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SCHOOL FEES IN PUBLIC EDUCATION

I. INTRODUCTION

The United States, from its beginning, has promoted the ideal that education is important to the continuance of our society.¹ Thomas Jefferson stated:

Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are the only safe depositories. And to render even them safe their minds must be improved to a certain degree. This indeed is not all that is necessary, though it be essentially necessary.²

All states are required to establish and maintain a public school system and a majority are required by their constitutions to have a "free" educational system.³ A truly free education is still not a reality however, as many states allow

1. See Augustus F. Hawkins, *Becoming Preeminent in Education: America's Greatest Challenge*, 14 HARV. J.L. & PUB. POL'Y 367, 371-72 (1991) (referring to the Land Ordinance Act of 1785 and the Northwest Ordinance of 1787, which when passed under the Articles of Confederation "linked the drawing of property lines to inclusion of schools"). *Id.* at 372. The Northwest Ordinance explicitly stated that "religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever by [sic] encouraged." *Id.* at 372 n.18 (citing David Tyack & Thomas James, *Education for a Republic: Federal Influence on Public Schooling in the Nation's First Century*, THIS CONSTITUTION Winter 1985, at 17.) (emphasis added).

2. 3 WRITINGS OF THOMAS JEFFERSON 254 (P. Ford ed., 1892), quoted in Patricia Jo Kendall, *Public School Fees in Illinois: A Re-examination of Constitutional and Policy Questions*, 1984 U. Ill. L. Rev. 99.

3. The following state constitutional provisions mandate the establishment of a public education system; ALA. CONST. art. XIV, amend. 111, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; HAW. CONST. art. X, § 1; IOWA CONST. art. IX, § 12; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MINN. CONST. art. XIII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; OHIO CONST. art. VI, § 2; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 68; WASH. CONST. art. IX, § 2; WYO. CONST. art. VII, § 1, § 9.

The following require some form of free public education or that no tuition be charged: ARK. CONST. art. 14, § 1; CAL. CONST. art. XI, § 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, para. 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; KAN. CONST. art. VI, § 1, § 6(b); MD. CONST. art. VIII, § 1; MICH. CONST. art. VIII, § 2; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1(3); NEB. CONST. art. VII, § 1; N.J. CONST. art. VIII, § 4, para. 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. IX, § 2(1); N.D. CONST. art. VIII, § 2, § 4; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3.

fees for both academic and non-academic activities.⁴ These fees hinder the full participation of low-income children in the educational system. These children are denied the right to participate in school programs and activities because of their inability to pay the required fee. This is true even where fee waiver policies are purportedly available to ensure low income children an equal opportunity to participate.

This paper will address the current federal and state law regarding the right to education when school fees are imposed. Part II will discuss education as a fundamental right under the federal constitution. Part III will address the different interpretations of free education under the state constitutions, and how different courts apply these interpretations. Part IV will review the policy objectives of a free education system and discuss alternatives under the current state programs. Additionally, current trends in state fee and fee waiver policies will be examined. This section will conclude by proposing that the best way to achieve the policy objectives in education is to abolish all fees in the public schools through free education clauses in state constitutions.

II: THE RIGHT TO FREE EDUCATION UNDER THE U.S. CONSTITUTION.

The right to an education is not explicitly protected in the federal constitution,⁵ and the Supreme Court has refused to recognize education as an implied fundamental right.⁶ However, the Court has recognized the importance of education in our democratic system⁷ by declaring education to be an

4. See Roger W. Hamm & Sandra Crosser, *School Fees*, 178 THE AMERICAN SCHOOL BOARD JOURNAL 29, (June 1991) (According to a survey of the Departments of Education in all 50 states and the District of Columbia, 34 states permit some type of student fees, including textbook fees, lab fees, class fees, activity fees, supplies and equipment, field trip, and participation fees for extra curricular activities).

5. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

6. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988). See also Suzanne McAlpine, Kadrmas v. Dickinson Public Schools: *Will Education Ever Be Deemed a Fundamental Right?*, 10 U. BRIDGEPORT L. REV. 629, 634 (1990).

7. Brown v. Board of Educ., 347 U.S. 483 (1954), stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our *recognition of the importance of education to our democratic society*. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in

important governmental interest.⁸ This section will describe the Court's shifting treatment of this interest in three leading education cases and will analyze how the Court's decisions apply to school fee cases.

A. San Antonio Independent School District v. Rodriguez.

In *San Antonio Independent School District v. Rodriguez*,⁹ the Supreme Court upheld the Texas school financing scheme against an equal protection claim. The parents, representing minority and poor residents in districts with low property tax bases, claimed that the system subjected poor students to a lower quality education. The system's reliance on local property taxes resulted in lower per pupil expenditure in poorer districts.¹⁰

The Court declined to apply a strict scrutiny standard of review,¹¹ holding that wealth was not a suspect classification, and that education was not a fundamental right adversely affected by the Texas scheme.¹² In determining that wealth was not a suspect class in this case, the Court inquired

awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 492 (emphasis added).

See also *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("We have recognized 'the public schools as a most vital civic institution for the preservation of a democratic system of government'")

8. See *Plyler*, 457 U.S. at 221. See also, Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After Kadrmas v. Dickinson Public Schools*, 74 CORNELL L. REV. 1078, 1086.

9. 411 U.S. 1 (1973).

10. *Id.* at 1.

