hill, *The Relief Iniquity Exposed*, CUTHBERT APPEAL, Apr. 9, 1868 (complaining about "free schools for [Blacks], to be supported by taxation upon the whites"). In 1874, Georgia legislatively attempted "[t]o ensure that white tax dollars were not used to support black schools" by "requiring separate tax returns" for both races. Pinder & Hanson, *supra* note 32, at 172 n.42 (citing

echoed across the South.[305] Not only did schools throw "money away" in their attempts to educate Black children,[306] many whites believed schools were illegitimately socially reengineering society and monopolizing public resources for Blacks.[307] White people who wanted to reap the benefit of their tax dollars had no choice but to attend schools with Black students.[308]

Segregating schools was not enough to placate these voices; states needed to segregate money, too.[309] A 1901 Birmingham,

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OSCAR H. JOINER, A HISTORY OF PUBLIC EDUCATION IN GEORGIA, 1734–1976, at 86 (1979)).

305. *Number VII*, *supra* note 304; *The Public School System*, COLUMBUS DAILY ENQUIRER, June 28, 1877; *Republicans Howling About It*, COLUMBUS DAILY ENQUIRER, May 30, 1877; *Why the People of the South Are Arrayed in a Body Against Radicalism*, DAILY CLARION, Apr. 9, 1868 (complaining about "a gigantic 'school system' (so called) which . . . the white people . . . will necessarily pay the bulk of"); *Sixteen Reasons for Voting Against the Proposed Constitution*, WILMINGTON J., Apr. 10, 1868; *Education—Social Equality*, WILMINGTON J., Mar. 13, 1868 (complaining that white people will pay for the schools and Black people will govern them); *To the Freedmen of South Carolina*, DAILY PHOENIX, Apr. 12, 1868 ("[T]he white man is taxed, without a vote, to school a black man's child, while the black man pays no tax at all, unless he owns property.").

306. Beasley, *supra* note 270, at 167; PRATT, *supra* note 31, at 55 (citing a newspaper article criticizing "excessive" government spending on Black education); Derrell Roberts, *Social Legislation in Reconstruction Florida*, 43 FLA. HIST. Q. 349, 353 (1965).

307. MCMILLAN, *supra* note 298, at 160 (complaining about school taxes and that white children will be forced "to go into all the free public schools upon terms of social equality with all sorts of [Black] children"); *Public Education—Negro Equality*, WILMINGTON J., Mar. 13, 1868 (calling "attention to this diabolical scheme to *force* [*Black*] *social equality* upon the poorer classes of our people") (emphasis in original).

308. *The Constitution*, DES ARC WKLY. CITIZEN, Feb. 22, 1868 (objecting to schools that promote equality); J. P. Thomas, *Remarks of Col. J. P. Thomas*, DAILY PHOENIX, May 14, 1868; "*They Don't Like Schools*," CHARLESTON DAILY NEWS, May 29, 1868 (claiming law "forces every man to choose between educational miscegenation and an onerous tax"); *The South Carolina Reconstruction Scandal*, KEOWEE COURIER, May 29, 1868; J. O. Lewis, *Educational*, KEOWEE COURIER, May 29, 1868 (suggesting white people not participate in public education); Richard A. Meade, A History of the Constitutional Provisions for Education in Virginia 235 (1941) (Ph.D. dissertation, University of Virginia) (discussing white people's racial objections to public education); s*ee also* VAUGHN, *supra* note 166, at 77 ("Most whites, who paid the great majority of property taxes, simply would not tolerate mixed schools, nor would they pay taxes for integrated schools which they believed would, in effect, exclude white children.").

309. *See The Public School System*, *supra* note 305 (bemoaning the slippery slope thought to result from non-segregated payments).

Alabama paper summarized the fervor this way:

> [I]f the constitutional convention shall accomplish but one reform, and that the separating of the education fund so that white children shall receive the benefit of the taxes of white people and the colored children receive the benefit of taxes of [Black] taxpayers, it will have conferred upon this people a lasting benefit.[310]

Or as another paper remarked, "a constitution that will not allow the white people to tax themselves for the benefit of their schools, after they have contributed liberally to [Black] schools, is not the constitution that the white people of North Carolina want."[311] The ultimate solution, as described in the prior section, was to devolve more funds and responsibility to the local level where these ends could be more easily achieved.

V. CONSTITUTIONAL IMPLICATIONS

The foregoing history has enormous constitutional implications. The local funding narrative, as explained by the Supreme Court and then state courts, is riddled with holes that disregard three crucial historical facts: (1) constitutional responsibility for education rests with the state and not local districts; (2) localism has been a means to an end rather than an end in itself; and (3) localism in the South was a means to further racial segregation and inequality. These facts directly relate to both federal and state constitutional inquiries. At the federal level, the intersection of localism and racism triggers equal protection concerns, particularly how and whether these racist motivations persist across time to discredit states' facially neutral local funding policies. At the state level, the general history of states' role in education and the South's racist motivations for localism discredit localism as a legitimate justification for school funding inadequacy and inequity.

Section A details the equal protection analysis. It first explains the requirement of proving discriminatory intent. It then explores the two major ways in which the Supreme Court has addressed the ongoing taint of intentional discrimination from the Jim Crow era, particularly regarding schools and the judicial system. Section A closes by synthesizing that precedent and applying it local school funding.

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310. MCMILLAN, *supra* note 298, at 318 (quoting BIRMINGHAM AGE-HERALD, Apr. 16, 1901).

311. Pritchett, *supra* note 294, at 280–81 (quoting NEW BERN DAILY J., May 16, 1886).

Section B details the state constitutional analysis, examining the extent to which localism can justify inequity and inadequacy and concluding that, in most instances, it is an insufficient government interest. With that framing, it finds that affirmatively promoting localism amounts to a dereliction of states' constitutional duty in education. It concludes that the only relevant question in adequacy and equity cases are those regarding state responsibility, not local responsibility.

