Brigham Young University Education and Law Journal

Volume 2003 | Number 2 Article 10

Fall 3-2-2003

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EDUCATION FUNDING AND THE ALABAMA EXAMPLE: ANOTHER PLAYER ON A CROWDED FIELD

John Herbert Roth[*]

I. INTRODUCTION

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 the experiences afforded by the community through the school, whereby the children may be prepared to participate in the life of the community.[1]

During the birth of the United States, when the many notable proponents of a system of free public education in this nation envisioned the benefits of an educated multitude, it is doubtful that they could have conceived of the free public school system that has become today's reality. Although it is manifest that an educated citizenry is an objective of the utmost importance in any organized and civilized society, the debate concerning how to provide for and fund a system of free public education has continued with little repose.[2] Yet, in spite of continued debate and political rhetoric concerning better

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1. Edgar G. Johnston & Roland C. Faunce, *Student Activities in Secondary Schools* 7 (Ronald Press Co. 1952).

2. *See* Michael Heise, *Equal Educational Opportunity Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 Ga. L. Rev. 543 (1998); John Dayton, *When All Else Has Failed: Resolving the School Funding Problem*, 1995 BYU Educ. & L.J. 1 (1995); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 Mich. L. Rev. 432 (1999).

schools for the future, the plight of education funding in many jurisdictions has remained unaltered from year to year, and thus, from generation to generation. The resulting status quo of this educational inadequacy has been to some, in one form or another, the main culprit in deepening the almost abysmal chasm between opportunity and sustained misery commensurate with a proper education or the lack thereof. Furthermore, if this status quo remains unchanged, many states will doubtless relegate many more future generations unable to rely on the vehicle which the proponents of public education dreamed would allow the less fortunate to break the bondage of illiteracy, political passivity, and poverty that free public education was meant to extinguish. Unfortunately, however persuasive the motivation to demand more attention to and better funding for public education may be, little has changed in some states where governments are still struggling to provide the desperately needed funds that are a minimum requisite to an effective education system.

The state of Alabama is but one example of a state facing a shortage of funds for education purposes,[3] although more states are likely to experience similar funding scarcities as national and international economies experience cyclical downturns in the natural business cycle,[4] as is the case currently. In recent years, the plight of public school education funding in Alabama has been a constant fixture in news reports across the state[5] and nation.[6] Stories regarding inadequate public school

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3. "First, there is the broken septic tank. If the Wilcox County school is to open for classes in three weeks, the tank must be fixed to meet health codes. Right now, there's no money to do it. There isn't money for a librarian or a physical education teacher or a full-time counselor, either. There isn't money for field trips. There isn't money to combat the termites eating the library books. There just isn't any money." Jim Yardley, *Seeking Fairness for Schools, Alabama Advocates Go to Court*, Atlanta J. & Const. F5 (Aug. 3, 1992); *but see* Bob Johnson, *Census Shows Quality of Life Up in Alabama*, Chattanooga Times/Chattanooga Free Press B5 (May 25, 2002) (comparison of the 2000 census against the 1990 census shows that more Alabamians are receiving higher income and more education).

4. "State economists are still compiling the bad news, but it is clear that revenue shortfalls are so serious that almost every school system will suffer cuts." Thomas Hargrove, *Recession Hits State Budgets—and Schools—Nationwide*, Albuquerque Trib. (Nov. 28, 2001) (available at <http://www.abqtrib.com/archives/news01/112801_news_budgets.shtml>).

5. Editor, *In Addressing Funding Issues*, Montgomery Advertiser A8 (Nov. 29, 2002); Peggy Ussery, *Richardson: Education Key to Strong Economy*, Dothan Eagle 1, 6 (May 14, 2002).

6. Editor, *The Lotto Loses in Alabama*, Chi. Trib. C20 (Oct. 17, 1999) ("Fairly or

financing in Alabama span the spectrum from equity funding[7] to the failed attempt at instituting a state lottery[8] that was proffered to rectify the inequitable and inadequate reality that exists in Alabama's state education system today.[9] Many of these problems arise from the system of local taxation of property that funds local school districts in the state,[10] yet the

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not, Alabama is usually considered one of the more backward of the 50 United States, a laggard in social attitudes, economics and education."); Dana Beyerle, *Alabama: Raising a School Tax*, N.Y. Times A16 (July 23, 2002); Jim Yardley, *Seeking Fairness for Schools, Alabama Advocates Go to Court*, Atlanta J. & Const. F5 (Aug. 3, 1992).

7. William Celis, *Parents Sue Alabama Over School Financing*, N.Y. Times 14 (Jan. 19, 1991); Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. Mich. J.L. Reform 559 (1995); Jeffrey D. Dyess, Comment, *A Mandate to the Legislature or Serious Judicial Intervention? A Remedy in the Alabama Public School Equity Funding Case*, 25 Cumb. L. Rev. 133 (1994); Carolyn J. Campbell & Sharon M. P. Nicholls, *Public School System Violates the Education, Equal Protection, and Due Process Clauses of the Alabama Constitution by Failing to Provide Equitable and Adequate Educational Opportunities and by Failing to Provide Appropriate Instruction and Special Services for Children with Disabilities*, 4 B.U. Pub. Int. L.J. 218 (1994).

8. *The Lotto Loses in Alabama, supra* n. 6; Patricia Kathryn Carlton, Student Author, *All Bets are Off: An Examination of Alabama's Proposed Lottery and the Educational Inadequacies It was Intended to Remedy*, 51 Ala. L. Rev. 753, 753–54 (2000).

9. "Alabama is not unique in that financial support for public schools varies throughout the state. Other states have the same problem and a number of lawsuits are under way to rectify the situation. The problem is particularly acute in Alabama because nearly seventy percent of the financial support for public schools comes from the state." John C. Walden & Renee D. Culverhouse, *School Finance Litigation in Alabama*, 72 Educ. L. Rep. 691, 691–92 (1992) (footnote omitted).

10. In the context of the equity funding debate, one commentator described the state of school funding in Alabama as follows:

> [T]he primary method of funding of the school systems involved is through the collection of local property taxes. The value, or basis, of the taxable property within any given district can vary widely throughout a state. Thus, the taxes collected and money spent per pupil reflects wide disparities in the level of education a district can afford to provide, regardless of the taxing effort within each district.

Dyess, *supra* n. 7, at 136 (citations omitted). *See also* Randall D. Quarles, Student Author, *Education in Alabama: Is There a Right to the Three R's?*, 43 Ala. L. Rev. 133 (1991) (stating that "the amount spent on a particular child's schooling depends largely on where his or her residence lies in relation to an arbitrary line—a county or municipal boundary"); H. C. Hudgins, Jr. & Richard S. Vacca, *Law and Education* 145 (4th ed., Michie Co. 1995) (stating that the "'property tax dependence' has caused a certain unevenness of development throughout state educational systems. . . .").

Although beyond the particular scope of this article, it is important to note that, of the many problems with the outdated Alabama Constitution of 1901, the archaic provision for property taxes is one of main importance to public school funding. *See* Gail Collins, *Alabama's Self-Inflicted Wounds; When the National Economy Takes a Dip, States With an Inherently Unfair Tax System Suffer First*, Pittsburgh Post-Gazette A21 (Mar. 21, 2001) (quoting Dr. David Bronner, head of the Retirement System of

problem is exacerbated by the health of the overall economy.[11] In other words, as local and state government entities in Alabama face weakening economic conditions, one of the first casualties of diminished state coffers are Alabama's public schools. In particular, programs in public schools that are deemed "unnecessary" or "not fundamental" to a minimum proper education required under the law are often the first to succumb to the funding war that has become commonplace in a state where equality on many levels has only recently gained prominence.

