

PROGRAM ON LAW AND STATE GOVERNMENT FELLOWSHIP SYMPOSIUM

Education Reform and State Government: The Role of Tests, Expectations, Funding, and Failure

WHAT DO WE EXPECT?: AN INTRODUCTION TO THE LAW, MONEY, AND RESULTS OF STATE EDUCATIONAL SYSTEMS

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Since its inception, the Program on Law and State Government has been dedicated to fostering the study and research of critical legal issues facing state governments. It continues to be an honor for me, as the founding Director of the Program, to be the custodian of this Fellowship experience at this school. This year's event, *Education Reform and State Government: The Role of Tests, Expectations, Funding, and Failure*, culminates the ideas, research, and work of the 2008 Program on Law and State Government Fellows, Ms. Jonelle Redelman¹ and Mr. Anderson Sanders.² With this Introduction to the articles by Professor Michael Heise, *Courting Trouble: Litigation, High-Stakes Testing, and Education Policy*,³ emanating from the symposium and that by Joseph O. Oluwole and Preston C. Green, III, *State Takeovers of School Districts: Race and the Equal Protection Clause*,⁴ I share some of my introductory remarks from the symposium conducting a brief exploration of three aspects of our public education system which contribute to its failures and its successes: law, money, and results. Then, this Introduction provides an overview of the symposium: a day filled with questions about what we get, what we expect, and what we test

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3. Michael Heise, *Courting Trouble: Litigation, High-Stakes Testing, and Education Policy*, 42 IND. L. REV. 327 (2009).

4. Joseph O. Oluwole & Preston C. Green, III, *State Takeovers of School Districts: Race and the Equal Protection Clause*, 42 IND. L. REV. 343 (2009).

from our political and fiscal investments in public education—both in our schools and in our correctional facilities. The Introduction closes with a few words of thanks to all of those who contributed to the symposium's success.

I. LAW

Unlike the Federal Constitution, every state constitution includes an education clause which speaks to the duty of the State to provide some sort of education for its citizens.⁵ More than three decades ago, the U.S. Supreme Court stressed that the Federal Constitution makes no mention of education as the Court declined to recognize a fundamental right to education.⁶ Since then, state governments and their respective local governments, from counties to cities to special school districts have turned to state constitutional clauses, state legislative funding formulae, and, more often than not, state courts, to calibrate how we fund our schools, what is fair, and, more recently, what constitutes an adequate education.⁷

Scholars suggest that “whether measured in terms of local budgets, the local government workforce, the impact on local communities or the broader implications for the economy and society, public elementary and secondary

5. ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1, ¶ 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. 8, § 1; IOWA CONST. art. 9, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1; *see also* Eli Savit, Note, *Can Courts Repair the Crumbling Foundation of Good Citizenship? An Examination of Potential Legal Challenges to Social Studies Cutbacks in Public Schools*, 107 MICH. L. REV. 1269, 1291-98 (2009) (listing the state constitutional provisions dealing with education and analyzing the civic dimensions of such provisions).

6. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit [or implicit] protection under our Federal Constitution.”).

7. *See, e.g.*, *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996); *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 870 N.E.2d 12 (Ind. 2007); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Tenn. Small Sch. Sys. v. McWhorter*, 894 S.W.2d 734 (Tenn. 1995).

education is the most important service provided by local governments.”⁸ Due in large part to the tradition of public school funding levels being directly related to local property values,⁹ state governments and state-wide taxpayer dollars enter into the education funding formulae primarily as a way to equalize the funding, and hopefully, the educational opportunities for the children of those states. As a result, state governments are tugged in at least two directions with respect to public education. The first tug springs from deference to the most local of local governments, the school districts. As the Supreme Court noted in *San Antonio Independent School District v. Rodriguez*,¹⁰ “The persistence of attachment to government at the lower level where education is concerned reflects the depth of commitment of its supporters.”¹¹ The second tug derives from states’ respective obligations to provide the requisite amount, whatever that may be, of education to their children as accorded by their own constitutions.¹²

What should the proper state/local balance be? A stark example of how the balance of state/local contributions to public education can make dramatically unfair what would, in a vacuum, be seen as a fair way to fund schools is set forth in a string of cases out of Texas.¹³ In *Edgewood Independent School v. Kirby*,¹⁴ the Texas Supreme Court noted the “glaring disparities” stating that the “wealthiest district has over \$14,000,000 of property wealth per student, while the poorest has approximately \$20,000” of property wealth per student—a 700:1 ratio.¹⁵ More than forty state supreme courts in the last four decades, have been called upon to address disparities in funding formula with more state tax dollars,

8. RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 486 (7th ed. 2009).

9. *See id.*

10. 411 U.S. 1 (1973).