11. In reviewing state action under the equal protection clause of the Constitution, the Court generally uses a two tiered approach. The Court applies strict scrutiny to cases involving either a suspect class, such as race or gender, or a fundamental right, such as the right to interstate travel or the right to a criminal appeal. In order to pass constitutional muster under this standard the state action must be necessary to achieve a compelling state interest. In cases where no suspect classification is made and no fundamental interest is involved, the Court will apply a more deferential rational basis review, which requires only that the state action bear some rational relationship to a legitimate state interest. See *McAlpine*, *supra* note 6, at 631-32.

12. *Rodriguez*, 411 U.S. at 28, 35.

whether an inability to pay resulted in an "absolute deprivation of a meaningful opportunity to enjoy that [educational] benefit."¹³ Two types of wealth classification cases have been held suspect: fees which deny indigent criminals an adequate trial or appeal,¹⁴ and voting cases which deny free access to the ballot.¹⁵ The Court found no definable class in *Rodriguez* which was absolutely deprived of an education by the Texas financing scheme.¹⁶ In so holding, the Court left open the issue of whether wealth could be a suspect class in other education cases, such as those dealing with school fees.¹⁷

The Court further held that education was not a fundamental right. It reasoned that although education is important to society, this "does not determine whether it must be regarded as fundamental . . ."¹⁸ The key factor in determining fundamentality is "whether there is a right to education explicitly or implicitly guaranteed by the Constitution."¹⁹ Education is neither.²⁰ The Court reasoned that holding education to be a fundamental right would require the Court to become a "super-legislature."²¹ The court would be forced to declare rights constitutionally protected without explicit or implicit authority.²² The Court conceded, however, that there might be some "identifiable quantum" of education guaranteed by the Constitution, but the Texas scheme met this requirement.²³

The Court also emphasized the importance of state and local control of education, noting that education financing has

13. *Id.* at 20.

14. *Id.* at 21.

15. *Id.* at 22.

16. *Id.* at 22-25.

17. The Court in a footnote stated:

An educational financing system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil there would be a clearly defined class of 'poor' people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance

Id. at 25 n.60.

18. *Id.* at 30.

19. *Id.* at 33-34.

20. *Id.* at 35.

21. *Id.* at 35.

22. *Id.* at 31.

23. *Id.* at 36-37.

traditionally been a state function.²⁴ The Court then deferred to state legislatures to solve school financing woes, emphasizing the possibility of more than one constitutionally permissible solution.²⁵

Rodriguez represents the general rule, that in most cases the Court will examine the state educational financing schemes under a rational basis standard. The Court may apply strict scrutiny if it can be shown that children are being absolutely deprived of a basic education based on their inability to pay a fee.²⁶

B. Plyler v. Doe.

In *Plyler v. Doe*,²⁷ the Supreme Court took a step toward acknowledging education as a fundamental right, striking down a statute denying illegal alien children the same free public education provided to citizens and legally admitted aliens. The Texas statute withheld state funds for the education of illegal alien children from local school districts and authorized the districts to deny these children enrollment.²⁸

The Court struck down the statute using an intermediate standard of review.²⁹ Determining that the illegal alien children constituted a suspect classification, the Court focused

24. *Id.* at 40.

25. *Id.* at 42. The court also stressed how grave an effect an alternative ruling would have on states. "[I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate the systems of financing public education presently in existence in virtually every State." *Id.* at 44.

26. *Id.* at 25 n.60. *See supra*, note 16.

The court had an opportunity to determine a school fee case prior to *Rodriguez*. In *Johnson v. N.Y. Dept. of Ed.*, 409 U.S. 75 (1972) children were not allowed to participate in class if they had not paid the required textbook fee. The case however, was remanded to the district court when the school district voters elected to assess taxes to purchase books for indigent children to use. The Court has not specifically ruled on this type of case with the limited exceptions of *Plyler v. Doe*, and *Kadrmas v. Dickinson Pub. Sch.*, which will be discussed in the next sections.

27. 457 U.S. 202 (1982).

28. *Id.* at 205. The statute also implicitly allowed the districts to charge tuition as an alternative to denying enrollment outright. The statute provides: "The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age. . . ." TEX. EDUC. CODE ANN. sec. 21.031 (Vernon supp. 1981). *Id.* at 206 n.1.

29. The test used was whether the classification served an "important governmental objectives" and was "substantially related to achievement of those objectives." Biegel, *supra* note 8, at 1094.

on the children's inability to affect their "parent's conduct" or "their own status."³⁰ The Court reasoned that "imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."³¹ The Texas statute discriminated on the "basis of a legal characteristic over which the children [had] little control."³²

The Court conceded that education was not a "right" granted by the Constitution, but the Court underscored the importance of education to the preservation of our "democratic system of government."³³ Finally, the Court emphasized the stigmatizing effect that withholding an education would have on these children. "By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."³⁴

The analysis of *Plyler* could be used to successfully challenge school fees. Indigent children are no more responsible for their status than are illegal alien children. Nor do indigent children have the means to change or control the financial status of their parents. Thus, it could be concluded that any denial of an educational opportunity to indigent children based on their inability to pay a fee should be struck down under the same heightened standard used in *Plyler*.³⁵ The Court,

30. *Plyler*, 457 U.S. at 220.

31. *Id.*, quoting *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972).

32. *Id.* (the Court compared this case to cases involving illegitimacy such as *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972)).

33. *Id.* at 221, (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963)). The Court stated further:

[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of all We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

[D]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit "[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society.

Id. at 221-22 (citation omitted).

34. *Id.* at 223.

