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## Beyond Equality and Adequacy: Equal Protection, Tax Assessments, and the Missouri Public School Funding Dilemma

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## NOTE

# Beyond Equality and Adequacy: Equal Protection, Tax Assessments, and the Missouri Public School Funding Dilemma

*Committee for Educational Equality v. State of Missouri*,  
294 S.W.3d 477 (Mo. 2009) (en banc).

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### I. INTRODUCTION

The Missouri Constitution guarantees a free public education for all school-age children until the age of twenty-one for the purpose of preserving the rights and liberties of the people. In 2005, the Missouri General Assembly sought to make this constitutional guarantee a reality by enacting Senate Bill 287 (SB287), which contained a new formula to be used for the distribution of state funds to public schools. The legislature intended for this new formula to result in a fairer administration of public education. However, simply having the intention of achieving a more just system of school funding does not guarantee that the legislature achieved its purpose with its recent action or that the legislation is consistent with the Missouri Constitution as a whole. In the 2009 case of *Committee for Educational Equality v. State of Missouri*, a group of students, taxpayers, and school districts challenged SB287, arguing that the funding formula violated numerous provisions of the Missouri Constitution and thus should be struck down as invalid.<sup>1</sup> The Supreme Court of Missouri rejected this challenge and upheld SB287 in its entirety.<sup>2</sup>

This Note focuses on the 2009 challenge to the SB287 formula and specifically the arguments that should have been accepted by the Supreme Court of Missouri. Central to the rejected challenges were two arguments not sufficiently considered by the court in its opinion: (1) the new school funding formula violates equal protection provisions of the Missouri Constitution because it does not adequately provide equal treatment under the law with

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1. 294 S.W.3d 477, 482 (Mo. 2009) (en banc).

2. *Id.* at 495.

respect to the fundamental right of education, and (2) the tax assessment procedures prescribed by the new formula and implemented by the State Tax Commission do not comply with the Missouri Constitution and related statutory requirements. Given its failure to adequately address these constitutional challenges to the new public school funding formula, the Supreme Court of Missouri erred in upholding SB287.

## II. FACTS AND HOLDING

In 2004, the Committee for Education Equality (CEE) and other plaintiffs<sup>3</sup> brought suit to challenge Missouri's school funding formula as it existed at that time.<sup>4</sup> The plaintiffs alleged that Missouri's school funding formula resulted in "inadequate and inequitable" funding to public schools and maintained that such deficiencies violated article IX, section 1(a) of the Missouri Constitution.<sup>5</sup> Before the plaintiffs' case reached trial, the state legislature amended the school funding formula by enacting SB287 in 2005.<sup>6</sup> Attempting to address potential deficiencies of inadequate and inequitable school funding, the new state formula adopted in SB287 provided state aid to Missouri public schools under the following calculation:

$$[\text{weighted daily attendance average}]^7 \times [\text{state adequacy target}]^8 \times [\text{dollar value modifier}]^9 = [\text{subtotal of dollars needed}] - [\text{local effort}]^{10} = [\text{state funding}].^{11}$$

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3. CEE and Coalition to Fund Excellent Schools (CFES) are not-for-profit education advocacy groups which represent their member school districts. *Id.* at 481 n.1. The other plaintiffs include students, parents, taxpayers, school districts, and the Board of Education of the City of St. Louis. *Id.*

4. *Id.* at 482. The school funding formula in 2004 was enacted as a part of the Outstanding Schools Act of 1993. S.B. 380, 87th Gen. Assem., 1st Reg. Sess. (Mo. 1993); *see also infra* notes 7-11 and accompanying text.

5. *Comm. for Educ. Equal.*, 294 S.W.3d at 482. Article IX, section 1(a) directs, *inter alia*, that the state provide all persons under the age of 21 a free public education to promote "[a] general diffusion of knowledge and intelligence." MO. CONST. art. IX, § 1(a).

6. *Comm. for Educ. Equal.*, 294 S.W.3d at 482; *see also* S. B. 287, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005).

7. *Comm. for Educ. Equal.*, 294 S.W.3d at 482. "This figure accounts for the average number of students . . . and for student needs." *Id.* at 482 n.8.