11. *Id.* at 49.

12. *See, e.g.,* BRIFFAULT & REYNOLDS, *supra* note 8, at 487; *see also* sources cited *supra* note 5.

13. *Neeley v. W. Orange Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 794-98 (Tex. 2005) (holding Texas’s school funding formula (upheld in *Edgewood IV*) unconstitutional under state constitution’s prohibition on state-level property tax); *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 750 (Tex. 1995) (upholding Texas legislature’s school funding formula. The funding structure included a recapture provision, requiring certain wealthy school districts to consolidate with another district, detach portions of district to another (presumably less wealthy) district, contribute additional funds to the state, to pay for education of non-resident students, or to consolidate its tax base with another district); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489, 513-14 (Tex. 1992) (holding a subsequent legislative attempt to revamp school funding and school district structure to address funding inequities unconstitutional); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 494-99 (Tex. 1991) (holding that the Texas legislature’s response to the 1989 case (eliminating much of the inter-district inequality by raising taxes) was unconstitutional); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989).

14. 777 S.W.2d 391 (Tex. 1989).

15. *Id.* at 392.

different funding formulae, or both.¹⁶ In over half of those cases, the plaintiffs from poorer school districts won at the state supreme court level with the court ordering some influx of state-wide, state funded education to offset the disparities arising from the purely local property tax funding mechanisms.¹⁷

The effect of these victories, although Pyrrhic in some respects due to the lack of power for the state supreme courts to actually change the funding formulae set out in legislation, has been to modestly reduce the local share, and thereby, increase the state share of school funding.¹⁸ Today, the proportional breakdown of education spending among states and their respective local governments varies widely. For example, New Mexico has funded as much as 88% of the cost of elementary/secondary education, with its specific school districts contributing 12%.¹⁹ In contrast, Nevada currently funds its elementary and secondary education costs at 38%, the lowest current statewide level, with 67% of its educational funding dollars coming from local school district property taxes.²⁰

A second result is that state courts have repeatedly had to analyze state constitutional equal protection and education clauses, decide the role of the states in addressing interlocal inequalities among school districts, and assess the relationship between the state government and its local governments in financing public education.²¹ State governments' increasing involvement in how we educate our children certainly helped set the stage for the federal government to become more involved than it ever has been, most recently and clearly, through the federal No Child Left Behind Act of 2002 (NCLB).²² So now, state governments, the quintessential middlemen, find themselves between local school districts who need state government help, those who do not want any interference, and federal government mandates to achieve yearly annual improvement on standardized tests.

16. See RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 417-18 (6th ed. 2004) (noting that funding formulae have been challenged in forty-plus states); see, e.g., *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558 (Tex. 2003); *Edgewood I*, 777 S.W.2d 391.

17. BRIFFAULT & REYNOLDS, *supra* note 16, at 417.

18. Compare Wayne Riddle & Lione White, *Expenditures in Public School Districts: Estimates of Disparities and Analysis of Their Causes*, in U.S. DEP'T OF EDUC., OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, NAT'L CTR. FOR EDUC. STATISTICS, *DEVELOPMENTS IN SCHOOL FINANCE*, 1996, at 23-37, NCES 97-535, with U.S. DEP'T OF EDUC., INST. OF EDUC. SCIS., NAT'L CTR. FOR EDUC. STATISTICS, *DIGEST OF EDUCATION STATISTICS: 2007*, fig. 9 (2007), available at <http://nces.ed.gov/programs/digest/d07/figures/fig-09.asp?referrer=figures>.