The focus of this article concerns only one particular area of the ongoing public school funding debate as it pertains to proposed programs that require students to pay fees[12] for participation in certain extracurricular activities that have played a traditionally vital role in the proper physical and mental development of school aged children for many generations. One particular example of such a fee charged to public school students today is referred to in education funding parlance as a "pay-to-play" fee.[13] A pay-to-play program is an alternative funding scheme[14] whereby students in public schools must pay a fee to take part in certain educational and sports programs, including extracurricular activities such as football and band.[15] Thus, instead of terminating certain

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Alabama, as saying, "This is the most screwed-up tax system in America, bar none."); *see* Editor, *Tax System Fails on Both Fronts*, Montgomery Advertiser (Feb. 5, 2003) (discussing a survey of the country's tax system concluding that only Nevada's tax system is worse than Alabama's). Currently, although the ad valorem property tax is one of the principal sources of funding for public schools, Alabama's ad valorem tax is the lowest in the nation. Laura D. Chaney, Student Author, *Alabama's Constitution—A Royal Pain in the Tax: The State's Constitutionally Defective Tax System*, 32 Cumb. L. Rev. 233, 245 (2001). *See* Lynn Hogewood Schuck, Student Author, *Ad Valorem Taxation Exemption: An Evaluation of Alabama's Tax Exemption for Property Devoted Exclusively to Charitable Purpose*, 33 Cumb. L. Rev. 135 n.3, 5 (2002).

11. *See* Editor, *Alabama 2002 Teacher Raises Highly Unlikely*, Chattanooga Times/Chattanooga Free Press B5 (Jan. 26, 2001) (economic downturn makes teacher pay raises difficult).

12. Examples of such fees include "towel fees in physical education classes, breakage fees in chemistry classes, fees for band and cheerleader uniforms, typing class fees covering supplies, and others." Hudgins & Vacca, *supra* n. 10, at 164.

13. *See generally* Marc D. Puntus, *Education Fees in Public Schools: A Practitioner's Guide*, 73 B.U. L. Rev. 71 (1993).

14. *Id.* (stating that thirty one states concluded the 1991 fiscal year with a budget deficit, and in order to remedy those results, states are attempting various methods of raising needed funding).

15. Extracurricular activities can be defined as activities "that are school-sponsored but are not part of regular class activities or the basis for academic credit."

sports programs and other extracurricular activities due to inadequate funding, the school will essentially charge any participating student a fee in order to offset the cost to the school system.[16] But, in order to enable disadvantaged students to participate, some programs will include a waiver of the fee structure for those students who cannot afford to pay the fee.[17]

A pay-to-play program[18] was considered recently by Alabama State Superintendent of Education Ed Richardson.[19] In December of 2001 and again in March of 2003, Dr. Richardson[20] proposed to deal with education funding cuts in Alabama by instituting a halt to sports and other extracurricular activities that are not self-funding, most notably, sports and music programs. Dr. Richardson's proposal was met with much criticism and discussion,[21] and to date, such a proposal has yet to be adopted by Alabama. However, if the Alabama state school board does determine that, due to inadequate funding, a pay-to-play program should be instituted, the board may need to consider[22] whether such a

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Martha M. McCarthy & Nelda H. Cambron-McCabe, *Public School Law* 126 (3rd ed., Allyn & Bacon 1992).

16. Other than the appropriateness of a pay-to-play program as it relates to violating a free school clause, another consideration not dealt with in this paper concerns which sports programs to cancel due to inadequate funding, without violating the provisions of Title IX and/or the IDEA.

17. *See Kelley v. E. Jackson Pub. Schs.*, 372 N.W.2d 638 (Mich. App. 1985) (for an example of a fee waiver system).

18. Many examples of this type of program have surfaced over the years. *See* E.M. Swift, *Why Johnny Can't Play: Because Athletic Budgets Haven't Kept Up with Costs, High School Sports Across the Nation Are Threatened*, 75 Sports Illustrated 60 (Sep. 23, 1991); John Valenti, *Rocky Point Families Pay Price*, N.Y. Newsday 163 (Sep. 12, 1991); Gary Miles, *Out of Money: Prep Sports Could Lose Budget Race*, USA Today 1C (July 30, 1991).

19. *See* Mike Cason, *Schools May Cut Sports, Band*, The Montgomery Advertiser, Mar. 6, 2003; Editor, *Richardson's Comments Draw Political Fire*, The Associated Press Newswires (Dec. 9, 2001); Sunny David, *Threat to Athletics Spurs School Tax Hike, Plan Appears to Pass in Mobile Area Vote*, The Atlanta J. & Const. 8A (May 16, 2001).

20. Many commentators have praised Dr. Richardson for the improvements made in the Alabama school system since he took the reigns of the battered system. *See* Charles Mahtesian, *Ed Richardson: Tough Grader*, Governing Mag. 76 (Feb. 1997). With regards to cutting funding for extracurricular activities, Dr. Richardson was quoted as saying, "'You're not going to save any large sum of money (by cutting athletics). But you have no other place to go.'" Cason, *supra* n. 19.

21. Jamie Kizzire, *School Closing Proposal Criticized*, Birmingham Post-Herald (available at <http://www.geocities.com/dmmead/bir1210.html>).

22. If such a program is instituted, affected plaintiffs may challenge the program, but the challenge will likely have to be brought under a non-constitutional law theory

program is allowable under the current constitutional and statutory scheme of education laws[23] in Alabama.[24] Stated more narrowly, the board must consider whether such a program would violate the free education mandates found in the laws of Alabama. Then the board must determine whether sports programs and extracurricular activities are of such importance to the general school curricula that removal of the programs will, in essence, be tantamount to removing any number of essential subjects, such as math or science, that are fundamental to the proper education of school children.[25]

The Alabama situation may be viewed in two layers, one being the local legal structure, the other being the national economic climate. Momentarily leaving the particulars of the Alabama education structure and its attendant problems aside and viewing the Alabama situation amidst a national scope, the issue of extracurricular program funding in Alabama may seem, upon a cursory review, to be one of local concern to the citizens of Alabama. However, upon a closer examination, it is arguable that the problem in Alabama may well have its roots in its current legal structure, but it must be recognized that the problem is also affected by the nation's current recessionary economic condition.

The purpose of this article is not simply to discuss the historical roots and legality of pay-to-play propositions in

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due to the holdings of the United States Supreme Court in *Rodriquez*. In *Rodriquez*, the Court held that "wealth discrimination alone does not merit strict scrutiny review;" and further, "the right to participate in extracurricular activities in public school cannot be a fundamental right under the Constitution because extracurricular activities are subsidiary to a primary education." Puntus, *supra* n. 13, at 74–75 (1993) (citing *San Antonio Indep. Sch. Dist. v. Rodriquez*, 411 U.S. 1 (1973)).

23. In order "to analyze the legal issues involving school fees the researcher must look to the constitution and statutes of each state." Hudgins & Vacca, *supra* n. 10, at 164.

24. Whether students in Alabama have a fundamental right to a free education in Alabama is not a new issue. *See* Quarles, *supra* n. 10 (concluding that the issue of whether education is a fundamental right is not clear). However, the analysis of a pay-to-play program proposed by Dr. Richardson may be affected by the recent order from the Alabama Supreme Court arising from the equity funding cases. *See* Section III-D, *infra*.

25. It might be noted that actual determination of what programs are integral components of an adequate education could (and probably should) be left up to each local school district. As such, if an individual school district does not determine that certain extracurricular activities are important enough to qualify as being integral to the proper education of the children in that district, then those programs will not require funding by the state. *See* Section IV-D(3), *infra*.

Alabama, but to use the Alabama situation as one example of a problem that may well become more prevalent across the nation's public school systems as a result of the current economic downturn.[26] This article will not address the sources of the current downturn of our nation's economy, for that is better left to the many economists and talking heads that have become commonplace in news reports that flood mainstream America. Rather, this article will focus on the proverbial "difficult case," followed by the conclusion that when the economy experiences a downturn, some of the first victims may be the extracurricular programs that offer school children what is arguably a properly well-balanced education.

II. PUBLIC EDUCATION LAW: IN GENERAL

A. Free Education and the Federalist System of Local Control

During the time before and after the American Revolution, there was a growing sentiment, especially in the American Colonies, that only an educated citizenry could constitute a legitimate democratic government.[27] In fact, it has been noted that Thomas Jefferson, champion of public education, "conceived of education first and foremost as the *sine qua non* of a truly viable democracy, as the inescapable prerequisite to any intelligent popular rule."[28] And, in his farewell address, George Washington, speaking to the people of the newly formed United States, encouraged the people to "[p]romote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a

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26. "Alabama is an excellent place to study, since its tax receipts are plummeting and its government is second to none in its inability to handle a crisis." Collins, *supra* n. 10, at A21 (editor claiming that she traveled to Alabama "to watch what happens in a state when the national economy turns south").

27. Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131 (1995); *see generally*, Martin D. Carcieri, *Democracy and Education in the Thought of Jefferson and Madison*, 26 J.L. & Educ. 1 (1997). However, the principle of a free public education was not born with the United States, but rather, "the principle of free elementary education is not of modern origin. Public schools were established for the education of the children of the community, in States which have long since perished. . . ." *Elsberry v. Seay*, 3 S. 804, 806 (Ala. 1887).

28. Gordon C. Lee, *Learning and Liberty: The Jeffersonian Tradition in Education*, in *Crusade Against Ignorance: Thomas Jefferson on Education* 1, 2 (Gordon C. Lee ed., William Byrd Press 1961).

government gives force of public opinion, it is essential that public opinion be enlightened."[29] Finally, Ralph Waldo Emerson, in expressing the free school ideal, so eloquently stated,

> We have already taken, at the planting of the Colonies . . . the initial step, which for its importance might have been resisted as the most radical of revolutions, thus deciding at the start the destiny of this country, —this, namely, that the poor man, whom the law does not allow to take an ear of corn when starving, nor a pair of shoes for his freezing feet, is allowed to put his hand into the pocket of the rich, and say, You shall educate me, not as you will, but as I will; not alone in the elements, but, by further provision, in the languages, in sciences, in the useful and in elegant arts.[30]

However, just as important as this idea of a free education was to the effectiveness of a democratic form of government in the eyes of the founding fathers, so too was the idea of federalism and leaving the province of education to the control of the states. Accordingly, the framers of the United States Constitution left to each individual state control over its education, evidenced by the lack of a provision in the Constitution regarding education. Pursuant to the Tenth Amendment,[31] because the power of control over education was not delegated to the United States, it was reserved by the individual states.[32] Thus, the Constitution "placed the direct responsibility for establishing and maintaining public school systems in the hands of state governments."[33] The only

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29. Kern Alexander & M. David Alexander, *American Public School Law* 24 (5th ed. 2001) (quoting Ellwood P. Cubberley, *A Brief History of Education* 288 (Houghton Mifflin Co. 1992)).

30. Ralph Waldo Emerson, *Education*, in *Educational Ideas in America: A Documentary History* 176 (S. Alexander Rippa ed., David McKay Co. 1969).

31. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Tenth Amendment was introduced in order "to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." *United States v. Darby*, 312 U.S. 100, 124 (1941).

32. Hudgins & Vacca, *supra* n. 10, at 6 (stating that "there is no single, national public school system; rather, public education exists in fifty different state public school systems"); *see also* McCarthy & Cambron-McCabe, *supra* n. 15, at 1.

33. Hudgins & Vacca, *supra* n. 10, at 6.

limitation to the free reign over education that each state enjoys is that which is prohibited by the Constitution itself, most notably, the provisions for freedom of religion, equal protection, and similar fundamental rights protected by the Constitution.[34]

This system of state and local control over the administration of public education cannot be overstated, [35] especially in light of the instant issue, considering that it is within the power of the individual states to commandeer the course of their school systems according to the wishes and desires of the people within each state. It has often been said that the "state's authority over education is considered comparable to its powers to tax and to provide for the general welfare of its citizens."[36] And like the power to tax and provide for the public welfare, "[t]he formation and governance of the public schools probably constitute the most important aspect of government used to improve the condition of humankind."[37]

B. State Law Provisions for Public Education

Because control over education was left to the states, nearly every state constitution has a clause containing a legislative directive for the establishment of education.[38] And, it is up to

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34. "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected." *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). *See* McCarthy & Cambron-McCabe, *supra* n. 15, at 1.

35. "Without question, public education through a system of public schools is, by the Constitution, as well as by the statutes, a government function in Alabama; indeed a major activity of the state government." *Williams v. State*, 161 S. 507 (Ala. 1935).

36. McCarthy & Cambron-McCabe, *supra* n. 15, at 2.

37. Alexander & Alexander, *supra* n. 29, at 89. In similar regard, the United States Supreme Court also stated that "education is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

38. Edward C. Bolmeier, *The School in the Legal Structure*, 88–89 (2d ed. W.H. Anderson Co. 1973). In discussing the nature of such constitutional provisions, Professors Alexander stated:

> Some state constitutions have very general provisions for education, requiring that a system of education be established and maintained, while others are more specific, including adjectives such as "free," "thorough and efficient," "uniform," "suitable," or "adequate." Such words are "terms of art" that, when interpreted by the courts, circumscribe the basis to which the legislature must conform in establishing a public school system.

Alexander & Alexander, *supra* n. 29, at 30. In like manner, one commentator stated:

> Each education clause has its strengths and weaknesses; some are more precise and lengthy, while others are vague and short. Some education

the courts of each state "to interpret those clauses and to define their depth and breadth."[39] The State of Alabama is no exception. In fact, the Supreme Court of Alabama stated that "courts may, should, and have involved themselves in defining the standards of a constitutionally mandated educational system."[40] Therefore, in an attempt to properly determine what type of public education system is mandated in Alabama or any other state, one must first consider the seminal source of the state's education mandate, as well as amendments thereto and court decisions interpreting both.[41] In the case of Alabama, the legislative mandate arises from the Alabama Constitution of 1901, yet the history of amendments and case law after that time have resulted in a web of confusing twists and turns in a history riddled with explicit racism and attempts at reform. It is from this complexity of laws that proposed pay-to-play programs must be scrutinized.

> clauses seem to establish a clear quality of education, while others are void of any distinct qualitative phrases whatsoever. The absence, abundance, and variety of qualitative phrases in specific state constitutions is wide-ranging.

Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU Educ. & L.J. 1, 4 (1997). Finally, Dean Underwood stated that, in essence, the particular language of a state's education clause can be understood only with respect to that state's history and judicial interpretation:

> Education clauses vary widely by state . . . . Although some scholars have attempted to categorize state education clauses according to their language . . . , such exercises are not particularly clear or useful. Education clauses, for the most part, defy categorization because they are peculiar to the state's constitutional history and its judiciary's own method of interpretation. State courts have used variously worded educational provisions to reach similar results, and state courts have used similarly worded educational provisions to reach different results.

Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. Mich. J.L. Ref. 493, 511–13 (1995) (footnotes omitted). *See also* William E. Thro, Student Author, *To Render Them Safe: The Analysis of State Constitutional Provisions in Pubic School Finance Reform Litigation*, 75 Va. L. Rev. 1639, 1661 n.103 (1989) (listing various state constitutional provisions).

39. Jensen, *supra* n. 38, at 36.

40. *Opinion of the Justices*, 624 S.2d 107, 154–55 (Ala. 1993) (citing *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 210 (Ky. 1989)). *But see Claremont Sch. Dist. v. Gov.*, 174 N.H. 499, 501 (N.H. 2002) (stating that "defining the parameters of the education mandated by the constitution is in the first instance for the legislature and the Governor").

41. Morgan et al., *supra* n. 7, at 564 (stating that an individual's own educational input standards "may be derived from at least three different sources: (1) the state's constitution, (2) the state's education statutes, and (3) the state's educational regulations and administrative policies").

III. THE CURRENT CONDITION OF PUBLIC SCHOOLS IN ALABAMA

A. Introduction

To understand the current condition of public education in Alabama, the history and development of Alabama public education law is both enlightening and necessary. Included in this history is the Alabama Constitution of 1901 as well as the numerous cases that interpret its many provisions. However, after a thorough review of recent cases[42] and the constantly changing form of the state constitution, it becomes evident that taking an accurate pulse of the status of Alabama public education for purposes of the instant issue is abstruse, at best. Accordingly, application of prior case law to the present state constitution is often instructive, but not necessarily controlling.

In introducing the early history of public education in the State of Alabama, the Supreme Court of Alabama stated,

> The constitutions of 1819, 1861, and 1865, only declared generally that schools and the means of education shall forever be encouraged in this State. . . . The system of common schools, as they now exist in Alabama, originated while the constitution of 1819 was in force, and was founded on the grant of the sixteenth section in every township by the United States to the inhabitants of such townships for the use of schools, as provided by the act for the admission of the State into the Union.[43]

Since 1819, however, the status of public education in Alabama has been largely a result of the many years of attempts by the majority of the state to promote racism and inequality within the state. In particular, the Alabama Constitution of 1901 was the product of a decidedly white supremacist convention, as evidenced by the segregationist language of Alabama's public education clause.[44] Further, the

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42. *See* Section III-D, *infra*.