A. EQUAL PROTECTION

The racially discriminatory impacts of local school funding, as demonstrated in Part I, are obvious. The racist motivations behind localism during the Jim Crow Era are also evident in Part IV. Schools, however, are not funded in the exact same way as they were during Jim Crow.[312] States and local districts have removed those aspects that were overtly discriminatory,[313] and the details of those facially neutral aspects of school funding have evolved.[314] Yet the general commitment to local funding, as well as certain strategies for achieving it, has remained.[315] The question now is whether the ongoing racially disparate impacts of those policies, combined with the racial intent that precipitated their initial genesis, are enough to establish an equal protection violation. The following sections demonstrate that the answer to that question depends in large part on the presumption with which a court begins that analysis. Some presume discriminatory taint persists across time, whereas others are quick to identify ways to sever modern policy from its historical antecedents.

1. Discriminatory Intent

The Supreme Court held in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* that "proof of

312. *See generally* Matthew G. Springer, Erica A. Houck & James W. Guthrie, *History and Scholarship Regarding U.S. Education Finance and Policy*, *in* HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 3–20 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015) (describing the historic evolution of American education finance policy).

313. *See, e.g.*, Lynch *ex rel.* Lynch v. Alabama, No. 08-S-450-NE, 2011 WL 13186739, at *333 (N.D. Ala. Nov. 7, 2011), *aff'd in part, vacated in part, remanded sub nom.* I.L. v. Alabama, 739 F.3d 1273 (11th Cir. 2014) (discussing a semantic change to the Alabama Constitution).

314. *See, e.g.*, *id.* (detailing the enactment of legislation meant to protect the interests of large rural landowners in paying low taxes).

315. As of 2014, a majority of states place a significant portion of their funding with local sources. *NCES Data*, *supra* note 54.

racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[316] Evidence that a practice negatively impacts one racial group more heavily than another is insufficient.[317] A plaintiff must show race was a motivating factor.[318] A plaintiff, however, need not show race was the only or primary motivating factor.[319] Legislators and government officials balance "numerous competing considerations."[320] Plaintiffs need only show that race was one of the factors.[321] Later, in *Personnel Administrator of Massachusetts v. Feeney*, the Court further explained that discriminatory purpose means that a "decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[322]

Proving discriminatory intent or purpose is a factually intensive and "sensitive inquiry" of circumstantial evidence. The most salient facts vary by case, but the Court in *Arlington Heights* emphasized the core inquiries as including: (a) whether the policy or practice "bears more heavily on one race than another;" (b) the "historical background of the decision . . . , particularly if it reveals a series of official actions taken for invidious purposes;" (c) the "specific sequence of events leading up the challenged decision;" (d) "departures from the normal procedural sequence;" (e) substantive departures from "the factors usually considered important;" and (f) "the legislative or administrative history."[323]

While history is a central aspect of this inquiry, the Court in *Arlington Heights* did not explore the nuances of historically relevant analysis. History might mean the immediate history directly surrounding a particular government policy or the much longer history through which a policy derives its meaning,[324]

316. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

317. *Id.* at 266.

318. *Id.*

319. *Id.* at 265.

320. *Id.*

321. *Id.* at 265–66.

322. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

323. *Arlington Heights*, 429 U.S. at 266–68.

324. For a thorough discussion of the meaning that history might provide regarding discrimination, see Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

particularly when the longer history includes obvious racial discriminatory motivations. Thus, it did not answer, for instance, the extent to which a state's history of systemic racism in criminal punishments could be probative as to whether its current facially neutral criminal sentencing scheme, which retains some of the old system's elements, is unconstitutional.

2. Discriminatory Taint

The Court, however, has been clear on one historical point: passage of time alone does not cleanse a law of its original discriminatory intent. In *Hunter v. Underwood*, the Court examined an Alabama felon disenfranchisement law that had been on the books since 1901.[325] While originally enacted for discriminatory purposes, Alabama contended that the disenfranchisement law was permissible because by 1985 Alabama had legitimate, nondiscriminatory reasons for the policy: excluding those who committed "felonies and moral turpitude misdemeanors" from voting.[326] The Court disagreed, writing that the law's "original enactment was motivated by a desire to discriminate against Blacks on account of race and the [law] continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*."[327] The Court, however, left open whether the disenfranchisement law "would be valid if enacted today without any impermissible motivation."[328] In short, a law's racist roots, so long as they are direct and unaltered, are sufficient to establish discriminatory intent, but reenactment of a law on other grounds presents a different question.

The Court's precedent on reenacted or evolving laws is less clear, varying in its approach to historical racism and other forms of bigotry. In school desegregation (including higher education), the Court aggressively attacked historical discrimination, requiring the state to take action to sever the link between past discrimination and its lingering effects. This obligation continues long after a state stops explicitly discriminating. But in more recent cases involving voting, immigration, religious bigotry, juries, and criminal justice, the Court has vacillated, sometimes affording substantial weight to past discrimination and sometimes discounting it. The following sections explore those different contexts.

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325. Hunter v. Underwood, 471 U.S. 222, 223 (1985).

326. *Id.* at 233.

327. *Id.* at 232–33.

328. *Id.* at 233.

a. Affirmative Obligations to Remedy or Remove Taint: Schools and Juries

In 1968 in *Green v. County School Board of New Kent County*, the Court rebuked a school district for failing to do more than just stop discriminating; the district had failed to discharge its constitutional responsibility to correct and counteract that past discrimination.[329] "In the context of the state-imposed segregated pattern of long standing," a local school board's decision to end formal segregation "merely begins, not ends, our inquiry."[330] Formerly segregated school districts are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[331]

Four years later in *Keyes v. School District No. 1*, the Court also rejected the notion that schools might sever their link to—or responsibility for—past segregation simply by "rely[ing] upon some allegedly logical, racially neutral explanation for their [current] actions."[332] Instead, school officials must prove "that segregative intent was not among the factors that motivated their actions."[333] This burden shifting, the Court reasoned, "is both fair and reasonable," flowing from the common sense evidentiary principle that "the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent."[334]

Speaking even more directly to historical intent, the Court "reject[ed] any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'"[335] Thus, courts must thoroughly examine the connection between past and present segregation because the connection "may be present even when not apparent."[336] Regardless of current motivations, past segregation "may have been a

329. Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 437 (1968).
330. *Id.*
331. *Id.* at 437–38.
332. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 210 (1973).
333. *Id.*
334. *Id.* at 207.
335. *Id.* at 210–11.
336. *Id.* at 211.

factor in creating a natural environment for the growth of further segregation."[337]

The Court took a similarly tough stance toward historical discrimination in higher education. States argued that student choice in selecting colleges, not the states' actions, explained current racial imbalances and severed the historical link.[338] The Court disagreed in *United States v. Fordice,* rejecting the notion "that the adoption and implementation of race-neutral policies alone suffice to demonstrate that [Mississippi] has completely abandoned its prior dual system" in higher education.[339] A state's admissions policies remain "traceable" to prior discrimination and "foster" continuing segregation long after it eliminates explicit discrimination.[340] Just like elementary and secondary education, states must take affirmative steps to sever the historical link and reform their system of higher education.[341] Certain admissions policies and new programs at white schools that would otherwise be permissible in the absence of past discrimination must end.[342]

The Court has, likewise, emphasized a duty to "purge" the effects of racial discrimination from juries.[343] For instance, in 2017 in *Pena-Rodriguez v. Colorado*, the Court explained that racial bias, both in "fact" and "perception," has long infected the jury system and inhibited its ability to function properly.[344] The problem "implicates unique historical, constitutional, and institutional concerns."[345] To ensure courts' ability to spot and prevent discrimination in jury decisions, the Court struck down a facially neutral rule that would otherwise insulate jury deliberations from judicial attack.[346] The Court emphasized it had a responsibility "to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the

337. *Id.*

338. United States v. Fordice, 505 U.S. 717, 728–29 (1992).

339. *Id.* at 729–30.

340. *Id.* at 729.

341. *Id.* at 728.

342. *Id.* at 737–38.

343. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017); *see also* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.").

344. *Pena-Rodriguez*, 137 S. Ct. at 868.

345. *Id.*

346. *Id.* at 870.

law that is so central to a functioning democracy."[347] Two years later in *Ramos v. Louisiana*, the Court emphasized that "race was a motivating factor" in states' original adoption of laws that permitted non-unanimous juries to impose criminal judgments.[348] Though the Court had independent grounds for declaring the laws unconstitutional, that history loomed large in its judgment.[349]

b. Severing the Past from the Present

In other areas, rather than treating historical discrimination as directly relevant to current discrimination, the Court has constructed rationales that drive wedges between the past and present. In a 1980 plurality opinion in *City of Mobile v. Bolden*, Justice Stewart dramatically departed from the approach of the foregoing cases, writing that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proven in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question."[350] On that basis, the Court disregarded the relevance of Mobile's "substantial history of official racial discrimination" to a new voting system with racially disparate effects.[351]

In 1982, Congress passed a bill that repudiated *Mobile*'s intent analysis for the purpose of Voting Rights Act claims.[352] But courts, including the Supreme Court, have since reiterated *Mobile*'s logic regarding constitutional voting claims. In 2018, for instance, the Supreme Court in *Abbott v. Perez* quoted *Mobile*'s assessment of historical discrimination and added that "the allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination."[353] The *Abbott* Court also distinguished the logic of *Hunter*, reasoning that *Hunter* involved an original discriminatory policy that had remained in place since 1901, whereas the instant case

347. *Id.* at 868.

348. Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020).

349. *Id.* at 1408; *see also id.* at 1418 (Kavanaugh, J., concurring in part) (pointing out these laws are "the last of Louisiana's Jim Crow laws" and, per *Pena-Rodriguez*, must be "purge[d]").

350. City of Mobile v. Bolden, 446 U.S. 55, 74 (1980).

351. *Id.*

352. Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

353. Abbott v. Perez, 138 S. Ct. 2305, 2324 (2018).

involved a new, revised plan.[354] Under these circumstances, the Court reasoned that the only thing that mattered was current intent and it is "the plaintiffs' burden to overcome the presumption of legislative good faith and show that the [current] Legislature acted with invidious intent."[355]

c. Synthesizing Disparate Doctrinal Strands

Some lower courts have attempted to slice the Court's precedent into a simple counterfactual framework.[356] When a policy was originally enacted for discriminatory reasons and remains unaltered, the doctrine of *Hunter* dictates the policy is unconstitutional.[357] When a law was originally enacted for discriminatory purposes but has been changed or reenacted for other reasons, plaintiffs must establish new discriminatory motivations under the inquiry articulated in *Arlington Heights*.[358] In this new inquiry, past discriminatory motives do not taint the current law but are contextual evidence at best.[359] In short, a factual inquiry into a policy or law's legislative history will dictate whether original discriminatory motive condemns a current law.

That framework, however, oversimplifies and glosses over contrary precedential threads and facts. School districts, for instance, enacted new facially neutral and sometimes affirmatively desegregative student assignment plans in the 1960s and 1970s.[360] Factually speaking, those new plans did break the unaltered direct connection to prior discriminatory motives and policies. If those new plans were sufficient to break the historical link, those new assignment plans arguably should have survived judicial review. But, of course, the Supreme Court, in a litany of

354. *Id.*

355. *Id.* at 2325. The Court did allow that the legislature's 2011 intent was "relevant to the extent that [it] naturally give[s] rise to—or tend[s] to refute—inferences regarding the intent of the 2013 Legislature," but that 2011 intent does not have independent significance. *Id.* at 2327. Rather, it is simply evidence to be "weighed together with any other direct and circumstantial evidence . . . ." *Id.*

356. *See, e.g.*, Johnson v. Governor of Fla., 405 F.3d 1214, 1222–25 (11th Cir. 2005) (attempting to slice the Court's precedent into a framework).

357. *Id.*

358. *Id.* at 1223.

359. *Id.* at 1223–24.