19. See INST. OF EDUC. SCIS., *supra* note 18, at ch. 2.

20. *Id.*

21. See BRIFFAULT & REYNOLDS, *supra* note 8, at 487.

22. 20 U.S.C. §§ 6301-7941 (2006).

II. MONEY

Sir Claus Adolf Moser is credited with saying, "Education costs money, but then so does ignorance."²³ But what amount of money might Sir Moser be talking about with respect to the costs of our efforts? What does it or what should it cost to provide an education to a child?

According to 2006 data, state and local governments together spent between \$5000 (Arizona and Utah) for one year of elementary/primary education and almost \$13,000 (New York and Connecticut) for one year. For that same academic year, the District of Columbia spent over \$15,000 per student, while Indiana spent almost \$9000 per student, with the national average at about \$8500.²⁴ According to 2002 census data, the national total of state and local government spending toward elementary and secondary education in that one year was over \$411 billion.²⁵ And how do we know what we are getting for that investment? One measuring stick includes results of standardized test scores developed from tests aimed toward measuring how much kids know. Ranging in scope, purpose, and complexity, these tests are as diverse as the challenges facing education in the first place.²⁶

States strapped for money are contemplating scaling down or even abandoning challenging, custom made state tests which combine essay questions and problems that require students to explain their answers²⁷ in favor of cheaper multiple choice tests.²⁸ Even with the scaled back cheaper tests on the rise, the U.S. General Accounting Office estimated that the cost of six years of developing, scoring, and reporting the tests would cost about \$6 billion.²⁹

23. Sir Claus Moser, DAILY TEL., Aug. 21, 1990, n.p. Moser is an academic statistician and civil servant who was born in Berlin, lived most of his life in England, and has served as the chancellor of both Keele University and Israel's Open University. In 1999, Moser authored a far-reaching investigation of England's literacy and numeracy. Nadene Ghouri, *Last of the Renaissance Men*, TIMES EDUC. SUPP., Mar. 26, 1999, at 25.

24. MORGAN QUINTO CORP., STATE RANKINGS 2006: A STATISTICAL VIEW OF THE 50 UNITED STATES 138 (Kathleen O'Leary Morgan & Scott Morgan eds., 2006) (citing NAT'L EDUC. ASSOC. RANKINGS & ESTIMATES (2005)). Estimates are for the 2004-05 school year and are based on student membership. *Id.*

25. *Id.* at 135 (citing U.S. BUREAU OF THE CENSUS, GOVERNMENTS DIVISION, STATE AND LOCAL GOVERNMENT FINANCES: 2002 CENSUS (2002), available at www.census.gov/govs/www/estimate02.html). This data includes capital outlays. *Id.*

26. U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS TITLE 1: CHARACTERISTICS OF TESTS WILL INFLUENCE EXPENSES; INFORMATION SHARING MAY HELP STATES REALIZE EFFICIENCIES, GAO-03-389, at 10-11 (May 2003).

27. See *id.* at 11 (noting that "some officials believe that open-ended questions, requiring both short and long student responses, more effectively measure certain skills").

28. *Id.* at 15-17. GAO report estimates that costs of multiple choice tests are less than half of the costs of a combination of multiple choice and open ended questions. *Id.* at 17, Table 5.

29. *Id.* at 20, Table 6. These estimates were made in 2003 and were projected from 2002-2008. *Id.* at 19.

Adding in indirect costs—teacher time devoted to coordinating and giving tests and preparing the students with ongoing “practice” tests—would likely drive costs even higher.

While money can be tracked through budgets and accounting, other aspects of the standardized testing culture are less easily measured. The private testing companies operate with little to no public accountability. One educational researcher noted recently that we have more oversight in “the food we feed our dogs than in the quality of tests our kids take.”³⁰ Even more difficult to measure is the impact of these standardized tests on the educational environments in our schools. Scholars continue to study the pedagogical impacts of the tension between “teaching to the test” and “educating” the child and the effects of test distortion on the classroom and its students.³¹ But in exchange for the money, the teaching hours, the thousands upon thousands of little circles filled in correctly or incorrectly, we do get a lot of one thing—test results.