43. *Elsberry*, 3 S. at 805. For a more complete history of educational provisions in Alabama, see *Opinion of the Justices No. 338*, 624 S.2d 107 (1993) (appendix including *Ala. Coalition for Equity, Inc. v. Hunt*, Nos. CV-90-883-R, CV-91-0117 (Ala. Cir. Ct. Apr. 1, 1993) (also available at 1993 WL 204083)).

44. "Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race." Ala. Const., Art. XIV, § 256 (1901, amended 1956). It is this fact, as well as many others, that drives proponents of state constitutional reform.

purpose of amending the 1901 public education clause in 1956[45] was an attempt to avoid the mandate of school desegregation under the then impending *Brown v. Board of Education* decision.[46]

However, even after many successful years of control over the fate of public education by the supporters of racial inequality in the state, the status of public education in Alabama has arguably made a turn for the better due to a recent and protracted court battle. As a result of the equity funding case, it is now clear that every child in the state has a fundamental right to a free public education. But, even though this is the current state of the law, an overview of the development of the law during various stages of the state's history is still contributive to the determination of whether a pay-to-play program will be tolerated if instituted by local school boards in Alabama.

B. Alabama Constitution of 1901: A Liberal Education[47]

1. Section 256

The Alabama Constitution of 1901 makes a specific, albeit vague, provision for the establishment of a public school system in Alabama in Section 256, which states,

> The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years. The public school fund shall be apportioned to the several counties in proportion to the number of school children of school age therein, and shall be apportioned to the schools in the districts or townships in the counties as to provide, as nearly as practicable, school terms of equal duration in such school districts or townships. Separate schools shall be provided for white and colored children, and no

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45. *See id.*

46. Jay Murphy, *Can Public Schools Be "Private"?*, 7 Ala. L. Rev. 48, 64–73 (1954).

47. For a discussion on the precursors to educational provisions in the pre-1901 constitution, see Quarles, *supra* n. 10, at 140–42. *See also Opinion of the Justices No. 338*, 624 S.2d at 156–61 (stating, inter alia, that "education in this state has been a prominent theme in all of Alabama's constitutions").

> child of either race shall be permitted to attend a school of the other race.[48]

The relevant language pertinent to the instant issue concerns the phrase "a liberal system of public schools." From this language, it is clear that the operative words in Alabama's constitutional provision for education are words of "quality," because they "emphasize the standard of quality . . . for the state's school system."[49] And, similar to the quality phrases found in over half of the country's state constitutions,[50] Alabama's quality statement is not extremely helpful in establishing exactly what the constitution demands.[51] Thus, judicial interpretation is of paramount importance to this determination. Again, it must be remembered that, as in the application of any judicial interpretation of statutory law, judicial interpretation of the 1901 education clause is appropriate only to the extent that the constitution and political forces have remained static.

2. Bryant v. Whisenant

In an early interpretation of Section 256, the Supreme Court of Alabama considered fees charged to students of the state's public school system shortly after the ratification of that section. In *Bryant v. Whisenant*,[52] the court upheld the imposition of an incidental fee to be paid by pupils in Calhoun County (with exemptions for indigent pupils). The court first noted that Alabama statutory law at the time "contemplate[d] that tuition shall be absolutely free to all minors of the state over the age of seven."[53] However, the court found a "hard distinction" between charging students tuition and charging a reasonable incidental fee for things such as heating and lighting of classrooms.[54] Further, the court reasoned, where

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48. Ala. Const., Art. XIV, § 256 (1901, amended 1956) (emphasis added). It must be noted that, pursuant to Judge Reese's 1993 order, this provision has been modified in that the segregationist language has been determined to be void. *See* Section III-D, *infra*.

49. Jensen, *supra* n. 38, at 4.

50. *Id.* at 4–5.

51. For a discussion of how other states interpret the terms "liberal" and "system," see Quarles, *supra* n. 10, at 160–62.

52. 52 S. 525 (Ala. 1910).

53. *Id.* at 525.

54. *Id.*

there is no provision for the funding of such items, "the county boards have the right to prescribe a reasonable method for the raising and collection of this fund . . . ."[55]

3. Vincent v. Board of Education

The interpretation of Section 256 was also considered by the Supreme Court of Alabama in *Vincent v. Board of Education* in 1931.[56] A father of two minor children challenged the constitutionality under Section 256 of a matriculation fee of $4.00 per student to be used by the local county or city board of education for library, laboratory, and shop work.[57] Mr. Vincent based his argument on the premise that Section 256 established a system of free public schools. However, the court did not agree when it stated,

> It is quite evident that, if the framers of the Constitution had thought to impose upon the Legislature the duty to establish a system of free public schools, they would have used just that word. "Free" and "liberal" are by no means synonymous. They are both terms of varied meaning and application.[58]

In its rationale, the court pointed to the common definitions of the words free and liberal as found in *Webster's New International Dictionary*. The court stated that *Webster's* "defines a free school as a school where no charge is made for tuition."[59] The court then noted that the term "liberal" has many meanings, but "[a]s applied to the public school system . . . it intends a system as generous and bountiful as a just consideration of the limited power of taxation and the varied needs of the state will in reason justify."[60] Further, "[t]his means that the schools shall be liberally maintained, that they should be open to common and general use,"[61] and that it should be up to legislative discretion as to how the actual management of the schools should be effectuated. As

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55. *Id. E.g., Kennedy v. Bd. of Educ.*, 107 S. 907 (Ala. 1926); *Roberson v. Oliver*, 66 S. 645 (Ala. 1914); *Williams v. Smith*, 68 S. 323 (Ala. 1915); *Ryan v. Sawyer*, 70 S. 652 (Ala. 1916); *Hughes v. Outlaw*, 73 S. 16 (Ala. 1916).

56. 131 S. 893 (Ala. 1931).

57. *Id.* at 893.

58. *Id.* at 894.

59. *Id.*

60. *Id.*

61. *Id.*

such, the statute in question that allowed for schools to charge a matriculation fee was enacted, not in opposition to Section 256, but in effectuating the purpose of Section 256.[62]

Thus, it would seem from *Vincent* that the provision of Section 256 was meant to provide for as much education as possible, but free education itself is not mandated. Similar results were announced in *Mitchell v. McCall*,[63] where the court found that "the State of Alabama is under no constitutional obligation to provide public schools."[64] Therefore, under the original wording of Section 256, as well as by an analysis of the judicial interpretation of that provision prior to 1956, it was well settled before the 1990s that the imposition of fees upon students in public schools was not violative of Alabama constitutional mandate. However, this analysis may not necessarily be controlling after the equity funding cases of the late 1990s.[65]

C. Constitutional Amendment: An Attempt at Avoiding Racial Integration

In order to avoid the mandate of public school integration as dictated by the federal government,[66] and in order to clarify any ambiguity about whether the Alabama Constitution provides for a right to public education, Section 256 was amended in 1956 by Amendment 111, which states in pertinent part,

> It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but *nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense*, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or

62. *Id.*

63. 143 S.2d 629 (Ala. 1962).

64. *Id.* at 630. However, even though the court held that section 256 did not mandate a system of free education, if such education is provided, every child should be allowed participation in it. *Id.*

65. *See* Section III-D, *infra*.

66. *See generally Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

> procedures deemed necessary to the preservation of peace and order.[67]

It is clear from the legislative history of Amendment 111 that the purpose of the amendment was to avoid court ordered integration.[68] Thus, Amendment 111 effectuated the desires of the voting majority in Alabama of the 1950s to prevent forced integration of the existing public school system,[69] and this amendment, in turn, affirmed the early common law interpreting Section 256. However, as noted previously, this is not where the analysis ends because many years of progressive political and social change have occurred in Alabama since 1956, rendering Amendment 111 a mere relic of past desires for public education for the children of Alabama no longer to be tolerated under current social norms.