360. *See, e.g.*, Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 315 (4th Cir. 2001) (recounting the history of desegregation in Charlotte).

desegregation cases, found that the passage of time and adoption of new plans did not sever the link.[361]

Lower courts have tried to synthesize school precedent with cases like *Abbott* by writing off school precedent as special. First, they reason that school desegregation involved unique institutional challenges and doctrines not intended to extend to other contexts.[362] Second, they argue that post-*Brown* school desegregation cases involved remedies for established constitutional violations rather than evidentiary doctrines regarding proof of governmental liability in the first instance.[363] The first point ignores the logic of desegregation doctrine without engaging it. Of course, desegregation involved its own facts. The question is whether the context is sufficiently distinct as to preclude its logic elsewhere. The Court in deciding those cases did not treat the intent question as special, instead writing that its approach to proving segregative intent in schools involved the "common sense" application of a "well-settled evidentiary principle" regarding the relevance of prior acts.[364]

The other attempt to distinguish school desegregation precedent is facially correct in a general sense but extremely misleading. While desegregation cases were primarily disputes over remedies, courts could only impose remedies based on a constitutional violation. Moreover, the Court articulated the failure to remedy the original constitutional violation as an ongoing new constitutional violation.[365] The ongoing violation demanded an immediate remedy.[366] This, then, logically raises the question of

361. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 210 (1973); Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 441–42 (1968); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 528 (1979); *see also* Jacksonville Branch, NAACP v. Duval Cnty. Sch. Bd., 883 F.2d 945, 947 (11th Cir. 1989) (recounting a school board's long history of attempting to circumvent court-imposed desegregation orders by adopting ineffective integration plans).

362. *Johnson*, 405 F.3d at 1226; Lynch *ex rel.* Lynch v. Alabama, 2011 WL 13186739, at *201 (N.D. Ala. Nov. 7, 2011) *aff'd in part, vacated in part, remanded sub nom.* I.L. v. Alabama, 739 F.3d 1273 (11th Cir. 2014); Burton v. City of Belle Glade, 178 F.3d 1175, 1190 (11th Cir. 1999).

363. *Lynch*, 2011 WL 13186739, at *201; *see also Johnson*, 405 F.3d at 1226 (distinguishing *United States v. Fordice*, 505 U.S. 717 (1992), as involving continuing discriminatory impacts).

364. *Keyes*, 413 U.S. at 201, 207.

365. *Green*, 391 U.S. at 438; *see also* john a. powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 U. S.F. L. REV. 419, 462 (2000) (discussing the ongoing violation).

366. *Green*, 391 U.S. at 438.

whether policies outside of school desegregation represent ongoing violations that demand a remedy or, stated differently, whether states ever remedied their prior constitutional violations. The Court has never clearly addressed those issues. Likewise, why would the Court demand that race, in both fact and perception, be purged from the jury system but not elsewhere? A universal doctrine for historical taint may very well be beyond the Court's reach, but that does not dictate the conclusion that rules regarding schools, universities, and juries are entirely irrelevant or reach no further than their own context.

Despite these unresolved tensions, the Court's prior analysis of historical discrimination reveals four core principles. First, historical taint can and does persist over time.[367] Second, the effect and relevance of past discriminatory motives to current policies exist across a spectrum. The effect in *Hunter* was direct and complete, warranting judicial intervention.[368] That effect, however, does not disappear simply because government replaces its explicitly discriminatory policies with facially neutral but subtly discriminatory ones.[369] The Court's jurisprudence, as well as voluminous scholarship, reveals that both the symbolism and effects of past discrimination can persist, even after a change in policy.[370] That persistence is the natural outgrowth of the discriminatory environment government previously created.[371] Individuals' choices about where to attend college, who to vote for, and who to acquit are influenced and shaped by the racial environment that preceded them.[372] Yet it is incorrect that race is necessarily the sole or dominant factor in those choices.[373] The

367. *See, e.g.*, *Keyes*, 413 U.S. at 211 ("Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation."); Hunter v. Underwood, 471 U.S. 222, 233 (1985) (stating that the discriminatory effect of the unconstitutional provision "continues to this day to have that effect").

368. *Hunter*, 471 U.S. at 222.

369. *Keyes*, 413 U.S. at 210–13.

370. *Id.*; Kiel, *supra* note 111, at 616–18 (2015); *see* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 139 (2004) (discussing schools and the challenges present in the post-*Brown* era, such as new issues arising like affirmative action).

371. *Keyes*, 413 U.S. at 211.

372. United States v. Fordice, 505 U.S. 717, 731 (1992).

373. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977); *see also* Freeman v. Pitts, 503 U.S. 467, 496 (1992) (discussing changes in the causal link between current school enrollment trends and past discrimination with other factors like demographic shifts).

effect depends on multiple variables, many of which are not reducible to mathematical precision.[374]

Third, this variability means that presumptions or rigid rules regarding historical taint are elusive. Such rules, to the extent that they exist, reflect prevailing social and judicial values more than inherent truths or rules. The Court, for instance, adopted presumptions in school desegregation because of the perceived imperative and fairness.[375] The Court, however, began struggling with the presumption of lingering discriminatory effects not long after adopting the rule.[376] As the Court's perception of values and imperatives changed, so too did its commitment to the presumption. The Court never overturned the presumption of intentional discrimination or the affirmative duty to correct past segregation, but in 1992, it adopted an escape mechanism, holding that evidence of demographic shifts eliminated a district's obligation to remedy past segregation.[377]

Fourth, courts cannot fairly understand current motives in isolation from related past racial motives. Regardless of whether a current policy that was once motivated by race remains fully intact or has changed, prior racial motives are relevant to assessing and understanding purportedly neutral government objectives.[378] A current decision to assign students to neighborhood schools, for instance, means something far different in a racially monolithic county than it does in a diverse county that also experienced segregation and desegregation for decades.[379] The desire for neighborhood schools in formerly segregated communities is not necessarily racist but should trigger more interrogation.[380] History justifies that interrogation and cautions against blind acceptance of a purportedly neutral government objective, even though that objective might easily suffice

374. *See Freeman*, 503 U.S. at 503 (Scalia, J., concurring) (calling it "guesswork" to try to determine the precise effect of multiple factors on segregation).

375. *Keyes*, 413 U.S. at 207.

376. Milliken v. Bradley, 418 U.S. 717, 741 n.19 (1974) (distinguishing the *Keyes* presumption and then not applying it).

377. *Freeman*, 503 U.S. at 494–95.