35. Biegel, *supra* note 8, at 1098-99.

however, refused to apply the heightened standard to school transportation fees in *Kadrmas v. Dickinson Public Schools*.³⁶

C. *Kadrmas v. Dickinson Public Schools*.

In *Kadrmas*, a student challenged the constitutionality of a North Dakota statute permitting non-reorganized school districts to charge a fee for door to door bus services.³⁷ The Court, refusing to extend *Plyler* to this case,³⁸ applied a deferential rational basis analysis and upheld the statute.³⁹ The Court would not extend *Plyler* "beyond the 'unique circumstances' that provoked its 'unique confluence of theories and rationales.'"⁴⁰ Heightened scrutiny was held generally applicable only to "discriminatory classifications based on sex or illegitimacy."⁴¹ The Court explained that the child in this case was not denied services because of her parents' illegal conduct, but by their refusal to pay the user fee.⁴² The Court concluded that the fee would neither create a "sub-class of illiterates,"⁴³ nor leave the child without an alternative source of transportation.⁴⁴ The state does not have a monopoly on transporting students, and in this case the child could and did find alternative transportation to school.⁴⁵ The fact that the *Kadrmas* child was not prevented from attending school during the time she was denied bus service was crucial to the Court's decision.⁴⁶

Kadrmas effectively precludes a challenge to school fees in the Supreme Court, unless a child is absolutely denied the right to an education and no alternative means for protecting that right are provided. Success, however, is unlikely considering the current atmosphere of the Court.⁴⁷ Thus, the

36. 487 U.S. 450 (1988). Biegel applied in *Kadrmas* the heightened standard and reached the same result as the Court. Biegel, *supra* note 8, at 1098.

37. *Kadrmas*, 487 U.S. at 450 (the statute required reorganized districts to provide the same services for free).

38. *Id.* at 460.

39. *Id.* at 461 (The statute will be upheld if "it bears a rational relation to a legitimate government objective.").

40. *Id.* at 459 (citations omitted).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 460.

45. *Id.* at 460-61. The court did not examine the practical effect of the alternative but emphasized that an alternative did exist.

46. *Id.* at 458.

47. The trend currently in the Court disfavors the recognition of new

practical result is that states will be allowed to burden the "access of poor persons to an education" denying them an "equal opportunity" and hope for full participation in our society.⁴⁸

School fee challenges now must be made at the state level.⁴⁹ Education clauses in state constitutions offer a strong theoretical basis for challenging school fees in the state courts.⁵⁰ An examination of state constitutions and their treatment of school fees will be discussed in the next section.

III. SCHOOL FEES AND THE STATE CONSTITUTIONS.

The education articles of state constitutions articulate "the state's role in public education."⁵¹ Virtually all state constitutions require states to "establish some system of free public schools."⁵² The language of the constitutions varies, and state courts differ in their interpretations of what "free" means.⁵³ The following sections will discuss the two analytical models used by state courts in school fee cases. Additionally, current fee policies will be reviewed, including types of fees charged and how they are treated under the differing analyses.

A. *Hamer v. Board of Education:* *An Historical Approach.*

In *Hamer v. Board of Educ.*,⁵⁴ the Supreme Court of Illinois held that a textbook rental fee did not violate the "free schools" provision of the Illinois constitution.⁵⁵ The court interpreted the "free schools" clause according to the "natural

"fundamental interests." See Biegel, *supra* note 8, at 1097.

48. *Kadrmas*, 487 U.S. at 471 (Marshall, J., dissenting).

49. See Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 516, 543 (1991). Federal challenges might still be possible if Congress were to condition receipt of federal education funding on a requirement that states equalize educational resources among school districts. See Hawkins, *supra* note 1, at 390.

50. Cf. Molly McUSIC, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 308 (1991).

51. Underwood, *supra* note 49, at 532.

52. McUSIC, *supra* note 50, at 311. See also Thomas J. Pepe & Alice L. Tufts, Commentary, *Pay for Play: Fees for Extra-Curricular Activities*, 16 EDUC. L. RPTR. 1013, 1026 (1984); Note, *School Law-The Constitutional Mandate for Free Schools*, 1971 WIS. L. REV. 971, 973.

53. See Underwood, *supra* note 49 at 529.

54. 265 N.E.2d 616 (Ill. 1971).

55. *Id.* at 622.

and popular meaning of the language used as it was understood at the time the constitution was adopted."⁵⁶ Upon tracing the history of the free schools provision, the court concluded that the provision only required the furnishing of a "schoolhouse and teachers at public expense,"⁵⁷ not textbooks.⁵⁸

Courts using a *Hamer*-type analysis find the meaning of "free education" either "inherently or contextually ambiguous."⁵⁹ These courts look to the intent of the "framers" to determine the scope of free education.⁶⁰ They look at the educational practices at the time the constitution was adopted to establish what was intended.⁶¹

In applying this analysis, courts have generally allowed fees for textbooks and other educational materials.⁶² They are split, however, on course and activity fees.⁶³ In sum, courts using *Hamer's* historical approach are "unconcerned with whether an item is important to education."⁶⁴ A fee may be

56. *Id.* at 620.

57. *Id.*

58. *Id.* at 621.

59. Patricia M. Harris, *Student Fees in Public Schools: Defining the Scope of Education*, 72 Iowa L. Rev. 1401, 1405 (1987). A list of cases following the *Hamer* approach is given at *id.* at 1403 n.25.

60. *Id.* at 1406.

61. Kendall, *supra* note 2, at 103.

62. See e.g., *Sneed v. Greensboro City Bd. of Educ.*, 264 S.E.2d 106 (1980) (upholding fees for fungible supplies and materials used in individual courses, locker rental, musical instrument rental and rental or purchase of gym uniforms.); *Marshall v. School Dist. re #3 Morgan County*, 553 P.2d 784 (1976) (absolving school districts of the responsibility to provide free textbooks to all students); *Beck v. Board of Educ.*, 344 N.E.2d 440 (1976) (upholding fees for workbooks and other educational materials and supplies charged to parents financially able to pay them); *Board of Educ. v. Sinclair*, 222 N.W.2d 143 (1974) (permitting fees for textbooks and similar fees).