D. The Equity Funding Cases: New Life for a Free System of Public Education?

1. Trial Court Sets the Standard

Almost forty years after the passage of Amendment 111, a challenge was made in the Circuit Court of Montgomery County to the then existing public school funding program enacted by the legislature in what has become commonly called the "Alabama equity funding case."[70] In *Alabama Coalition for Equity, Inc. v. Hunt*,[71] plaintiffs brought suit against the state of Alabama claiming that the existing system of public elementary and secondary education was neither equitable nor adequate and sought a declaratory judgment to that effect.[72]

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67. Ala. Const. amend. 111 (amending Ala. Const. art. XIV, § 256) (emphasis added).

68. *See* Murphy, *supra* n. 46, at 64–73.

69. Over forty years after the passage of Amendment 111, Justice Houston, in his concurring opinion in the equity funding cases, discussed whether the court in that litigation had subject matter jurisdiction. In arguing in the negative, Justice Houston stated that "Amendment 111 . . .merely authorizes certain legislative activities and requires or precludes virtually none." *Ex Parte James*, 2002 Ala. LEXIS 166, 39 (Ala. 2002).

70. A full discussion of the equity funding cases is well beyond the scope of this paper. However, a brief mention of the outcome of the litigation is important, nonetheless.

71. 1993 WL 204083 (Ala. Cir. 1993).

72. *Pinto v. Alabama Coalition for Equity*, 662 S.2d 894, 895 (Ala. 1995) (quoting *Opinion of the Justices No. 338*, 624 S.2d 107 (Ala. 1993)). The basis for the plaintiffs'

After class certification, the trial court bifurcated the bench trial into two components—the liability phase and the remedy phase.[73] With respect to the liability phase of the suit, the trial court entered a judgment on March 31, 1993, stating in pertinent part, that

> Alabama school aged children, including children with disabilities, have and enjoy a constitutional right to attend school in a liberal system of public schools, established, organized and maintained by the state, which shall provide all such schoolchildren with substantially equitable and adequate educational opportunities; That the essential principles and features of the "liberal system of public schools" required by the Alabama Constitution include the following: (a) It is the responsibility of the state to establish, organize, and maintain the system of public schools; (b) the system of public schools shall extend throughout the state; (c) *the public schools must be free and open to all schoolchildren on equal terms*. . . . That the present system of public schools in Alabama violates the aforestated constitutional and statutory rights of plaintiffs; That the state officers charged by law with responsibility for the Alabama public school system, are hereby enjoined to establish, organize and maintain a system of public schools. . . .[74]

In addition to holding that the then present system was inadequate and inequitable under the laws of Alabama[75] and requiring the state to comply with the law, the court also provided a list of what it considered to be the essential components of an adequate public education system.[76] Further, in a rather bold move,[77] the trial court unilaterally declared

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suit rested, in part, on their claim that they were denied equal protection under the law. Much debate, and thus, much confusion, has resulted from the question of whether the 1901 Constitution contains an equal protection clause. *See* Albert P. Brewer and Robert R. Maddox, *Equal Protection Under the Alabama Constitution*, 53 Ala. L. Rev. 31 (2001) (examining the status of equal protection under the Alabama Constitution).

73. *Pinto*, 662 S.2d at 895.

74. *Opinion of the Justices No. 338*, 624 S.2d at 165–66.

75. *See* Editor, *Alabama School Financing Not Equitable, Judge Rules*, L.A. Times A7 (Apr. 4, 1993).

76. *Opinion of the Justices No. 338*, 624 S.2d at 166. As discussed below, this list is extremely important to the instant issue of whether pay-to-play programs are allowed under the laws of Alabama.

77. Justice Houston, in a later opinion, noted his disdain for Judge Reese's action

that Amendment 111 was "void *ab initio* and in its entirety under the Equal Protection Clause,"[78] and ordered that the first part of Section 256 be revived and the segregation language be struck.[79] Although challenged by a myriad of defendants and criticized by various justices,[80] the Supreme Court of Alabama consistently upheld the order pertaining to the liability phase on numerous occasions[81] and ultimately refused to reverse the order under the guise of judicial restraint.[82]

To that end, the result of the equity funding case that has outlasted several governors and remained in the Alabama court system for the better part of a decade[83] was that every child in Alabama is fundamentally entitled to a free and equally funded public education.[84] And, pursuant to Judge Reese's order, the Alabama legislature was required to effectuate the same even though the mandate of the circuit

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in a concurring opinion by stating that, "[a] trial judge elected by the majority of the voters in a single Alabama judicial circuit has declared a portion of the Alabama Constitution unconstitutional" in violation of his oath to uphold that very document. *Ex Parte James*, 2002 Ala. LEXIS 166 at 21–22. He also argued that, when a constitutional provision is repealed by amendment and the amendment is later deemed unconstitutional, e.g., Section 256 was reversed by Amendment 111 which was then held unconstitutional, the prior section is revived. *Id.* at 50.

78. Order of August 13, 1991, at 2, *Ala. Coalition for Equity, Inc. v. Hunt*, No. CV–90–883 (Cir. Ct. Montgomery Co., Ala.).

79. *Id.*

80. *Ex parte James*, 713 S.2d 869, 895–923 (Ala. 1997) (Hooper, C.J., dissenting); *Pinto*, 662 S.2d at 901–10 (Houston, J., concurring in the result).

81. *James v. Ala. Coalition for Equity, Inc.*, 713 S.2d 937, 943 (Ala. 1997); *Ex parte James*, 713 S.2d at 878; *Pinto*, 662 S.2d at 90; *Opinion of the Justices No. 338*, 624 S.2d 107 (Ala. 1993).

82. "[T]he Liability Order having been purportedly made 'final' by the trial court pursuant to Rule 54(b), Ala. R. Civ. P., and never appealed, this Court has, rightly or wrongly, so far refused to review the merits of the Liability Order." *Ex parte James*, 2002 Ala. LEXIS 166 at 6.

83. "The case has been in the courts for so long that children in kindergarten when it was filed would have graduated this year." Bob Johnson, *Legislature Made Responsible for Schools Remedy*, Chattanooga Times/Chattanooga Free Press B6 (June 2, 2002).

84. "By its wholesale striking of Amendment 111, the trial court appears to have attempted to create a new right to public education, disregarding the expressed wishes of the people as set forth in Amendment 111 to the Alabama Constitution." *Ex Parte James*, 2002 Ala. LEXIS 166 at 88 (Moore, C.J., concurring in part, dissenting in part). Commentators feel that Judge Reese's order provides for a right to a free education. Morgan et al., *supra* n. 7, at 566 (stating that the circuit court "found that it was the framers' intent that [section 256] impose a mandatory duty on the state to provide the children of Alabama with an education at public expense."); Campbell & Nicholls, *supra* n. 7.

court was clearly in opposition to the earlier unequivocal case law rendered by the state's highest court, as discussed above.

2. Revisiting Earlier Opinions

The orders rendered by the trial court and many appeals to the Supreme Court of Alabama finally gained closure in 2002. In January 2002,[85] after expressly finding in other written opinions that the 1901 Constitution does not contain an equal protection clause, the Supreme Court of Alabama revisited its 1993 affirmance of the trial court's orders *ex mero motu*[86] and re-opened the equity funding litigation one final time. In May 2002, after hearing more arguments from the parties, the Court dismissed the remedy phase order[87] of the equity funding

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85. On January 10, 2002, the Supreme Court of Alabama issued the following order, which says in pertinent part:

> The "Equal Protection provision" of the trial court's order dated March 31, 1993, is predicated upon the premise that §§ 1, 6, and 22 of Article I of the Constitution of Alabama of 1901, combine to guarantee the citizens of Alabama equal protection under the law of Alabama. *Opinion of the Justices No. 338*, 624 S.2d 107, 156–61, 165 (Ala. 1993). The trial court ordered the state officers charged by law with the responsibility for the Alabama public school system to provide equitable and adequate educational opportunities to all school-age children in accordance with the constitutional mandates of Art. I, §§ 1, 6, and 22. Therefore, the "Equal Protection provision" resulting from the combination of §§ 1, 6, and 22 is a necessary component on which all phases of this ongoing litigation are founded.
>
> In 1999, after [several of] this Court's opinions . . ., this Court held that §§ 1, 6, and 22 do not combine to provide equal protection and that the Constitution of Alabama of 1901 does not contain an equal-protection provision. *Ex parte Melof*, 735 S.2d 1172 (Ala. 1999).
>
> The parties in the above-styled cases have been notified that we have placed these cases on rehearing *ex mero motu*.