378. *See Keyes*, 413 U.S. at 207 ("[T]he prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent." (quoting 2 J. WIGMORE, EVIDENCE 200 (3d ed. 1940))); *Arlington Heights*, 429 U.S. at 267 (stating that historical background is an important source of evidence in discerning intent).

379. Lawrence, *supra* note 324.

380. *Id.*

in some other context.[381] Several Supreme Court opinions incorporate this lesson.[382] Those resting on universal doctrines and rigid factual distinctions, unfortunately, overlook it.

3. The Equal Protection Case Against Local School Funding

The history in Part IV demonstrates that racial discrimination played an enormous role in multiple aspects of school funding in the South. Beyond facially discriminatory segregation provisions, states also altered the way they financed schools and structured various aspects of educational authority.[383] Pushing more school funding responsibility to the local level was an important means of masking discriminatory state action and allowing for and ensuring unequal resources. As the federal district court in *Lynch ex rel. Lynch v. Alabama* found, records from Alabama's 1910 Constitutional Convention "clearly and convincingly establish" that, in addition to voter disenfranchisement and segregation, "another objective of nearly equal importance to a large majority of the delegates was . . . suppressing the millage rates of ad valorem property taxes that could be devoted to the support of Black education at public expense."[384]

The court, however, perceived a rigid line between school desegregation and voting precedent and reasoned that the issue of school funding was more appropriately governed by voting precedent.[385] Drawing on voting rights cases, it concluded that the passage of time and subsequent reenactment of Alabama's funding scheme severed current policies from historical racism.[386] Thus, "despite the racist, segregationist origin of Amendment

381. *Keyes*, 413 U.S. at 211–12 (emphasizing the need to closely examine the facts even when discrimination is not apparent and when the policy might otherwise be permissible); *see also Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

382. *Keyes*, 413 U.S. at 211–12; *Arlington Heights*, 429 U.S. at 267; Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).

383. *See infra* note 396.

384. Lynch *ex rel.* Lynch v. Alabama, No. 08-S-450-NE, 2011 WL 13186739, at *327 (N.D. Ala. Nov. 7, 2011), *aff'd in part, vacated in part, remanded sub nom.* I.L. v. Alabama, 739 F.3d 1273 (11th Cir. 2014).

385. *Id.* at *199–201, *328.

386. *Id.* at *327 ("The racist, white supremacist intent of the delegates to the 1901 Constitutional Convention, most of whom were two generations in the grave by the decade between 1972 and 1982, cannot be imputed to [later] persons . . . .").

111 during the days of 'massive resistance' to the *Brown* decisions, the provision as . . . amended arguably retains a relationship to the legitimate government interest of promoting education."[387]

The court, unfortunately, asked the wrong question. The question is not simply whether the state has made some alteration to school funding over the decades (and thus the rigid approach from voting cases applies) but whether the historical intent helps explain the reason Alabama continues to rely so heavily on local school funding mechanisms—as well as the effect of those mechanisms. Any number of cases, particularly education cases, have found that this type of historical intent is extremely relevant. Moreover, it is far from apparent why the logic and doctrine of *Keyes* and *Fordice* is not applicable to local school funding policies that were borne out of the exact same era and context. The court in *Lynch* skirts those cases with the cursory assertion that "school desegregation jurisprudence is unique and difficult to apply in other contexts."[388]

The irony is that *Lynch* itself acknowledged that local school funding policy was central to Southern states' imposition of school segregation and inequality.[389] The fact that the plaintiffs were slower to directly challenge this aspect of school segregation and demand a remedy in the context of school desegregation does not warrant treating these funding issues as an entirely distinct species of claims. The delay in raising funding claims was based not on the notion that they involved distinct issues but that school funding inequalities would correct themselves once schools were physically integrated.[390] In fact, some civil

387. *Id.* at *339.

388. *Id.* at *201 (quoting Johnson v. Governor of Fla., 405 F.3d 1214, 1226 (11th Cir. 2005)).

389. *See id.* at *242 (discussing the methods used by local legislators and school board members to "divert education funds to white schools").

390. JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 28 (2010); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 748–78 (1975); *see also* Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1570 (2004) ("The NAACP pushed for integration because it sought to force white-controlled state and local governments to provide a quality education and equal educational opportunity to black schoolchildren.").

rights attorneys pursued integration because they saw it as the means to resolve school funding inequalities.[391]

Regardless, school desegregation remedies did eventually intersect with school funding. In those locations where physical integration was no longer possible or integration alone was insufficient to cure harms, courts authorized additional school funding as the primary remedy.[392] In *Milliken v. Bradley II,* the Court shifted its focus to "compensatory or remedial educational programs for schoolchildren who have been subjected to past acts of *de jure* segregation."[393] It held that when state officials were, in part, responsible for the constitutional violation, courts could allocate remedial costs to the state.[394] Later, in *Missouri v. Jenkins*, the Court went a step further, indicating that a federal court could "enjoin[] the operation of state laws that would have prevented [a school district] from exercising" their taxing power to fund desegregation remedies.[395] In short, these cases demonstrate that states' school funding and taxing schemes are not immune from judicial intervention. Rather, judicial intervention may be altogether necessary to remedy the continuing effects of discrimination and segregation.

The major oversight in this line of cases is that they conceptualized additional school funding as a means to remedy the evil of school segregation without recognizing that the system through which those funds flowed was an integral part of maintaining and exacerbating inequality.[396] Thus, they failed to identify states' school funding systems as requiring their own reforms.[397] School funding, understood in historical context, never stood outside segregation at the local level.[398] Had the Court in cases like *Keyes*, *Milliken*, and *Jenkins* appreciated that point, it

391. *See* sources cited *supra* note 390.

392. Milliken v. Bradley, 433 U.S. 267, 279 (1977).

393. *Id.* at 269.

394. *Id.* at 289.

395. Missouri v. Jenkins, 495 U.S. 33, 51 (1990).

396. The Court in *Jenkins*, while overturning the lower court order, interestingly recognized a problem with local financing: "This is true as well of the problems of financing desegregation, for no matter has been more consistently placed upon the shoulders of local government than that of financing public schools." *Id.* at 52. The Court recognized, however, that the state could not hand that responsibility over to the local districts on one hand but then enact laws limiting them in their ability to use local taxing power to remedy segregation. *Id.* at 57.