8. *Id.* at 482. "This number is a per-pupil spending target" defined by section 163.011(18). *Id.* at 482 n.9. "For 2007 and 2008, the state adequacy target was set at \$6,117." *Id.*

9. *Id.* at 482. "This number adjusts for variations in costs across the state." *Id.* at 482 n.10.

10. *Id.* at 482. The amount of funds expected from the district is calculated according to MO. REV. STAT. § 163.011(10) (Supp. 2009). *Id.* at 482 n.11.

The amended formula reflected the view that school districts with greater contributions from local funding “require[d] less state financial assistance to meet the costs of providing a free public education.”<sup>12</sup> The SB287 formula “was designed to be phased in over seven years.”<sup>13</sup> In the present case, the plaintiffs argued that both the old and new school funding formulas applied assessed valuation calculations that violate the Missouri Constitution because they fail to fund the public school system adequately.<sup>14</sup>

At trial, the “[p]laintiffs presented evidence of alleged inadequacy by focusing on [specific districts] whose funding under [the SB287] formula failed to meet the ‘state adequacy target’” requirement.<sup>15</sup> The plaintiffs “highlighted the spending disparities” as well as the differences among the tax bases of Missouri’s school districts.<sup>16</sup> Specifically, the plaintiffs contended that the legislature’s reliance on 2004 tax assessment data was irrational and unlawfully grounded in failures by the State Tax Commission to administer its statutory oversight and equalization responsibilities.<sup>17</sup> The plaintiffs argued that Missouri assessments “were not on pace with market values” and that freezing the assessments at 2004 levels only compounded this problem.<sup>18</sup> Citing a study critical of the school funding formula,<sup>19</sup> the plaintiffs argued that the SB287 formula was improperly based on assessment calculations that varied widely across the state and were unacceptably low in many cases because they did not reflect accurate market values.<sup>20</sup> An expert for the plaintiffs testified that Missouri’s school funding system was “one of the most disparate” in America because the “funding formula placed a [significant] burden on local school districts by increasing their responsibility [to fund] public schools.”<sup>21</sup> Finally, while the plaintiffs acknowledged that the SB287

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11. *Id.* at 482. The amount of funds the state will be expected to provide. *Id.* at 482-83.

12. *Id.* at 483.

13. *Id.* “Section 163.031.4 provides phase-in formulas applying both” the old and new school funding “formulas through the 2011-2012 school year.” *Id.* at 483 n.12; *see also* MO. REV. STAT. § 163.031.4 (6) (2000).

14. *Comm. for Educ. Equal.*, 294 S.W.3d at 483. CEE and the other plaintiffs challenged the constitutionality of the SB287 funding formula and the constitutionality of its use of “assessment calculations that varied widely throughout the state and that, in many cases, were unacceptably low because they did not reflect market values.” *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. PUB. POLICY RESEARCH CTR., UNIV. OF MO.-ST. LOUIS, DISPARITY OF ASSESSMENT RESULTS: WHY MISSOURI SCHOOL FUNDING FORMULA DOESN’T ADD UP (2007), available at [http://pprc.umsl.edu/data/CFES\\_FINAL\\_april2007.pdf](http://pprc.umsl.edu/data/CFES_FINAL_april2007.pdf) [hereinafter PPRC].

20. *Comm. for Educ. Equal.*, 294 S.W.3d at 483.

21. *Id.*

formula would contribute more than \$2 million in public funds statewide, they argued that this number was far below the \$904.8 million required to fund the schools adequately.<sup>22</sup>

The State<sup>23</sup> defended the SB287 formula by asserting that the funding plan would provide a total of \$800 million once fully implemented.<sup>24</sup> The State urged the court to note that the long-term goal of the new school funding formula was to move from a tax-based system to a need-based one.<sup>25</sup> Finally, the State argued that SB287 was constitutional because it explicitly complied with the requirements outlined in article IX, section 3(b) of the Missouri Constitution.<sup>26</sup> Agreeing with the State's arguments, the trial court ruled that Missouri law did not require funding public education beyond twenty-five percent of state revenue.<sup>27</sup> The trial court rejected CEE's claims that SB287 violated the Hancock Amendment<sup>28</sup> and that the amendment provided the remedy sought by the plaintiffs.<sup>29</sup> Finally, the court dismissed CEE's claims regarding assessment calculation on standing and procedural grounds and rejected the argument that the legislature wrongly relied on the State Tax Commissioner's 2004 data.<sup>30</sup>

In appealing the trial court's decision, the plaintiffs raised four constitutional challenges to SB287's funding formula: "(1) the formula 'inadequately' funds schools in violation of article IX . . . ; (2) the formula violates equal protection; (3) the formula violates Missouri's Hancock Amendment; and (4) the legislature violated article X of the Missouri Constitution and certain statutes by incorporating inaccurate assessment figures into the formula."<sup>31</sup> On September 1, 2009, the Supreme Court of Missouri held that each of the

22. *Id.* at 483-84.