III. RESULTS

The chart included as Appendix A represents a sliver of insight from this deluge of information of how well one set of kids did on one standardized test administered in Indiana in the fall of 2007. The chart shows passage rates for different groups of students, grades 3 through 10, on the Indiana Statewide Testing for Educational Progress (ISTEP). The chart indicates that depending on a group’s race or socio-economic status (indicated by whether the student qualifies for the federal free or reduced price lunch program) or educational program (general education or special education) or English language proficiency (limited or proficient), the passage rate differs wildly.³² The last bar on the chart illustrates the sobering, but not surprising statistic, that if a child is black, requires special education and qualifies for a free lunch, that child falls into a group with a mere 17% passage rate. Is that a failure or a success? How should states respond to those scores, those kids? How should we?

In 2005, 71.5% of the senior high school student class of this country graduated—an almost 30% failure rate. Currently, over 85% of U.S. citizens over the age of twenty-five have high school degrees, thus 15% do not. How far will the latter statistic fall if current trends continue? These statistics are aptly captured in an editorial cartoon by John Darkow appearing in the *Columbia Tribune*; the artist depicts three kids walking along with their jeans around their hips. One kid says to the others, “Can you believe that thirty percent of us will drop out [of high school]?” One responds, “Dude, that’s like half!”³³

30. Barbara Miner, *Keeping Public Schools Public: Testing Companies Mine for Gold*, RETHINKING SCH., Winter 2004-05, at 1 (quoting Walt Haney, Professor of Education at Boston College).

31. See generally PHYLLIS TAUB GREENLEAF, I’D RATHER BE LEARNING: HOW STANDARDIZED TESTING LEAVES LEARNING BEHIND AND WHAT WE CAN DO (2006).

32. See App. A.

33. John Darkow, Editorial Cartoon, COLUM. TRIB., Apr. 2, 2008, n.p., available at

All joking aside, the Program on Law and State Government Fellowship Symposium of 2008 examined questions about what the law, the money, and the results mean in terms of America's citizenry, democracy, and future. The first half of the day focused on the effects of high-stakes testing on student success. Jonelle Redelman presented her paper, *Kids Who Fail: State Governments' Response to Failure*. Ms. Redelman's introduction of some of the legal and educational issues surrounding State mandated standardized tests was complemented by contributions from three experts in the field, hailing from a law school, a department of sociology, and a state department of education.

An accomplished lawyer, scholar and teacher, Professor Michael Heise³⁴ shared his thoughts on litigation impacting states' high-stakes testing mandates. Professor John Robert Warren³⁵ presented his recent empirical research exploring the meaning and use of high school exit examination results in the labor market. Kevin McDowell³⁶ related Indiana's experience with high school exit examinations detailing one state's path toward increasing the stakes of its standardized tests.

The symposium's afternoon focused on education and testing in the juvenile justice system beginning with Anderson Sanders' Fellowship presentation entitled, *Educating Incarcerated Kids: Lowering Double Digit Recidivism*. Angel Marks³⁷ further explored the realities and constraints of measuring educational success in a paper based on her experiences and findings as a public defender and a special education advocate. A panel composed of the Honorable Greg Porter,³⁸ Laurie Elliott,³⁹ Susan Lockwood,⁴⁰ Joann Helfereich,⁴¹ and Angel Marks rounded out the symposium discussing perspectives on challenges and opportunities states face as they work toward creating a better system for educating incarcerated youth.

<http://archive.columbiatribune.com/2008/apr/20080402Comm051.asp>.

34. Professor of Law, Cornell Law School. Ph.D., Northwestern University, 1990; J.D., University of Chicago, 1987; A.B., Stanford University, 1983. Professor Heise served as Senior Legal Counsel to the Assistant Secretary for Civil Rights in the U.S. Department of Education and later as Deputy Chief of Staff to the U.S. Secretary of Education between 1990 and 1992.

35. Associate Professor and the Director of Undergraduate Studies at the University of Minnesota. Ph.D., University of Wisconsin—Madison, 1998; M.S. in Sociology, University of Wisconsin—Madison, 1993; B.A., Carleton College, Northfield, Minnesota, 1991.