397. *Id.* at 52.

398. *See infra* note 414.

could have dislodged *Rodriguez*'s local funding narrative and applied the presumption regarding the lingering aspects of school segregation and discrimination to school funding mechanisms. At the very least, some affirmative justification for doing otherwise would have been in order. To be clear, however, the Court's overall trend since deciding those cases has been to recognize fewer equal protection violations, not more.[399]

B. STATE EDUCATION CLAUSE CLAIMS

Education history is crucially important to state constitutional claims. Thus far, courts—and litigants to some extent—have conceptualized school districts as independent units of analysis and assumed the legitimacy of localism.[400] The more a court assumes the legitimacy of localism the more likely it is to refuse to intervene in school funding disputes. Even those courts that intervene often afford localism a substantial measure of importance.[401] They leave key aspects of localism in place, only requiring the state to counteract—rather than eliminate—localism and its negative effects.

Both the general and racial history of localism, however, require that all state courts reevaluate the primacy of localism, particularly in the South. First, Southern history reveals that localism is not a neutral concept in the South. To the contrary, localism and racial discrimination are intertwined in most Southern states. Thus, a court need not defer to a claimed interest in localism in those states. Second, if localism is not a neutral concept in the South, courts should not assume it is neutral elsewhere. Even in the absence of racist intent, the general history of education reveals that localism does not necessarily serve appropriate or important ends. Localism's failures during the nineteenth century were the predicate for establishing state constitutional duties in education. To allow localism to now serve as a justification for a state's failure to address inadequacy or inequity turns constitutional clauses—and the history behind them—on their head. The following sections detail this logic through the appropriate constitutional standards.

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399. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979); McCleskey v. Kemp, 481 U.S. 279, 292–93 (1987); Abbott v. Perez, 138 S. Ct. 2305, 2324 (2018); *see also* Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1084–97 (1998) (evaluating the differing levels of intent the Court has required).

400. *See* discussion *supra* Part II.

401. *See* discussion *supra* Part II.

1. Standard of Review for Evaluating Localism

State courts vary wildly in the level of scrutiny they apply in education equity and adequacy cases. Some stick to traditional modes of analysis, applying rational basis or strict scrutiny.[402] Many, however, do not clearly articulate any level of scrutiny.[403] These courts, which constitute the majority,[404] apply a binary analysis that frames the question as whether the state had discharged its constitutional duty in education;[405] either it has or has not delivered an adequate education. One of the earliest state supreme courts to address school funding remarked of traditional levels of scrutiny that

> Mechanical approaches to the delicate problem of judicial intervention . . . may only divert a court from the meritorious issue or delay consideration of it. Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary.[406]

These "compliance" courts have, however, shown various levels of aggression or presumptions in assessing state compliance. The New Jersey Supreme Court, for instance, wrote that "while we are unable to conclude from this record that the State is clearly wrong, we would not strip all notions of equal and adequate funding from the constitutional obligation unless we were convinced that the State was clearly right."[407] Other courts have taken a softer approach, assessing compliance based on reasonableness, interest balancing, or arbitrariness.[408] Still others basically presume constitutional compliance, absent overwhelming

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402. *See, e.g.*, Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973) (applying rational basis review); Thompson v. Engelking, 537 P.2d 635, 645 (Idaho 1975) (rejecting strict scrutiny in favor of rational basis review); Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758, 788 (Md. 1983) (using rational basis review); Kukor v. Grover, 436 N.W.2d 568, 580 (Wis. 1989) (following the Supreme Court in *Rodriguez* by using a rational basis standard).

403. *See, e.g.*, Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Idaho Schs. for Equal Educ. Opportunity v. State, 129 P.3d 1199 (Idaho 2005).

404. *See* Weishart, *supra* note 38, at 246–54 (charting levels of scrutiny in education cases).

405. *See, e.g.*, *Rose*, 790 S.W.2d at 200 ("The subject matter of this lawsuit is whether the General Assembly has complied with its constitutional duty to provide an 'efficient' system of common schools in Kentucky.").

406. Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973). The court also noted that "we have not found helpful the concept of a 'fundamental' right. No one has successfully defined the term for this purpose." *Id.*

407. Abbott *ex rel.* Abbott v. Burke, 575 A.2d 359, 404 (N.J. 1990).

408. Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746,

evidence to the contrary.[409] Reviewing all the cases, Joshua Weishart describes the compliance courts this way: "state courts that declined to specify a standard of review for education clause claims ultimately assess whether the legislature did enough (means) to provide a constitutionally adequate education (end)."[410]

2. The Insufficiency of Localism Under Heightened Review

Under all these methods and levels of scrutiny, the question of the state's interest in the status quo will arise. States consistently assert localism—local control and funding—as a justification for inadequacies and inequities.[411] Under more rigorous forms of review, such as strict scrutiny or New Jersey's compliance approach, localism should not logically justify the inadequacy and inequity it causes. Yet some of these rigorous courts remain sympathetic to localism, even when they rule for plaintiffs. Rather than outright reject localism as a sufficient goal, they reason that states' particular funding practices are not sufficiently tailored to achieving localism.[412] In other words, as applied, localism is not working correctly. The history as detailed in Parts III and IV, however, would indicate that localism is insufficient, on its face, to justify unequal and inadequate education under rigorous forms of review.

The most favorable reading of the history is that localism is not really an important end unto itself but is merely a means to some other end. Localism may have assisted in quelling tax objections and marshalling local capacity in the nineteenth century,[413] but local education authorities have no authority or independent significance outside of that which the state grants them.[414] To borrow the Supreme Court's logic from a case involving the delegation of authority from one branch of government

783–85 (Tex. 2005); McCleary v. State, 269 P.3d 227, 248 (Wash. 2012).

409. Davis v. State, 804 N.W.2d 618, 628 (N.D. 2011) (stating that plaintiffs must show there is no reasonable doubt as to the violation).

410. Weishart, *supra* note 38, at 259.

411. *See generally* Briffault, *supra* note 122 (analyzing localism claims).