Order of January 10, 2002, *Ex parte Gov. Fob James*, (Ala. 2002).

86. It is questionable whether the Supreme Court of Alabama had the power to revisit its 1993 decision over seven years after the fact. However, in opposition to this potential "roadblock," Justice Houston argued:

> It cannot be denied that our review of the Equity Funding Case has proceeded along an unusual path; however, given the highly unusual nature of the Equity Funding Case, that fact should be unremarkable. However, the fact that a court's action does not navigate a familiar course does not automatically indicate that the court is without authority so to navigate. Instead, as is true in this case, it may simply mean that unusual circumstances have compelled the court to exercise little-used but quite legitimate powers. I believe that our June 29, 2001, order implicates two such powers: our general powers of supervisory authority as the Supreme Court of Alabama over courts of inferior jurisdiction and our inherent appellate power to recall our judgements.

Ex parte James, 2002 Ala. LEXIS 166 at 58–59 (footnote omitted).

87. For a discussion of the liability and remedy phases of the equity funding case,

case as constituting a violation of the separation of powers clause of the Alabama Constitution, but left the liability phase order intact.[88] In other words, although the Court did not reverse the trial court's liability order, it did rule that the judicial branch was powerless to fashion a remedy. In arriving at its decision, the Court stated that, "the duty to fund Alabama's public schools is a duty that, for over 125 years, the people of this State have rested squarely upon the shoulders of the Legislature, [and that] it is the Legislature, not the courts, from which any further redress should be sought."[89] Therefore, it is finally clear after almost five decades that Amendment 111 no longer has any effect on the public school question, and that under the laws of Alabama, every child has a fundamental right to a public education.[90]

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see Ira W. Harvey, *Equitable Funding for Alabama's Schools: A Summary of the Liability and Remedy Orders in the Case of Alabama Coalition for Equity, Inc., et. al vs. Guy Hunt and Mary Harper, et. al vs. Guy Hunt*, 55 Ala. Law. 354 (1994).

88. *Ex parte James*, 2002 Ala. LEXIS 166.

89. *Id.* at 2. The Court continued:

> With regard to the remedy, our concern is . . . that the pronouncement of a specific remedy "from the bench" would necessarily represent an exercise of the power of that branch of government charged by the people of the State of Alabama with the sole duty to administer state funds to public schools: the Alabama Legislature.

Id. at 8, *id.* at 87–88, 91 (Moore, C.J., concurring in the result in part, dissenting in part).

90. In a press release regarding the May 31, 2002, equity funding decision, the Alabama Attorney General, Bill Pryor, stated:

> The Court, as I advocated, reached three conclusions: (1) The Court refused to revisit the liability order, which established that the children of Alabama enjoy a constitutional right to an education; (2) the Court refused the request of some universities to reconsider the ruling that Amendment 111, adopted in the 1950s to maintain segregation, violates the Fourteenth Amendment to the U.S. Constitution; and (3) the Court dismissed the remainder of this litigation on the ground that any remedy of public education funding is the exclusive province of the Legislature and the administration of public schools is the business of the State Board of Education. . . . I am pleased that the constitutional right of Alabama children to an education has been upheld, and the constitutional authority of the Legislature had the State Board of Education has been preserved.

Press Release, Attorney General Bill Pryor, *Statement of Attorney General Bill Pryor Praising the Alabama Supreme Court Ruling in Equity Funding Suit* (May 31, 2002), (available at <http://www.ago.state.al.us/news/053102.htm>).

IV. PAY-TO-PLAY PROGRAMS IN ALABAMA

A. Introduction

Considering the recent developments and conclusion of the equity funding case, if a pay-to-play program is enacted in Alabama's public schools, it could be argued that charging fees for participation in sports and other extracurricular activities in Alabama's public schools would violate the newly created free education guarantee. This argument, lodged in other states, will be successful, however, only if the determination is first made that extracurricular activities are fundamental components to the proper education of the children of Alabama, setting them on par with classic subjects such as mathematics, physics, writing, and the like. If it is successfully argued that extracurricular activities such as football and band are fundamental components to a proper education, then it would follow that charging fees for participation would violate the spirit and intent of a "free" education. Such an argument, although not yet considered in Alabama,[91] might draw its analysis from the courts of other states, and, if successful, will provide yet another wrinkle in the on-going struggle to secure scarce state funds for education.[92]

B. Supporting a No Fee System

1. The California Example: Hartzell v. Connell

In 1984, the Supreme Court of California announced a radical change in the way education programs may be funded in California by holding that "the imposition of fees for educational extracurricular activities violates the free school guarantee."[93] In *Hartzell v. Connell*,[94] the Santa Barbara High

91. In fact, the pay-to-play issue has not been considered in any context in the Alabama court system, and neither has any student fee case since the new mandate of free public schools as determined by Judge Reese in the equity funding cases.

92. *See* Editor, *In Addressing Funding Issues*, Montgomery Advertiser A8 (Nov. 29, 2002) (discussing the annual struggle between higher education institutions and K–12 schools in Alabama).

93. *Hartzell v. Connell*, 679 P.2d 35, 38 (Cal. 1984).

94. 679 P.2d 35 (Cal. 1984).

School District, in the face of decreased revenue for public school funding, adopted a plan whereby students would be charged $25 for participation on each athletic team, as well as $25 for participation in each other extracurricular activity, none of which yield any credit towards graduation.[95] The Board divided the extracurricular activities into four categories, including (1) dramatic productions, (2) vocal music groups, (3) instrumental groups, and (4) cheerleading groups.[96] However, the plan did provide for a fee waiver program whereby students in financial need desiring to participate could obtain a scholarship to participate in a program requiring a fee.[97] In reaction to the fee plan adopted by the Board, plaintiffs filed suit against the Board, claiming that the plan violated California's free school and equal protection guarantees.[98]

In considering the plaintiffs' claim, the court asked, "May a public high school district charge fees for educational programs simply because they have been denominated 'extracurricular'?"[99] Answering in the negative, the court first noted that the California Constitution mandated that the legislature "provide for a system of common schools by which a *free school* shall be kept up and supported in each district. . . ."[100]

The court next considered two approaches discussed in other states. In the first approach discussed, the *Hartzell* court considered the holding from Georgia[101] that the free school guarantee is restricted to programs that are "essential to the prescribed curriculum."[102] Under that view, the *Hartzell* court noted, "[T]he right to an education does not extend to activities that are 'outside of or in addition to the regular academic

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95. *Id.* at 37. Even though participation in the activity did not yield any credit toward graduation, such participation was linked to a for credit course in which the students spent time in the course preparing for the noncredit performance. *Id.* Further, each student had the "option of participating in the credit course but not the fee-paid performance, or vice versa." *Id.*

96. *Id.*

97. *Id.* In defining what constitutes "need," a standard similar to that used to qualify for the free lunch program was used. *Id.*

98. *Id.*

99. *Id.* at 36.

100. *Id.* at 38 (quoting Cal. Const., art. IX, § 5) (emphasis added by court).

101. *See also Paulson v. Minidoka County Sch. Dist. No. 331*, 463 P.2d 935 (Idaho 1970).

102. *Hartzell*, 679 P.2d at 39 (quoting *Smith v. Crim*, 240 S.E.2d 884 (Ga. 1977)).

courses or curriculum of a school.'"[103] And, under such reasoning, students would have no right to participate in extracurricular activities.[104]

The *Hartzell* court discussed a second approach, which stands for the proposition that a free school guarantee should "extend[] 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.'"[105] Contrary to the first approach, this approach would hold that "'the right to attend school includes the right to participate in extracurricular activities.'"[106]

The *Hartzell* court then discussed the history of the free school guarantee in California and its importance to a democratic form of government and concluded that "[i]t can no longer be denied that extracurricular activities constitute an integral component of public education,"[107] and that such activities are "[no] less fitted for the ultimate purpose of our public schools, to wit, the making of good citizens physically, mentally, and morally, than the study of algebra and Latin. . . .'"[108] Thus, the court held that "all educational activities—curricular or 'extracurricular'—offered to students by school districts fall within the free school guarantee . . . ."[109]

In its conclusion, the *Hartzell* court dismissed the school board's argument that the fee waiver provision of its plan satisfied the free school guarantee:

> 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

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103. *Id.* (quoting *Paulson*, 463 P.2d 935).