36. General Counsel, Indiana Department of Education.

37. J.D., Indiana University School of Law—Indianapolis, 2003.

38. Member, Indiana House of Representatives, 96th District; B.A., Earlham College, 1978. Representative Porter also graduated from Harvard University's John F. Kennedy School of Government's Executive Program in 2001.

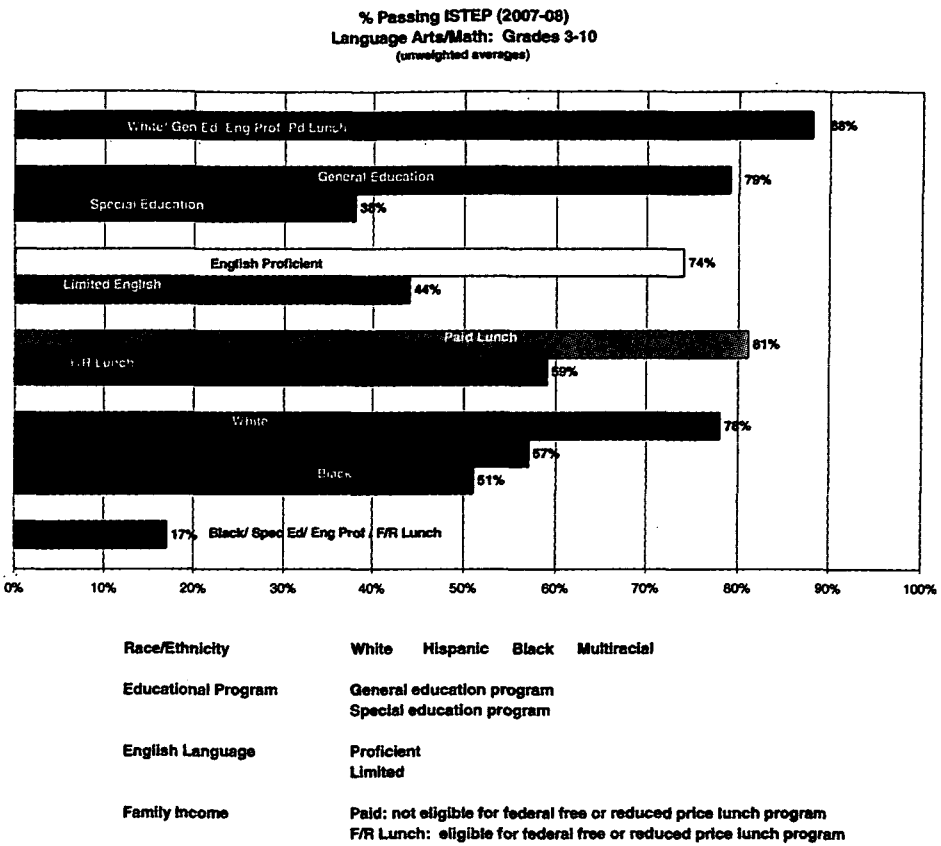
39. Executive Director of the Youth Law T.E.A.M. of Indiana. J.D., Indiana University School of Law—Indianapolis, 1986; B.A., Valparaiso University, 1983.

40. Juvenile Education Coordinator for the Indiana Department of Correction. Ed.D., Oakland City University, 2008.

41. Director, Aftercare for Indiana through Mentoring (AIM). J.D., Indiana University School of Law—Indianapolis, 1999.

The questions, problems, and statistics posed during the symposium highlight some of the challenges in the work ahead as we address the conundrum posed by Sir Moser's assertion that education does cost money, but so does ignorance.⁴² The Program on Law and State Government thanks the *Indiana Law Review* for continuing the dialog of the symposium with its inclusion of pieces on that topic in this issue. The Program also thanks all of those who made scholarly contributions to the 2008 Fellowship Symposium, especially Professor Michael Heise, whose work is published in these pages. Finally, the Program acknowledges the efforts of the 2008 Fellows, Jonelle Redelman and Anderson Sanders. My sincere hope is that the ideas emanating from their Fellowship year continue to inform us all as we address how our laws direct our money toward a better educated citizenry.

42. Moser, *supra* note 23.



Graph, Courtesy of:
Dan Clark, Deputy Executive Director,
Indiana State Teachers Association