23. Three taxpayers, W. Bevis Schock, Rex Siquefield, and Menlo Smith, were allowed to join in the State's defense of SB287 in October of 2006 over objections by the plaintiffs. *Id.* at 486-87 & nn.14-15. The defendant-intervenors' only interest in the case was their status as taxpayers, and while the trial court noted the State's interests were already adequately represented, the defendant-intervenors were allowed to join the case by the trial court. *Id.* at 486-87. This Note discusses the impact of the defendant-intervenors in the Comment section below. See *infra* notes 211-21 and accompanying text.

24. *Comm. for Educ. Equal.*, 294 S.W.3d at 484.

25. *Id.*

26. *Id.* This section of the constitution mandates that the state set aside no less than twenty-five percent of state revenue to support public schools. See *infra* notes 76-78 and accompanying text.

27. *Comm. for Educ. Equal.*, 294 S.W.3d at 484.

28. The Hancock Amendment provides, *inter alia*, that the state not require new programs without funding them. MO. CONST. art. X, §§ 16-24 (amended 1980).

29. *Comm. for Educ. Equal.*, 294 S.W.3d at 484.

30. *Id.*

31. *Id.*

plaintiffs' claims were without merit; in doing so, the court upheld the constitutionality of the SB287 formula for school funding.<sup>32</sup>

### III. LEGAL BACKGROUND

#### A. Rodriguez – A Federal Constitutional Right to Public Education?

In 1973, the Supreme Court of the United States decided the case of *San Antonio Independent School District v. Rodriguez*.<sup>33</sup> In *Rodriguez*, students from school districts with low expenditures per pupil challenged the state's school funding scheme by alleging that funding public schools based on property tax collections violated federal equal protection requirements.<sup>34</sup> Specifically, districts with low property values generated vastly different levels of revenue for funding public schools than did those in districts with high property values.<sup>35</sup> Writing for the Court, Justice Powell argued that unless there is an absolute deprivation of state services, a lack of equality in state funding of public schools does not violate equal protection guarantees.<sup>36</sup> The Court found that the Texas school funding scheme neither depended upon a suspect class based on wealth<sup>37</sup> nor violated a fundamental right to education generally.<sup>38</sup> The key fundamental right inquiry was whether the Federal Constitution "explicitly or implicitly guaranteed" an education to all, and the majority held that the Constitution contained no such right.<sup>39</sup>

Justice White's dissenting opinion highlighted that the school funding scheme was more than just unwise, it was also irrational because it guaranteed that school funding in low-income districts could never increase.<sup>40</sup> This fact ensured that some children would not enjoy equal protection under the law, and thus the Texas scheme was unconstitutional, even under rational basis review.<sup>41</sup> Justice Marshall's dissent went a step further by claiming that the interests of low-wealth property districts and education generally were significant enough to warrant a heightened level of scrutiny in judicial review.<sup>42</sup> Nevertheless, a federal fundamental right to education was denied.<sup>43</sup>

32. *Id.* at 489-95.

33. 411 U.S. 1 (1973).

34. *Id.* at 4-6.

35. *Id.* at 12-13. In 1968, the Edgewood school district, one of the plaintiffs in the case, annually spent \$356 per pupil, as opposed to the Alamo District, which annually invested \$594 per pupil. *Id.*

36. *Id.* at 23-24.

37. *Id.* at 28.

38. *Id.* at 35.

39. *Id.* at 33-35.

40. *Id.* at 68 (White, J., dissenting).

41. *Id.*

42. *Id.* at 122 (Marshall, J., dissenting).

43. *Id.* at 35 (majority opinion).