The following items have been considered educational materials: magazine subscriptions, learning center supplies, file folders, paint, glue, chalk, pencils and marking pens, locks, towels, atlases, pamphlets, paperback books kept by the school, laboratory supplies, home economics supplies and industrial arts supplies. Kendall, *supra* note 2, at 108 n.55.

Current trends suggest that *Hamer* could be used to justify fees for "secretarial services, school nurses, physical education equipment, desks, chairs, [and] library books . . ." *Id.* at 112.

63. Compare, *Sneed*, 264 S.E.2d at 109-110 (allowed fees for credit courses including art, typing, vocational education and science, some were required courses, others were elective) with, *Sinclair*, 222 N.W.2d at 48 (struck down fees for any course required or elective). See also Harris, *supra* note 59, at 1409.

64. Kendall, *supra* note 2, at 105.

charged, regardless of an item's educational value, unless it was historically provided free.⁶⁵

Commentators have three main criticisms of the *Hamer* analysis. First, the assertion that "free" is textually ambiguous is against the "weight of judicial authority. 'Free' is an absolute term rather than one of degree."⁶⁶ The fact that different constitutions may have provisions describing the educational system does not render the term "free" ambiguous. "Free" means without cost. The additional requirements define the nature of that state's educational system. They do not affect what will be provided free by the state.⁶⁷

Second, critics claim that *Hamer* is not based on a reliable precedent.⁶⁸ Before 1970, no case had dealt with a school fees issue under a state constitutional challenge.⁶⁹ The discussion of free schools in *Segar v. Board of Education*,⁷⁰ relied on in *Hamer*, has been described as "dictum."⁷¹ According to these critics, any precedent before 1970 "supporting courts' decisions on either side is suspect."⁷²

Finally, critics argue that *Hamer* ignores the advancements made in education over the last century.⁷³ It is "inapposite to contemporary views about what constitutes an education."⁷⁴ This "historical approach freezes . . . education" and "eviscerates the inherent nature of education as progress."⁷⁵ These critics prefer to interpret free education under the state constitutions using a plain meaning

65. *Id.*

66. Harris, *supra* note 59, at 1407.

67. *Id.* 1407-08.

68. *Id.*

69. *Id.*; Kendall, *supra* note 2, at 111.

70. 148 N.E. 289 (Ill. 1925).

71. Kendall, *supra* note 2, at 111 ("[T]he specific controversy before the court did not involve a constitutional mandate for free textbooks, but rather involved interpretation of the Free Textbook Act and the constitutionality of damage deposits.").

72. Harris, *supra* note 59, at 1408.

73. Kendall, *supra* note 2, at 113.

74. Harris, *supra* note 59, at 1408. The author stated:

Today, . . . more courses are offered in the course of a school year. A different text is usually required for each grade or level of study, and teaching methods and technological advancements result in a higher textbook replacement rate. These factors combine to create a much heavier financial burden on students today than students faced 100 years ago.

Id. at 1408 n.67.

75. Kendall, *supra* note 2, at 113.

approach.⁷⁶ This approach will be discussed in the next section.

*B. The Plain Meaning Approach:
Paulson/Bond and Their Progeny*

The plain meaning approach was initially applied in *Paulson v. Minidoka County Sch. Dist.*,⁷⁷ and *Bond v. Ann Arbor Sch. Dist.*⁷⁸ Under this approach, courts look to the "plain ordinary meaning of the constitutional language"⁷⁹ Courts first determine if the constitutional language allows any fees.⁸⁰ Where the constitution calls for "free" schools, the courts have interpreted "free" to mean "without cost or charge."⁸¹ Following this determination, the court then must determine "whether the activity or item subject to charge constitutes 'education.'"⁸² In making this determination, the courts in *Paulson* and *Bond* have developed separate tests. These tests have been used together and separately to determine the scope of free education in subsequent school fee cases.⁸³ The following section will review these cases and describe the treatment of different types of fees using these analyses.

1. *Paulson v. Minidoka County School District.*

Paulson involved a challenge to a twenty-five dollar fee for school activities and a twenty-five dollar fee for textbooks. *Paulson* was denied a copy of his transcript, needed to enroll in the state university because he had failed to pay the fees.⁸⁴ The Supreme Court of Idaho held that the high schools fell

76. See, Harris, *supra* note 59, at 1411; Kendall, *supra* note 2, at 103.

77. 463 P.2d 935 (Idaho 1970).

78. 178 N.W.2d 484 (Mich. 1970).

79. Kendall, *supra* note 2, at 102.

80. *Id.* at 103.

81. *Bond*, 178 N.W.2d at 487.

82. *Id.*

83. See, Kelley v. East Jackson Pub. Sch., 372 N.W.2d 638, 639 (1985) (applying both the "necessary elements of any school's activity" test and the "integral fundamental part of the educational process" test). *But see* Parsippany-Troy Hills Educ. Ass'n, 457 A.2d 15, 19 (N.J. Super. Ct. App. Div. 1983) (applying only the *Bond* integral test).

For a list of other cases following the *Bond-Paulson* analysis, Harris, *supra* note 59, at 1403 n.25.