412. *See, e.g.*, Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993) ("There is no doubt that county and school district officials collectively control, in the management sense, the educational resources within a school district. However, in some counties, this is a very different matter from effective control of the quality of education provided by the local system.").

413. *See supra* notes 231, 235.

414. *See, e.g.*, Op. of the Justs., 765 A.2d 673, 676 (N.H. 2000) ("The State may not shift any of this constitutional responsibility to local communities

to another: "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself."[415] In the educational context, districts may assist in discharging a state's constitutional duty, but their existence is not a relevant consideration in the state's failure to discharge that duty.[416]

The least favorable reading of history is that localism was a means to a nefarious end in the South. In these cases, the failure to disentangle localism from racism leaves racist values in place to masquerade as normative values.[417] But under either reading of history, localism lacks the importance typically associated with a goal that is facially sufficient to survive heightened review. Courts, at the very least, should place the burden on states to carry the burden of establishing localism as a weighty interest.

In states that already apply heightened scrutiny, increased skepticism toward localism would not be the difference between winning or losing a case at the global level. Plaintiffs "win" most of these cases already.[418] The difference is at the remedial stage, which many would argue is actually the most important stage in school funding litigation because courts face so many nuanced issues with enormous consequences.[419] At this high stakes stage, courts face yet another question of deference, varying in the extent to which they dictate some remedies to the state and accept

. . . ."); McDuffy v. Sec'y of the Exec. Off. of Educ., 615 N.E.2d 516, 548 (Mass. 1993) ("While it is clearly within the power of the Commonwealth to delegate some of the implementation of the duty [to educate] to local governments, such power does not include a right to abdicate the obligation imposed on [state] magistrates and Legislatures placed on them by the Constitution."); Abbott *ex rel.* Abbott, 693 A.2d 417, 435 (N.J. 1997) ("The State . . . cannot shirk its constitutional obligation under the guise of local autonomy."); *see also* Briffault, *supra* note 122, at 774 ("[C]ourts should not rely upon the asserted interest in local control as a basis for rejecting legal challenges to the inequities in existing school funding systems.").

415. Alexander v. Sandoval, 532 U.S. 275, 291 (2001).

416. *See, e.g.*, *Abbott*, 693 A.2d at 435 ("The State, however, cannot shirk its constitutional obligation under the guise of local autonomy.").

417. *See generally* Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. Rev. 162, 166 (1994) ("In short, race-neutral principles cannot prevent covert, oppressive uses of race.").

418. Weishart, *supra* note 38.

419. *See, e.g.*, Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL'Y 346 (2018) (analyzing the remedial challenges in education rights cases).

others from the state.[420] Serious skepticism of localism—and the ends it serves—should trigger courts to question the extent to which they will accept the maintenance of certain aspects of the status quo or to demand that the state, for instance, create funding structures that fully place responsibility on the appropriate state actors.

3. The Illegitimacy and Pretext of Localism Under Minimal Review

The historical rebuttal of localism may, however, be most important in those states that apply more lenient or rational basis review. Rational basis review, of course, only requires a legitimate government end and policies that rationally relate to that end.[421] Any plausible government end will generally suffice, and plaintiffs bear the burden of disproving it.[422] But if plaintiffs can use history to remove localism's normative specter of positivity or neutrality, the burden could shift to the state to justify localism.

Analogous federal precedent is most instructive here. Even under the Supreme Court's extremely deferential rational basis review, the Court has been willing to strike down certain legislative oddities.[423] The Court has explained that certain state goals, even under rational basis review, are simply off limits or illegitimate.[424] The most notable examples involve what the Court characterizes as making it "more difficult for one group of

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420. Malhoit & Black, *supra* note 36, at 67–72 (categorizing the various levels of deference at the remedial stage).

421. *See, e.g.*, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1022 (Colo. 1982) ("[U]nder the rational basis test, we are obligated to uphold any classification based on facts which can reasonably be conceived as supporting the action.") (citations omitted).

422. *Id.*

423. *See* cases cited *supra* note 37 and accompanying text.

424. Romer v. Evans, 517 U.S. 620, 634 (1996) (finding that "a bare . . . desire to harm a politically unpopular group" is an illegitimate government goal); Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (holding that targeting undocumented students for exclusion from school is illegitimate); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 535–36 (ruling that undocumented students' targeted exclusion from school is illegitimate); *see also* Magoun v. Ill. Tr. & Sav. Bank, 170 U.S. 283, 294 (1898) ("Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition . . . ." (quoting Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232, 237 (1890))).

citizens than for all others to seek aid from the government"[425] or singling out groups for disadvantage, even if they are not suspect classes.[426] Other scholarship reveals how some school funding formulas and policies transgress this,[427] but the lesson for state education clause analysis is that some state goals are illegitimate even under the most deferential review.

The racial history of localism should fall in that category. Even if localism were somehow theoretically defensible as a general principle, evidence that localism is infected with racial motives should trigger more rigorous rational basis review in which the state must affirmatively demonstrate that its policies are effective in achieving legitimate goals.[428] Even in states without that racial history, courts should not automatically assume localism is a legitimate government end.[429] If plaintiffs demonstrate that localism lacks the normative grounding that the state claims or is interfering with the discharge of the state's constitutional duty,[430] a court need not assume the legitimacy of localism (or balance it against the state's responsibility). A court could appropriately require that the state offer some other justification.

Stripped of normative weight, localism more closely resembles pretext than policy. Even in the absence of past or present malevolent motivations for localism, it is far from obvious exactly what purpose localism serves. Rather than an affirmative good, localism may be nothing less than cover for the fact that a

425. *Romer*, 517 U.S. at 632.

426. *Id.* at 634; *Moreno*, 413 U.S. at 535–36.

427. Black, *supra* note 37, at 1391–94 (arguing that state attempts to disadvantage disfavored groups via school funding schemes would not survive rational basis review).

428. *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 879 (Iowa 2009) (indicating that the normal deference built into rational basis did not apply); Porter v. State, 902 N.W.2d 566, 582 (Wis. Ct. App. 2017), *aff'd* 913 N.W.2d 842 (Wis. 2018) (applying rational basis with bite).