As a result of *Rodriguez*, the movement to challenge public school financing schemes shifted to arguments based on state constitutions.<sup>44</sup>

### *B. State Constitutional Challenges to Public Education Funding*

After the *Rodriguez* Court denied a federal fundamental right to education, numerous state cases followed with attempts to establish education as a fundamental right under state constitutions or education statutes.<sup>45</sup> Lacking a federal constitutional right to education, proponents of public school finance reform were forced to bring their challenges exclusively at the state level and to argue that the state constitution provided such a right.<sup>46</sup>

Predating *Rodriguez*, the case of *Serrano v. Priest*<sup>47</sup> challenged the California system of public school funding on federal equal protection grounds.<sup>48</sup> In *Serrano I*, the Supreme Court of California held that the California scheme of public education funding violated federal equal protection guarantees because the funding system was based on local property tax revenue, which made access and quality of education a wealth-based issue.<sup>49</sup> Its holding invalidated by *Rodriguez*, *Serrano I* inspired a second case that instead challenged the public school funding system under the state constitution. In this new case, *Serrano II*,<sup>50</sup> the Supreme Court of California used suspect class analysis based on school district wealth to find that education was a fundamental right under the California Constitution.<sup>51</sup>

In other cases during the post-*Rodriguez* period, state supreme courts struck down school funding laws based on funding inequalities in a variety of different situations.<sup>52</sup> The courts did so despite above-average efforts at school funding equalization,<sup>53</sup> high percentages of state revenue supplied,<sup>54</sup> and vague constitutional commitments to providing free public schools.<sup>55</sup> In *Horton v. Meskill*, the plaintiffs challenged the Connecticut school funding law on the grounds that disparities in funding between districts in a wide array of education categories violated equal protection principles of the Con-

44. See VICTORIA J. DODD, PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY 114-17 (2003).

45. See *infra* notes 47-66 and accompanying text.

46. See DODD, *supra* note 44 at 114-27.

47. 487 P.2d 1241 (1971) (en banc).

48. *Id.* at 1244.

49. *Id.*

50. *Serrano v. Priest*, 557 P.2d 929 (1976) (en banc).

51. *Id.* at 951. See generally CAL. CONST. art. IX, § 1.

52. See *infra* notes 56-66 and accompanying text.

53. See *Horton v. Meskill*, 376 A.2d 359, 379 (Conn. 1977) (Loiselle, J., dissenting). At the time, Connecticut was the fiftieth highest ranking state in the nation in its efforts to equalize school funding. *Id.* at 368 (majority opinion).

54. See *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 91-92 (Ark. 1983).

55. See *Robinson v. Cahill*, 303 A.2d 273, 291-93 (N.J. 1973).

necticut Constitution.<sup>56</sup> Despite the lack of language in the constitution establishing a fundamental right to education,<sup>57</sup> the state supreme court nevertheless used strict scrutiny to evaluate the inequality of funding claims.<sup>58</sup> As a result, the court held that the state funding scheme was unconstitutional.<sup>59</sup> Similarly, in *DuPree v. Alma School District No. 30*,<sup>60</sup> the Arkansas Supreme Court struck down the state's public school funding scheme even though the state supplied more than fifty percent of the public school's operating budget.<sup>61</sup> Disregarding this relatively high state expenditure, the court held that because the state funding system was ultimately based on local district wealth, it was an irrational system to promote the constitutionally required "efficient system of education."<sup>62</sup>

Perhaps the most influential in this line of cases is *Robinson v. Cahill*.<sup>63</sup> In *Robinson*, the Supreme Court of New Jersey turned away from an equal protection argument and, instead, focused on the education article of the New Jersey Constitution.<sup>64</sup> Noting that the constitution required "a thorough and efficient system" of public schools, the court found that the state funding system violated the education provisions of the state constitution because it relied heavily on local funds, thus giving rise to great funding disparities statewide.<sup>65</sup> The legacy of *Robinson* is that plaintiffs challenging a public funding education scheme could allege the scheme was a direct violation of the state constitution's education provisions, rather than relying upon a more indirect violation of the equal protection provisions. However, to be successful in a claim based on the logic of *Robinson*, the plaintiffs must be able to cite specific language in their respective state constitution conferring a duty upon the legislature to provide equal or adequate opportunities for the state's children.<sup>66</sup>

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56. *Horton*, 376 A.2d at 361.