84. *Paulson*, 463 P.2d at 936-37.

under the definition of "common schools" and were to be "free."⁸⁵ First, the activity fee was held to constitute a charge on attendance contrary to the constitutional mandate for free schools.⁸⁶ The court, however, would allow social and extra-curricular activity fees to be charge if they "cover[ed] costs of such activities to be paid by students who wish to exercise the option to participate in them."⁸⁷ Textbook fees were then held invalid by the court. The court found that textbooks were "necessary elements of any school's activity" and thus fell under the free school guarantee.⁸⁸ In making this determination, the court focused on the lack of control or choice the student has over the textbooks used.⁸⁹

2. *Bond v. Ann Arbor School District.*

The Supreme Court of Michigan followed *Paulson* in *Bond v. Ann Arbor Sch. Dist.*⁹⁰ This case also involved a challenge to textbook and supply fees.⁹¹ The court struck down the fees determining that "free" under the Michigan constitution meant "without cost or charge . . ."⁹² The court then applied both the "necessary elements of any school's activity test" from *Paulson*, and an additional test, requiring anything that was an "integral fundamental part of the elementary and secondary education . . ." to be free.⁹³ The court concluded that textbooks and supplies fell into this category and were essential to the public school system.⁹⁴

85. *Id.* at 937.

86. *Id.* at 938. Idaho Const. art. IX § 1, states that "it shall be the duty of the legislature of Idaho to establish and maintain a general, uniform and thorough system of public, free common schools."

87. *Paulson*, 463 P.2d at 938.

88. *Id.*

89. *Id.* at 939. The court stated:

[T]he student has no choice in the quality or quantity of textbooks he will use if he is to earn his education. He will use exactly the books, prescribed by the school authorities, that his classmates use; and no voluntary act of his can obviate the need for books nor lessen their expense. School books are, thus, indistinguishable from other fixed educational expense items such as school building maintenance or teachers' salaries.

Id.

90. 178 N.W.2d 484 (Mich. 1970).

91. *Id.* at 485.

92. *Id.* at 487. Mich Const. art. VIII § 2 reads in part: "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."

93. *Id.* at 488.

94. *Id.*

3. *Validity of fees under Paulson/Bond*

Courts using the *Paulson/Bond* analysis focus on "what constitutes an education."⁹⁵ These courts uniformly strike down fees for textbooks, finding them to be "indistinguishable from fixed educational expenses."⁹⁶ Further, courts have generally struck down fees for required courses and the materials related to them.⁹⁷ Extra-curricular fees, however, are allowed under this approach, because these activities "by definition fall outside a district's educational program."⁹⁸ It is unclear, however, whether fees for elective courses are allowed under this test.⁹⁹

The plain meaning rule applied in *Paulson and Bond* is "more judicially sound."¹⁰⁰ Courts adopting this rule are "not bound by the past and are better able to accommodate current educational needs . . ."¹⁰¹ The rule is "clearly defined," succinct and manageable.¹⁰² It ensures that a basic level of education is provided.¹⁰³ This analysis is an improvement over the historical approach because it is concerned with what presently constitutes an education rather than what did a hundred years ago. The rule, however, still fails to satisfy the policy objectives underlying free education even when fee waivers are available to indigent students.

Part IV will consider the policy objectives of "free" education and how the current analyses conflict with these objectives. Fee waiver policies will be reviewed, concluding that they are an inadequate substitute for a totally free education. Finally, the paper will propose that the best approach to providing free public education is the approach taken in

95. Harris, *supra* note 59, at 1410.

96. *Id.* See also Kendall, *supra* note 2, at 105.

97. Harris, *supra* note 59, at 1410.

98. *Id.*

99. Harris, *supra* note 59, at 1417 ("[C]ourts . . . split over what constitutes an education. They dispute whether an education includes required, credited elective, or noncredited elective courses and activities."). Harris points out that elective courses are problematic in that they are required due to credit hour requirements for graduation yet they are elective because students may choose from several alternatives. *Id.* at 1411 n. 84. See e.g., Norton v. Board of Educ., 553 P.2d 1277 (N.M. 1976) (holding required courses to be without charge, but reasonable fees may be charged for elective courses).

100. Harris, *supra* note 59, at 1411.

101. Kendall, *supra* note 2, at 106. See also Harris, *supra* note 59, at 1411.

102. Note, *supra* note 52, 1971 WIS. L.REV. at 980.

103. Harris, *supra* note 59, at 1411.

*Hartzell v. Connell*¹⁰⁴ striking down all fees regardless of type.

IV. POLICY CONSIDERATIONS: TO FEE OR NOT TO FEE?

"It is the mark of a moral and humane society to assist all human development to its fullest potential; it is a virtual economic necessity to properly educate and train all of society's members."¹⁰⁵ Currently "[t]hirty-four states permit some type of student fees . . ."¹⁰⁶ School districts in these states have differing policies to deal with the non-payment of fees. The sanctions imposed on students for non-payment of fees include: denying enrollment in school;¹⁰⁷ withholding grades, transcript or diploma;¹⁰⁸ denying enrollment or participation in specific classes or activities;¹⁰⁹ denying access to textbooks or requiring students unable to pay to share with paying students;¹¹⁰ threats or humiliation;¹¹¹ reducing grades;¹¹²

104. 679 P.2d 35 (Cal. 1984).

105. Hawkins, *supra* note 1, at 370. The author, quoting The Committee for Economic Development, stated:

[T]his nation cannot continue to compete and prosper in the global arena when more than one-fifth of our children live in poverty and a third grow up in ignorance. And if the nation cannot compete, it cannot lead. If we continue to squander the talents of millions of our children, America will become a nation of limited human potential. It would be tragic if we allow this to happen. America must become a land of opportunity—for every child.

Id. at 368.