104. *Id.* (citing *Granger v. Cascade County Sch. Dist.*, 499 P.2d 780 (Mont. 1972)).

105. *Id.* (quoting *Bond v. Ann Arbor Sch. Dist.*, 178 N.W.2d 484 (Mich. 1970)).

106. *Hartzell*, 679 P.2d at 39 (quoting *Moran v. Sch. Dist. #7*, 350 F. Supp. 1180, 1184 (D. Mont. 1972)).

107. *Id.* at 42.

108. *Id.* (quoting *Alexander v. Phillips*, 254 P. 1056, 1059 (Ariz. 1927)). *See also* Louis R. Kilzer, et al., *Allied Activities in the Secondary School* (Harper & Bros., Publishers 1956); Jerry H. Robbins & Stirling B. Williams, Jr., *Student Activities in the Innovative School* 42 (Burgess Publg. Co. 1969); Robert W. Frederick, *Student Activities in American Education* 3 (Ctr. For Applied Research in Educ., Inc. 1965); Frederick C. Gruber & Thomas Bayard Beatty, *Secondary School Activities* (McGraw-Hill Book Co. 1954); Marilyn V. Yarbrough, *If You Let Me Play*, 6 Marq. Sports L.J. 229 (1996) (discussing the importance of athletics in the development of women and girls).

109. *Hartzell*, 679 P.2d at 43.

> needy and nonneedy families. . . . The free school guarantee lifts budgetary decisions concerning public education out of the individual family setting and requires that such decisions be made by the community as a whole. Once the community has decided that a particular educational program is important enough to be offered by its public schools, a student's participation in that program cannot be made to depend upon his or her family's decision whether to pay a fee or buy a toaster.[110]

Important to the instant discussion, the *Hartzell* court dismissed the school board's argument that the court's holding would produce a disparate impact on students in different districts due to differences in budgetary constraints. In so holding, the court stated that "financial hardship is no defense to a violation of the free school guarantee."[111] The court also stated that equally accessible "public education is not contingent upon the inevitably fluctuating financial health of local school districts. A solution to those financial difficulties must be found elsewhere . . . ."[112]

2. *Other Authority in Support of* Hartzell

Although, to date, no other states have followed the lead set by California as pronounced in *Hartzell*, some state courts have, at least indirectly, supported the rationale of the *Hartzell* court in holding that the place of extracurricular activities in education is not subordinate to classic "classroom" subject matter. For instance, an Ohio federal court stated that

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110. *Id.* at 43–44.

111. *Id.* at 44.

112. *Id.* This ruling, of course, offers an archetypal example of a "classification problem" bounded by the natural limits of budgetary constraints. Once a district determines that one extracurricular activity is fundamental to the proper education of the student body, will there result an endless struggle for the determination of what activity will constitute the line of demarcation worthy of school funding? In the face of potentially endless budgetary sparring, proponents of a school fee system might argue that once the courts require the schools to fund extracurricular programs, this classification struggle will only push the already under funded school districts in Alabama to the brink of bankruptcy. Opponents of a fee system might argue, in turn, that budgetary battles are a constant fixture in school planning, and this will be just another piece of that puzzle. Such opponents may further argue, like the *Hartzell* court, that funding should not dictate whether certain programs are offered. Instead, the need for providing certain extracurricular programs should be addressed by seeking school revenue via taxation (or other non-fee means).

"extracurricular activities are, in the best modern thinking, an integral and complementary part of the total school program."[113] In similar fashion, a New Jersey court found that, even though extracurricular activities commonly occur outside of regular classes, such activities "form an integral and vital part of the educational program."[114]

Finally, in an excellent discussion on the importance of school sports, the Supreme Court of Arizona outlined the evolution of extracurricular activities in the school setting, and then made an argument that athletic games promote the proper development of the body. First, the court noted that, prior to the urbanization of our nation when the country was still agrarian, there was no need for physical education in the school system because students received enough physical activity at home.[115] However, the court continued, due to modern industrialization of our country, the need for physical education has become increasingly important.[116] Arguing in support of the importance of sports in the academic setting, the court then made an analogy between football and life:

> To use the one game of football as an illustration, the boy who makes a successful football player must necessarily learn self-control under the most trying circumstances, courage, both physical and moral, in the face of strong opposition, sacrifice of individual ease for a community purpose, teamwork to the exclusion of individual glorification, and above all that "die in the last ditch" spirit which leads a man to do for a cause everything that is reasonably possible, and, when that is done, to achieve the impossible by sheer will-power. The same is true to a greater or lesser degree of practically every athletic sport which is exhibited in a stadium.[117]

Therefore, even though the aforementioned cases did not deal directly with pay-to-play programs, the courts did amplify the need for, and importance of, extracurricular sports in the school setting. These reasons support the rationale in *Hartzell.*

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113. *Davis v. Meek*, 344 F. Supp. 298, 301 (N.D. Ohio 1972) (citing *Brown v. Bd. of Educ.*, 347 U.S. at 493).

114. *Feaster v. Old Security Life Ins. Co.*, 209 A.2d 354, 357 (N.J. Super. L. Div. 1965).

115. *Alexander v. Phillips*, 254 P. 1056, 1058 (Ariz. 1927).

116. *Id.*

117. *Id.* at 1059.

C. Opposing a No Fee System

1. Kelley v. East Jackson Public Schools

A few state courts have directly opposed the rationale adopted by the *Hartzell* court. For instance, in *Kelley v. East Jackson Public Schools*,[118] a Michigan court of appeals upheld a system whereby students were charged fees for participation in interscholastic athletics that were not related to any for credit class.[119] The court reasoned, "we do not find interscholastic athletics to be a necessary element of any school's activity. Nor can we say that these activities are an integral, fundamental part of the education process rising to the level that would require them to be provided at no cost."[120] The *Kelley* court distinguished itself from the *Hartzell* case by holding that the students in the school system in question were not "arbitrarily prevented from participation" because no student had been denied access to participation due to lack of funds, which was a result of a fee waiver system.[121] Another distinction from the facts of the *Hartzell* case is that there was no ability to earn any school credit in the *Kelley* case from participation in the extracurricular activities. Therefore, it could be argued that the *Kelley* decision would have been different, and more in line with *Hartzell*, if the extracurricular activities did involve some type of school credit and/or there was no fee waiver system.

2. Other Authority in Support of Kelley

In considering a program similar to a pay-to-play program, a decision of the Supreme Court of Idaho lends itself to the conclusion reached by the *Kelley* court. In *Paulson v. Minidoka County School District No. 331*,[122] the court considered a fee charged to every student for, inter alia, the funding of extracurricular activities. In invalidating the fee, the court reasoned that the problem was that the fee was "imposed generally on all students whether they participate in extra-

118. 372 N.W.2d 638 (Mich. App. 1985).

119. *Id.* at 639. The Michigan constitutional provision in question provided that "[t]he legislature shall maintain and support a system of free public elementary and secondary schools as defined by law." Mich. Const., art. 8, § 2 (1963).

120. *Kelley*, 372 N.W.2d at 639.

121. *Id.*

122. 463 P.2d 935 (Idaho 1970).

curricular activities or not" and that "[s]uch a charge contravenes the constitutional mandate that the school be free."[123] Further, the court "noted that, because social and extracurricular activities are not necessary elements of a high school career," the school would not violate the free school mandate by charging a fee to participating students.[124]

Another case generally in support of the allowance of fees was delivered by the Supreme Court of Montana in *Granger v. Cascade County School District No. 1*.[125] The *Granger* court, even though recognizing the importance of extracurricular activities to a thorough education, affirmed a program whereby fees were charged for participation in activities that are not required but optional.[126] Before making its final determination, however, the court stated that "mentality without physical well-being does not make for good citizenship—the good citizen, the man or woman who is of greatest value to the state, is the one whose every faculty is developed and alert."[127] The court further noted that "'[e]ducation may be particularly directed to either mental, moral, or physical powers of faculties, but in its broadest and best sense it embraces them all.'"[128] Even in light of its proclamation concerning the importance of physical education in the school setting, the court concluded that the test for whether fees could be charged lies more in the determination of whether "a given course or activity [is] reasonably related to a recognized academic and educational goal of the particular school system."[129] Accordingly, the court gave each local school board great deference by declaring that each board has the power to "define its own academic and educational goals and the courses and activities that will carry credit toward graduation within the limits provided by law."[130]

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123. *Id.* at 938.