57. Article VIII, section 1 of the Connecticut Constitution provided only that there must be free public elementary and secondary education for state students.

58. *Horton*, 376 A.2d at 374.

59. *Id.*

60. 651 S.W.2d 90 (Ark. 1983).

61. *Id.* at 91. The state supplied 51.6% of all Arkansas public school operating funds. *Id.*

62. *Id.* at 91-93; see also ARK. CONST. art. 14, § 1.

63. 303 A.2d 273 (N.J. 1973).

64. *Id.* at 287-88; see also N.J. CONST. art. VIII, § 4, art. IV, § 7.

65. *Robinson*, 303 A.2d at 292.

66. DODD, *supra* note 44, at 122.



### C. Public Education and the Missouri Constitution

Missourians have acknowledged the importance of education in laws since the enactment of the first constitution in 1820.<sup>67</sup> In that document, the citizens of Missouri mandated that education “shall forever be encouraged” and that the Missouri General Assembly had the duty to ensure that each township had at least one or more schools where the poor could attend without costs.<sup>68</sup> In 1865, the legislature amended the constitution and its education article to include a mandate that all schools must be funded equally across the state.<sup>69</sup> This was a marked distinction from the 1820 language merely mandating free schools be provided in all townships. The significant requirement for publicly funded education did not last long, however. The mandate for equality of funding existed until 1875 when the state constitution was amended.<sup>70</sup> In this subsequent version of the education clause, the legislators deleted the language mandating equality of education as a right for all Missouri children.<sup>71</sup> After this alteration, funding of public schools was still guaranteed, but by no means did the funding have to be equal for all children across the state.<sup>72</sup> The language of pertinent sections of the education clause remained unchanged until the Missouri Constitution of 1945, which remains the current version today.<sup>73</sup> The current education section of the Missouri Constitution mandates:

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.<sup>74</sup>

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67. See MO. CONST. art. VI (1820).

68. *Id.* § 1.

69. See MO. CONST. art. IX, § 9 (1865); see also *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 490 n.20 (Mo. 2009) (en banc).

70. See generally MO. CONST. art. IX, § 5 (1875).

71. *Id.*; see also *Comm. for Educ. Equal.*, 294 S.W.3d at 490 n.20.

72. MO. CONST. art. IX, § 5 (1875). Specifically, schools for children of lower class or minority backgrounds would not have to be funded equally. The *Committee for Educational Equality* majority acknowledged as significant to their fundamental rights analysis that equality of education was no longer a constitutional desideratum after 1875. *Comm. for Educ. Equal.*, 294 S.W.3d at 490. However, the majority did not address the relatively obvious reason why this language was changed at that time. As discussed in the Comment section below, before the 1875 amendment, all schools, even the separate schools established for children of African descent, were required to be funded equally. See *infra* notes 233-38 and accompanying text.

73. See generally MO. CONST. art. IX.

74. MO. CONST. art. IX, § 1(a).

The language of interest in this section is that noting the importance of a “general diffusion of knowledge and intelligence” and the mandate to “establish and maintain free public schools for the gratuitous instruction of all persons in this state.”<sup>75</sup>

The final education provision of the Missouri Constitution pertinent for the instant challenge to the SB287 formula is the minimum funding level section of article IX:

In [the] event the public school fund provided and set apart by law for the support of free public schools, shall be insufficient to sustain free schools at least eight months in every year in each school district of the state, the general assembly may provide for such deficiency; but in no case shall there be set apart less than twenty-five percent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools.<sup>76</sup>

The important language to note here is that the only explicit adequacy requirement for public education is that at least “twenty-five percent of state revenues” must be allocated for school funding.<sup>77</sup> Thus, funding of public schools beyond this level does not appear to be required.<sup>78</sup>

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75. *Id.* The specific meaning intended by the introductory sentence of this section is a significant issue in the case. Whether “general diffusion of knowledge and intelligence” is mere legislative aspiration or a more substantive fundamental goal of providing free public education is a question that ultimately determined the outcome of the case. *Comm. for Educ. Equal.*, 294 S.W.3d at 490. If one interprets the language as mere aspiration and not a substantive right or goal, then rational basis review is appropriate for this case. The result of this interpretation is that legislative attempts to fund public schools need only “rationally relate[] to a legitimate end.” *Id.* at 491. However, if one interprets the language as indicative of a fundamental right of Missouri school-age children, then a stricter standard of scrutiny is appropriate and the burden of proof dramatically shifts to the state to show that its means of providing a free public education satisfies constitutional equal protection requirements. *Id.* at 490-91. Whether or not the new school funding formula can be upheld as constitutional depends in great part on the interpretation of this opening sentence of the education clause.