106. Hamm & Crosser, *supra* note 4, at 29. (drawing on the results from a survey of the departments of education in every state and the District of Columbia).

107. Harris, *supra* note 59, at 1419. *Cf.*, *Salazar v. Honig*, 246 Cal. Rptr. 837, 841 (Ct. App. 1988).

108. Harris, *supra* note 59, at 1419. *See also* *Canton v. Spokane Sch. Dist. #81*, 498 F.2d 840, 843 (9th Cir. 1974).

109. *In re Distribution of Educational Books and Materials to Underprivileged Children in West Virginia*, No. 280 at 3 (N.D. W.Va., June 17, 1977) (order enjoining school district from charging fees to needy school children for textbooks and other educational materials) [hereinafter *In re Distribution*]; Utah Issues Information Program, Inc., *SCHOOL FEES: THE LAW AND THE PRACTICE* 31 (1991) [hereinafter *UTAH ISSUES*].

110. *In re Distribution*, at 3.

111. *Canton*, 498 F.2d at 843; Nancy Hobbs, *Poor Have Enough Obstacles to an Education, Says Group Fighting to Keep Them in School*, SALT LAKE TRIBUNE, Feb. 11, 1992, at A1; *UTAH ISSUES*, *supra* note 109, at 20, 31.

112. *Canton*, 498 F.2d at 843.

physical punishments,¹¹³ and requiring students to work off fee debt.¹¹⁴ Some students forego taking classes requiring fees to avoid these types of sanctions.¹¹⁵ The fees and the sanctions they perpetuate do not further the social, economic or political goals of education. They can also be psychologically damaging to students who must endure them.

Education is intended to break down the social barriers between the classes and act as an equalizer,¹¹⁶ "promoting social cohesion."¹¹⁷ It "prepares students for active involvement in political affairs,"¹¹⁸ and fosters "those habits of open-mindedness and critical inquiry which alone make for responsible citizens" and "an enlightened and effective public opinion."¹¹⁹ Education produces "well rounded-human being[s] that in and of themselves justify education."¹²⁰ "Public Education helps produce an efficient labor force . . . "¹²¹ by giving students the intellectual and communication skills and the practical training necessary to compete in the marketplace.¹²²

Fees compromise these goals by denying "some students the benefits of full exposure to the academic variety, social skills and activities contemplated in achieving" them.¹²³ Fee

113. *Id.*

114. Hobbs, *supra* note 111, at A1 (student required to do janitorial work to pay school fees); UTAH ISSUES, *supra* note 109, at 31 (student required to clean toilets to pay fees).

115. UTAH ISSUES, *supra* note 109, at 20, 31.

116. Hartzell, 679 P.2d at 35, 40 (quoting John T. Wickes, a delegate to the California Constitutional Convention, who said: "[F]or the man who has a liberal education, if he has no money, . . . he can stand in the presence of his fellow-men with the stamp of divinity upon his brow . . .").

117. *Id.* at 52.

118. *Id.* at 40.

119. *Id.* at 41 (quoting *Wieman v. Updegraff*, 344 U.S. 183 (1952) (Frankfurter, J., concurring)).

Persons with higher educational attainment are more able and more likely to become involved in the political process and to influence the outcomes of those issues that affect them. Persons with lower levels of education not only are not as knowledgeable concerning political issues, and thus not as likely to be aware of matters affecting themselves, but also are less well informed about the entire political process and thus not as capable of expressing their views even when they are aware of relevant issues. Clearly, lack of schooling or lack of good schooling restricts one's ability to exercise political rights. Kendall, *supra* note 2, at 119 n.123 (quoting J. Guthrie, G. Kleindorfer, H. Levin & R. Stout, *Schools and Inequality* 104-05 (1971)).

120. Hartzell, 679 P.2d at 48 (Mosk, J., concurring).

121. Harris, *supra* note 59, at 1409.

122. *Cf.*, Hartzell, 679 P.2d at 41.

123. Kendall, *supra* note 2, at 117.

programs weaken the "political, economic and social balance" by creating barriers to communication between different social groups.¹²⁴ They stigmatize students and keep those students who are unable to pay the fees in a lower class, taking away the means for them to achieve economic independence.¹²⁵ Fee waiver programs, designed to compensate for these problems, are grossly inadequate and only worsen the social stigma on low income children.

A. Fee Waivers

The purpose of fee waiver policies is to "ensure that no student is denied the opportunity to participate in a class or school sponsored or supported activity because of an inability to pay a fee."¹²⁶ The policies generally require some kind of notice to parents;¹²⁷ confidentiality in the process to avoid embarrassing students and their parents;¹²⁸ and an appeal if the waiver is denied.¹²⁹ The policies generally allow waivers for both curricular and extra-curricular fees.¹³⁰ Eligibility for waivers is usually determined according to the same family income guidelines used in the federal school lunch program.¹³¹ However, some policies allow others falling

124. *Id.* at 120.

125. *See id.* at 119-22.

126. UTAH ADMIN. R. R300-407-6A (1990). *See also* UTAH CODE ANN. § 53A-12-103 (1988); BURKE COUNTY PUBLIC SCHOOLS, SUPERINTENDENT'S GUIDELINES FOR IMPLEMENTING POLICY ON WAIVER OF STUDENT FEES (hereinafter BURKE COUNTY SCHOOLS).

127. UTAH ADMIN. R. R300-407-5C (1990) (requiring districts to ensure written notice to all parents or guardians of fee and fee waiver policies within a reasonable time before fees become due); BURKE COUNTY SCHOOLS § II (requiring minimal notice of waiver policy to be sent home with each student at or before the beginning of each term). *See also Hartzell*, 679 P.2d at 38 (in addition to fee-waiver policy "[t]eachers and coaches are asked to inform their principals of any students . . . expected to participate . . . " who do not.).