124. *Id.*

125. 499 P.2d 780 (Mont. 1972). The Montana free school clause states in part that the "legislature shall provide a basic system of free quality public elementary and secondary schools." Mont. Const., art. X, § 1 (2002).

126. *Granger*, 499 P.2d at 781.

127. *Id.* at 784 (quoting *McNair v. Sch. Dist. No. 1*, 288 P. 188 (Mont. 1930)).

128. *Id.*

129. *Id.* at 786.

130. *Id.* Thus, the court essentially declared that it would not make a blanket determination of whether a certain extracurricular activity was of enough importance to provide to it credit towards graduation, and thus, the protection of the free school

D. Pay-to-Play in Alabama After Equity Funding Cases

1. Introduction

Whether the institution of pay-to-play programs in Alabama public schools is in violation of the required system of public school education is a question suitable for legitimate debate. If a pay-to-play program is presented as a means of alternative funding amidst the current recessionary economic conditions, an appeal to the common law of Alabama will not likely be determinative of the issue. The Alabama case law arising prior to the equity funding case was reached under a different set of standards than what is required today of public schools. If presented with the question in yet another round of school funding litigation, a court may look to other states for a determination of whether to allow such fees.[131] However, as discussed previously, the interpretation of the free education clause of each state seems to be too state specific to be of any help to the Alabama courts because each state's clause was ratified under a different rationale from any other state. However, if presented with the issue at hand, the Alabama courts are not wanting for direction because the courts can look to the basic theories advanced by other states.

The main determination for a court to potentially consider if a pay-to-play program is instituted and subsequently litigated in Alabama is whether sports and other extracurricular activities are fundamental and necessary components of a proper education. Although there is no clear authority in Alabama for such a proposition,[132] some direction may be gleaned from the liability order that survived the

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provision. This deferential treatment is consistent with the United States Supreme Court decision of *School District of Abington Township v. Schempp*, 374 U.S. 203, 300 (1963) (holding that curriculum determination should be left up to the school officials, not the courts). *See also* Alexander & Alexander, *supra* n. 29.

131. This issue is not within the sole control of the court system. On the contrary, the legislature is free to pass a law outlawing such fees. Also, a future Alabama constitutional convention would be free to clarify the issue with the passage of a new, revamped education clause.

132. In *Lee v. Bd. of Educ.*, 283 F. Supp. 194, 197 (M.D. Ala. 1968), the court stated that "[I]t is without serious question that athletic programs in the various public high schools throughout Alabama are an integral part of the public school system in Alabama." However, upon further consideration of this statement within the context of the case, the meaning of "integral" was likely a term used to describe the pervasiveness of athletic programs, not their value.

equity funding case, in particular, the portion of the order setting forth an exhaustive list of the minimum requirements indicative of an adequate education:

> [A]dequate educational opportunities shall consist of, at a minimum, an education that provides students with opportunity to attain the following: (i) sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years; (ii) sufficient mathematic and scientific skills to function in Alabama, and at the national and international levels, in the coming years; (iii) sufficient knowledge of economic, social, and political systems generally, and of the history, politics, and social structure of Alabama and the United States, specifically, to enable the student to make informed choices; (iv) sufficient understanding of governmental processes and of basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation; (v) *sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being;* (vi) *sufficient understanding of the arts to enable each student to appreciate his or her cultural heritage and the cultural heritages of others*; (vii) sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently; (viii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market; and (ix) sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential.[133]

From this list, it is arguable that all sports and many other academic programs offered by many schools today are included in the minimum requirements as set forth in the new standard of education in Alabama by the equity funding case. The aforementioned list could serve as a model by other states

133. *Opinion of the Justices No. 338*, 624 S.2d at 166 (emphasis added).

considering the same issue. However, as determined by the Supreme Court of Alabama in its May 31, 2002 decision, no court in the state has the authority to require the state legislature to adhere to the list, which seemingly reduces the list to a mere persuasive status.

2. Policy Arguments

If presented with a challenge to a pay-to-play program, a court should be mindful of the policy arguments for and against the imposition of fees for extracurricular activities. Such policy arguments might be based on whether fees will deter participation by students unable or unwilling to pay the fees (resulting in a disparate educational experience for different students), whether the fees will further promote wealth-based inequality within the state (due to the ability to pay being associated with a wealth-based privilege), or whether the fees will have a psychological effect on students contemplating whether to forgo participation or accept a fee waiver (thus affirming that they wear a "badge of inferiority").[134] In order to continue to promote a new age of equality within Alabama, the required policy analysis should adopt as it's underlying motto the goal of promoting education as a vehicle by which children of every race and socioeconomic background can break any vestiges of inferiority that the grossly outdated education laws of years past have striven to maintain. In doing so, the existence of adequate funds to provide programs that promote the educational opportunities of children in the state should not be used as a crutch to avoid taking a stand against proper and adequate education funding.

3. Effects

If a state court determines that a pay-to-play program violates the mandates of Alabama law, then certain results may follow. In the short run, the individual voters of the school systems of Alabama may be forced to pursue a property tax increase in their counties in order to provide for such programs.

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134. *Johnson v. N.Y. St. Educ. Dept.*, 449 F.2d 871, 883 (2d Cir. 1971) (Kaufman, J., dissenting); *see* Patricia Jo Kendall, *Public School Fees in Illinois: A Re-Examination of Constitutional and Policy Questions*, 1984 U. Ill. L. Rev. 99 (1984) (discussing in Part IV(B) various policy considerations in the appropriateness of allowing fees to be charged to students in public schools).

Alternatively, the school boards may have to seek other alternative funding methods in the same quest to provide for an "adequate education" for the children of Alabama, or in a more desperate attempt, declare that such programs are not fundamentally necessary to a proper education in their respective district.[135] In the long run, however, a more permanent solution to the problem must be sought.[136] In particular, a constitutional delegation might address the issue by inserting a requirement in the Alabama Constitution that mandates the legislature provide every child of this state with an adequate free public education. Such a provision may also provide the legislature with some guidance as to what constitutes an "adequate" education as well as how individual school boards might sufficiently fund local schools. If these actions are taken, then the future of Alabama's public education system and its coterminous prosperity[137] will arguably mature from a relic of the state's past, and grow into a standard that will provide a populace that will lead Alabama toward a brighter future.

V. CONCLUSION

Facing an economic downturn and a resulting reduction in state revenues, state policy makers are in the unenviable position of having to allocate limited resources to almost limitless needs. Included in the many state and locally funded programs across the country are services such as police and fire protection, natural resource management, education, and countless others. Although it is difficult to develop a hierarchy of importance among the many expenditures that a state budget must accommodate, it is arguable that education should top the list. Democracy can survive only by means of an informed vote, and a truly informed voter, it follows, is one who

135. However, this might run the risk of violating what the equity funding case order determined to be "adequate."

136. Due to the order stemming from the equity funding litigation, the Alabama Board of Education has been making strides towards providing a more adequate public education system. Mark Niesse, *Alabama Panel OKs Education Upgrade*, Chattanooga Times/Chattanooga Free Press B7 (Sept. 14, 2001) ("Without knowing how much it would cost or where money would come from, the Alabama Board of Education on Thursday approved a plan to overhaul public schools as directed by a court.").

137. *See* Peggy Ussery, *Richardson: Education Key to Strong Economy*, Dothan Eagle 1, 6 (May 14, 2002).

has been educated. What constitutes an adequate education in today's society is a question that is debated in many circles, including the legal one. As the needs and resources available to fund public education experience the ebb and flow commensurate with the nation's rapidly changing society, the law should remain steadfast in its duty to ensure that all fundamental and necessary educational programs remain available for every student no matter the student's economic or social background. Concededly, extracurricular activities are educational programs on the margin between being necessary and not. Yet, school boards facing a pinch in available funds should be mindful of the need for extracurricular programs and their importance in the total development of today's student, and more importantly, whether instituting a pay-to-play program is allowed under the laws of their state. In doing so, school boards will help to prevent extracurricular activities from being the first casualty in education funding crises.