76. MO. CONST. art. IX, § 3(b).

77. Respondents’ Joint Brief Regarding Constitutional Claims at 45, *Comm. for Educ. Equal.*, 294 S.W.3d 477 (No. SC 89010) (citing *Comm. for Educ. Equal. v. State*, 878 S.W.2d 446, 458 (Mo. 1994) (en banc) (Robertson, J., concurring)).

78. As noted below, allocations above this level are not prohibited. *See infra* notes 94-97 and accompanying text. However, overall funding levels dipping below this percentage of state revenue are constitutionally prohibited. Respondents’ Joint Brief Regarding Constitutional Claims at 24, *Comm. for Educ. Equal.*, 294 S.W.3d 477 (No. SC 89010) (citing MO. CONST. art. IX, § 3(b)).

#### *D. Equal Protection and the Missouri Constitution*

Article I, section 2 of the Missouri Constitution contains the state's equal protection guarantees. This language has remained almost unchanged since the enactment of the constitution of 1875.<sup>79</sup>

That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.<sup>80</sup>

Among other guarantees, this clause requires the government to promote the general welfare and to protect all persons equally under law.<sup>81</sup> This section sets out security of equal rights and opportunities for its citizens as a primary purpose of government.<sup>82</sup> Like the Fourteenth Amendment of the United States Constitution, the Missouri Constitution provides that a law may treat different groups of individuals differently, but similarly situated individuals can be treated differently only with adequate justification.<sup>83</sup> Where a fundamental right is involved, a compelling state interest must be advanced.<sup>84</sup> Conversely, if a fundamental right is not impacted, then the State only must show that the law is rationally related to some legitimate end.<sup>85</sup> Much like federal equal protection claims considered by the Supreme Court of the United States, whether the Supreme Court of Missouri considers a right as fundamentally protected will have a great impact on determining if the actions of the state legislature that affect this right will be upheld by the court.

#### *E. Taxation and the Missouri Constitution*

Additionally, the section of article X of the Missouri Constitution regarding the duties of the State Tax Commission has a bearing on the present case insofar as tax commission assessments must be accurately equalized so that their use in the SB287 funding formula complies with state constitutional

79. MO. CONST. art. II, § 4 (1875).

80. MO. CONST. art. I, § 2.

81. *Id.*

82. *Id.*

83. *Comm. for Educ. Equal.*, 294 S.W.3d at 489-90 (citing *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. 2006) (en banc)).

84. *Id.* (citing *Doe*, 194 S.W.3d at 845).

85. *Id.* (citing *Doe*, 194 S.W.3d at 845).

and statutory requirements. The clause mandating the duties of the State Tax Commission reads:

The general assembly shall establish a commission, to be appointed by the governor by and with the advice and consent of the senate, to equalize assessments as between counties and, under such rules as may be prescribed by law, to hear appeals from local boards in individual cases and, upon such appeal, to correct any assessment which is shown to be unlawful, unfair, arbitrary or capricious. Such commission shall perform all other duties prescribed by law.<sup>86</sup>

As this clause explains, the State Tax Commission has the duty to equalize assessment of property taxes across the state and to correct assessments "shown to be unlawful, unfair, arbitrary or capricious."<sup>87</sup> Failure to perform this task is an explicit violation of the State Tax Commission's constitutional duties.<sup>88</sup>

Furthermore, the Hancock Amendment to article X focuses on taxpayer remedies for unfunded mandates by the state legislature:

Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval as provided by this constitution. The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions.<sup>89</sup>

This amendment to article X seeks to ensure that the state cannot create new programs without funding them.<sup>90</sup> Section 23 of article X goes on to describe the remedies available to a plaintiff suing under the amendment.<sup>91</sup> The overall conclusion regarding the Hancock Amendment and its affect on the present case is that only declaratory relief is available under these provi-

86. MO. CONST. art. X, § 14.

87. *Id.*

88. CEE complains that the state wrongly relied on assessments that do not comply with this provision. *Comm. for Educ. Equal.*, 294 S.W.3d at 485. Whether the court accepts this argument has significant bearing on whether the CEE's claims concerning the constitutionality of the tax assessment data is persuasive.