128. BURKE COUNTY SCHOOLS § III. UTAH ADMIN. R. R300-407-6A(2-3) (1990) reads:

The waiver policy shall include procedures to ensure that:

* * *

(2) the process for obtaining waivers or pursuing alternatives is administered fairly, objectively and without delay, and avoids stigma and unreasonable burdens on students and parents;

(3) students who have been granted waivers or provisions in lieu of fee waivers are not treated differently from other students or identified to persons who do not need to know;

129. UTAH ADMIN. R. R300-407A(8)(1990); BURKE COUNTY SCHOOLS § III.

130. BURKE COUNTY SCHOOLS § IV; UTAH ADMIN. R. R300-407-1A (1990).

131. BURKE COUNTY SCHOOLS § III; UTAH ADMIN. R. R300-407-6A(5)(a) (1990)

outside this category to qualify,¹³² and some districts simply determine the eligibility for waivers on a case by case basis.¹³³ These policies appear to alleviate any inequality in access to education. However, because administration of the policies is left to local school administrators, they have not achieved the goal of alleviating the inequalities and in many cases have caused greater harm to students.¹³⁴

When administration of fee waiver policies is left to the local districts, many times the policies are not implemented, or are inadequately implemented,¹³⁵ resulting in severe long term harm to students and increases in societal costs.¹³⁶

(inability to pay is presumed for those receiving public assistance or free school lunch).

132. UTAH ADMIN. R. R300-407-6A(5)(b) (1990) (allows a case by case determination for those not on public assistance or school lunch who have extenuating circumstances limiting their ability to pay school fees).

133. See *Marshall*, 553 P.2d at 785 (citing Colorado Constitution which requires school boards to provide books to indigent children without charge upon written statement of a teacher that the parents of such children are unable to pay); *Sneed*, 264 S.E.2d at 110 (discussing practice of granting fee waivers on a case by case basis, in the absence of a uniform waiver policy or procedure).

134. See *Hobbs*, *supra* note 111.

135. See *Salazar*, 246 Cal. Rptr. at 839 (districts failed to notify parents of fee waiver policy, and some districts refused application for the waiver).

A Dec. 1991 survey of fee waiver policies in Utah revealed the following: 21 of 41 districts failed to provide notice of waivers, 16 of 33 districts providing a policy stated the eligibility guidelines incorrectly, 14 districts provide no guarantee of confidentiality and 19 districts failed to ensure that the procedures did not create stigmas or unreasonable burdens on parents or students. In addition eight school districts in Utah authorized fees for students in grades six and below, although such fees are specifically prohibited by the Utah Constitution. UTAH ISSUES, *supra* note 106, at 38-40.

The survey of parents revealed that students felt restricted in choosing classes and activities because of the fees. They were threatened with denial of grades or transcripts or actually denied these because they had not paid the school fee. Students who were automatically eligible under the Utah rules were denied waivers for all or some of the fees. *Id.* at 20, 33.

The anecdotal information included in this report recorded many instances where parents were intimidated, badgered and threatened for not paying the school fees. It is clear from this survey that the Utah policy is far from being uniformly applied to all eligible students. *Id.* at 20-37.

136. The Utah Issues survey revealed that some parents had to forgo paying rent, utilities or buying groceries in order to pay the required school fees, and in some cases the students simply dropped out of school rather than face the humiliation of not being able to pay the fees, or applying for a waiver. UTAH ISSUES, *supra* note 109, at 44.

Kendall has also argued that:

[T]hese waivers do not adequately alleviate the psychological impact upon the indigent child. Any fee waiver procedure is a potentially degrading experience to the child or parent unable to pay the additional costs incumbent upon a "free" education. Children may feel singled out and

"Even the most efficiently administered procedure risks stigmatizing students who need a fee waiver."¹³⁷ "[T]o a child or his parents who are unable to pay the additional fees . . . any waiver procedure is a degrading experience," whether it is efficient or not.¹³⁸

Besides being inadequately applied, the fee waiver policies are not comprehensive enough to cover all of the students who may be unable to pay.¹³⁹ Those who are not eligible for free school lunches or who have several children in school may be just as unable to pay fees as those who do receive waivers. Thus, the waiver policies do not alleviate the barriers to equal access to education for all children. Even if waiver programs were adequately administered, they are not adequate substitutes for "free" education, because they would not help those children outside the standard eligibility requirements, and they stigmatize the families receiving waivers regardless of the efficiency of the waiver program.

B. Solutions

It has been suggested that the best approach to the school fees problem is to "prohibit fees for all courses carrying credit toward graduation, including any textbooks and materials necessary to complete these course offerings," and provide fee waivers for extra-curricular fees.¹⁴⁰ This analysis takes into consideration the financial constraints on school districts,¹⁴¹ while "ensuring provision of a basic education."¹⁴² This analysis, however, does not alleviate the problems with fee waiver programs that were discussed above. Such an analysis fails to take into account the important role extra-curricular programs play in the educational scheme.

Extra-curricular activities are "generally recognized as a fundamental ingredient of the educational process."¹⁴³ They

stigmatized by their peers. Furthermore, fee waiver procedures impose an administrative barrier many may simply prefer not to cross.

Kendall, *supra* note 2, at 122.

137. Harris, *supra* note 59, at 1420. See also *Hartzell*, 679 P.2d at 44.

138. *Granger v. Cascade County Sch. Dist. No.1*, 499 P.2d 780, 786 (Mont. 1972).