429. For instance, administrative convenience can justify the denial of certain ordinary government services, but administrative convenience is questionable as a legitimate end when it comes at the expense of carrying out a government duty. The Court has consistently taken this approach in gender cases. *See* Craig v. Boren, 429 U.S. 190, 198 (1996) ("Decisions following *Reed* . . . have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications."); *see also Ex parte* Hoover, Inc., 956 So. 2d 1149, 1155 (Ala. 2006) (rejecting administrative efficiency in the context of the Commerce Clause).

430. *See, e.g.*, Abbott *ex rel.* Abbott v. Burke, 693 A.2d 417, 435 (N.J. 1997) (dismissing the State's approach purportedly emphasizing "flexibility").

state is unwilling to discharge its constitutional duty in education.[431] In other words, localism is the excuse the state offers to avoid addressing inadequacy or inequality. A state constitution that requires the state to attend to adequacy or equity requires more than pretext or excuses for failed state policies.[432] Entertaining that pretext as a legitimate government end distracts courts from the most pertinent inquiry.

4. State, Not Local, Responsibility as the Primary Inquiry

Delegitimizing localism through historical evidence further accentuates the primacy of state fiscal responsibility for public education. As has long been the case, state constitutions place the primary and final responsibility for education on the state.[433] While states may engage local communities to assist in discharging its duty, the state does not relieve itself of constitutional responsibility simply by involving districts.[434] Nor do states deserve credit for counteracting the problem of local funding when the problem is of the state's own making. In other words, the problem of localism is an imagined one. If the history of the state-

431. *Id.*; *see* Op. of the Justs., 765 A.2d 673, 676 (N.H. 2000) (stating that legislative findings contradicted "the State['s] . . . exclusive obligation to fund a constitutionally adequate education").

432. *See* Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 91 S.W.3d 472, 495 (Ark. 2002) (discussing absolute education duty); Rose v. Council for Better Educ., 790 S.W.2d 186, 215 (Ky. 1989) (same); Claremont Sch. Dist. v. Governor, 794 A.2d 744, 754 (N.H. 2002) ("[I]t is the State's duty to guarantee" necessary funding); *see also* GA. CONST. art. VIII, § 1, para. I (using "primary obligation" language); FLA. CONST. art. IX, § 1 (establishing the "paramount duty of the state to make adequate provision" for education); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 91 (Wash. 1978) (en banc) ("[T]he [C]onstitution has created a 'duty' that is supreme, preeminent or dominant."); Campbell Cnty. Sch. Dist. v. State, 907 P.2d 1238, 1257, 1259 (Wyo. 1995) ("By establishing education first as a right in the Declaration of Rights article and then detailing specific requirements in a separate Education article in the state constitution, the framers and ratifiers ensured, protected, and defined a long-cherished principle" that "was viewed as a means of survival for the democratic principles of the state.").

433. *Rose*, 790 S.W.2d at 216 ("[T]he *sole responsibility* for providing the system of common schools lies with the General Assembly."); Abbeville Cnty. Sch. Dist. v. State, 767 S.E.2d 157, 164 (S.C. 2014), *amended by* 777 S.E.2d 547 (2015), *order superseded by* 780 S.E.2d 609 (2015) ("The South Carolina Constitution mandates the General Assembly to 'provide for the maintenance and support of a system of free public schools open to all children in the state.'").

434. *Op. of the Justs.*, 765 A.2d at 676; McDuffy v. Sec'y of the Exec. Off. of Educ., 615 N.E.2d 516, 548 (Mass. 1993); *Abbott*, 693 A.2d at 435.

local relationship in education has demonstrated any single consistent principle, it is that the state can impose and disperse both state and local funding at will.[435] For that matter, it can dissolve and create districts at will (save a few exceptions).[436]

Under current constitutional structures, there is but one question: has the state created a funding system that adequately and equitably supports public schools? District-level data and local resources provide an empirical answer to that question, but that data does not alter the normative lens through which a court must interpret the question. The normative lens, historically contextualized, is that all taxing power, whether exercised at the state or local level, is state power.[437] Thus, all revenues are state public education revenues.[438] Similarly, the state funding formula is not simply the funds that flow directly from state coffers. The state funding formula is one that encapsulates and includes the local millage rates that states authorize, mandate, or cap.[439] Thus, the metric of assessment is not what one district or another can or cannot do on its own; the metric of assessment is what the state has done, in totality, and whether it is sufficient to meet its constitutional obligation.[440]

CONCLUSION

Localism has stood the test of time for some good reasons. Local communities are committed to their local schools. That level of commitment and accountability is vitally important to successful schools. Public education would be worse off if policymakers or courts sought to interfere with those positive aspects of localism. But localism has also served sordid ends: segregation

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435. *See infra* note 438.

436. Carrolton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch., 826 S.W.2d 489, 511 (Tex. 1992) (acknowledging that the state has a "'free hand in establishing independent school districts[,]' including the abolition and consolidation of districts" (quoting State v. Brownson, 61 S.W. 114, 115 (Tex. 1901))).

437. Briffault, *supra* note 122.

438. Abbott *ex rel.* Abbott v. Burke, 575 A.2d 359, 403 (N.J. 1990) ("All of the money that supports education is public money, local money no less than state money. It is authorized and controlled, in terms of source, amount, distribution and use, by the State.").

439. *See generally id.* at 325–30 (analyzing the entirety of the state funding and equalization system).

440. *See, e.g.*, *id.* at 384–85 (finding a constitutional violation by the state because some districts lack sufficient resources).

and convenient excuses for states to not fully discharge their constitutional commitments to students.

Policymakers and courts have too often papered over these negative aspects of localism. Now localism appears so natural as to go unnoticed. Localism, however, is not the foundation or natural order of public education. In fact, the expansion of public education through local school districts came at the behest of state policy, not local initiative. While it was once the undeveloped frontier that stood as a barrier to education, it is now, ironically, the local district itself—with its sacrosanct borders and funds—that creates barriers and entrenches inequality. Until courts and policymakers seriously confront this reality—and the history and constitutional principles that demand change—our schools will remain indefinitely segregated and unequal.