139. See *Hartzell*, 679 P.2d at 52 ("[T]he waiver is available only to those students who meet a specified standard of need.").

140. Harris, *supra* note 59, at 1420-21.

141. *Id.*

142. *Id.* at 1411.

143. *Hartzell*, 679 P.2d at 42 (citations omitted).

have become so "interwoven with . . . curricular subjects" that "it is impossible to draw a clear-cut line of demarcation between them."¹⁴⁴ They teach students the important principles of "justice, fair play and good citizenship."¹⁴⁵ These activities are generally sponsored by the schools, and school personnel supervise the students and handle preparations.¹⁴⁶ They "form an integral and vital part of the educational program."¹⁴⁷ Charging a fee for these activities creates an "attitude of exclusion" which would defeat the goals of public education.¹⁴⁸

A better policy is to interpret the term "free" in its broadest sense and prohibit all fees in the public schools. The Supreme Court of California took this approach in *Hartzell v. Connell*.¹⁴⁹ The court, in this case, faced a challenge to extra-curricular activity fees.¹⁵⁰ Interpreting the California Constitution according to the *Bond* test,¹⁵¹ the court struck down the extra-curricular fees finding that they were an "integral component of public education."¹⁵² The court reasoned that the importance of extra-curricular activities had been found in a variety of other contexts, including: desegregation cases, teacher assignment cases, educational expenditure cases, and cases determining the scope of school-related tort liability.¹⁵³

144. *Id.* at 42 n.12 (citation omitted).

145. *Id.* at 42 (quoting *McGrath v. Burkhard*, 280 P.2d 864 (Cal. 1955)).

146. *Id.* at 38.

147. *Id.* at 43 (citation omitted).

148. *Pepe & Tufts*, *supra* note 52, at 1015.

149. 679 P.2d 35 (Cal. 1984).

150. *Id.* at 36.

151. *Id.* at 38-39. The court first noted that "[t]he California Constitution requires the Legislature to 'provide for a system of common schools by which a free school shall be kept up and supported in each district' (Cal. Const., art. IX, § 5)" *Id.* at 38. It then went on to apply the *Bond* approach which holds that the free school guarantee extends to all activities which constitute an "integral fundamental part of the elementary and secondary education" or which amount to "necessary elements of any school's activity." *Id.* at 39 (quoting *Bond v. Ann Arbor Sch. Dist.*, 178 N.W.2d 484 (Mich. 1970)).

152. *Id.* at 42. The court quoting *JOHNSON & FAUNCE, STUDENT ACTIVITIES IN SECONDARY SCHOOLS* 6-7 (1952), stated:

A concept which finds general acceptance today is that which identifies the curriculum with the experiences of the pupil. If the fundamental task of the school is to prepare children for life, the curriculum must be as wide as life itself. It should be thought of as comprising all the activities and experiences afforded by the community through the school

Id. at 42 n.12.

153. *Id.* at 42-43.

The court rejected the *Paulson* approach, determining that its focus on whether an activity was offered for credit was insufficient to “ensure compliance with California’s free school guarantee.”¹⁵⁴ This approach, the court noted, would allow a fee to be charged for a non-credit program with “identical content—and equal value” as a program for which no fee is charged.¹⁵⁵

Finally, the court held that the available fee-waiver provision did not meet the constitutional requirement of “free” schools.¹⁵⁶ The court stated:

The free school guarantee reflects the people’s judgment that a child’s public education is too important to be left to the budgetary circumstances and decisions of individual families. It makes no distinction between needy and nonneedy families. Individual families, needy or not, may value education more or less depending upon conflicting budget priorities . . . “[I]f left to their own unaided efforts, a great majority of the people will fail through want of means to properly educate their children; *another class, with means at command, will fail through want of interest.* The people then, can be educated only by a system of Free Schools, supported by taxation, and controlled directly by the people.”¹⁵⁷

The court recognized the limitations on funding faced by school districts, but concluded that “financial hardship [was] no defense to a violation of the free school guarantee.”¹⁵⁸

In sum the court concluded that “access to public education is a right enjoyed by all—not a commodity for sale. Educational opportunities must be provided to all students without regard to their families’ ability or willingness to pay fees or request special waivers.”¹⁵⁹ And, solutions to the funding difficulties “must be found elsewhere—for example, through the political process.”¹⁶⁰ All states should follow California’s lead, as it implements the soundest approach to the problem of school fees and achieves the educational goals of “Free Schools.”

154. *Id.* at 41.

155. *Id.*

156. *Id.* at 44.

157. *Hartzell*, 679 P.2d at 43 (citation omitted).

158. *Id.* at 44.

159. *Id.*

160. *Id.*

V. CONCLUSION

Challenges to school fees brought in federal courts will likely be unsuccessful. The best forum for changes in school fee policies is at the state level. Most states provide for free education in their constitutions. Those that do not should adopt free school guarantees, to ensure that all children in their states are provided with the education they need to become productive citizens. Although different approaches are taken to the interpretation of "free school" guarantees, the best approach is that taken by the California court in *Hartzell*. It achieves the goals of public education and ensures that children of needy families are not excluded or stigmatized by ineffective fee waiver policies. Although this approach may create financial hardships for school districts, or force them to make tough choices regarding what kinds of extra-curricular programs to offer, the alternative damage to students created by ineffective fee policies outweigh the need for some of these programs. "If the schools' existence benefits the entire community, then their *complete* maintenance and functioning should be the responsibility of that community."¹⁶¹ A community should provide what it can to all children rather than exclude some solely because they are unable to pay.

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161. Note, *supra* note 52, at 981 (emphasis added).