89. MO. CONST. art. X, § 16.

90. *Id.* §§ 16-24. The Hancock Amendments comprise sections 16-24 of article X of the Missouri Constitution. *Id.*

91. *Id.* § 23. These remedies only allow for declaratory relief, thereby barring recovery of both compensatory and punitive damages. *Comm. for Educ. Equal.*, 294 S.W.3d at 491-92.

sions.<sup>92</sup> Thus, CEE's claim for damages in the form of increased school funding as a remedy for allegedly inaccurate tax assessments is not supported by the Hancock Amendment.<sup>93</sup>

#### F. *The Evolution of Missouri Law on Funding Public Schools*

Missouri has a long history of legal challenges to school funding schemes and to the meaning of its constitutional guarantee of public education. In 1877, the Supreme Court of Missouri decided the case of *State ex rel. Sharp v. Miller*.<sup>94</sup> In *Sharp*, the court considered a challenge to the 1868 Missouri legislative act authorizing the imposition of a larger tax for the funding of public schools.<sup>95</sup> The court affirmed the lower court's judgment that the tax was constitutional based on the principle reasoning that the Missouri Constitution of 1865 required funding for schools for *at least* four months of the year and not *only* four months total as the challengers of the law had claimed.<sup>96</sup> Noting that the Missouri Constitution of 1865 provided a minimum funding requirement of four months per year, the court held that this was not to be construed as precluding the legislature from providing funding for a longer duration.<sup>97</sup>

The courts would again attempt to discern the meaning of the education provision in the Missouri Constitution in 1927. In the case of *State ex rel. Roberts v. Wilson*, the Springfield Court of Appeals of Missouri considered whether the right of children to attend public school in their own district is a fundamental one guaranteed by the education provisions of the Missouri Constitution.<sup>98</sup> Interpreting the "duty of the General Assembly to establish and maintain free public school[s]" for all Missouri children as indicative of a fundamental right to education, the court held that this right is guaranteed by the constitution and can only be denied for the protection of the general welfare.<sup>99</sup>

One hundred years later, the issue of what the Missouri Constitution required with respect to school funding remained an issue for the courts. In *Concerned Parents v. Caruthersville School District 18*, the Supreme Court of Missouri considered whether the Missouri Constitution prohibited a public school from charging registration and course fees.<sup>100</sup> In *Concerned Parents*, the defendant school district required registration and course fees with punishment for noncompliance, including possible grade deductions, reduction

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92. *Comm. for Educ. Equal.*, 294 S.W.3d at 491-92.

93. *Id.*

94. 65 Mo. 50, 1877 WL 9120 (1877).

95. *Id.* at 53.

96. *Id.* at 54; MO. CONST. art. IX, § 8 (1865).

97. *Sharp*, 65 Mo. at 54.

98. 297 S.W. 419, 420 (Mo. App. 1927).

99. *Id.*; see also MO. CONST. art. XI, § 1 (1875).

100. 548 S.W.2d 554, 556 (Mo. 1977) (en banc).

of class participation, and withholding of grade reports and diplomas.<sup>101</sup> The court held that because the Missouri Constitution of 1945 required the state to provide public education for its children “to which admission is without charge and that instruction was to cost the students nothing,”<sup>102</sup> the registration and course fees required by the defendant school district violated state constitutional provisions.<sup>103</sup> In so holding, the court favorably cited the *Roberts* ruling that the right to an education is a *fundamental right* that cannot be denied except for maintenance of the general welfare.<sup>104</sup>

Finally, the specific issue of whether property tax assessments were valid under the Missouri Constitution came before the Supreme Court of Missouri in 1994 in *Committee for Educational Equality v. State of Missouri (CEE I)*.<sup>105</sup> The plaintiffs in this case contended that state funding of public schools via the contemporary property tax scheme resulted in inequalities in distribution of money to state schools and thus resulted in inequities in the quality of education provided to students in different parts of the state.<sup>106</sup> In a prior ruling, the Circuit Court of Cole County had determined that the public school funding formula at that time,<sup>107</sup> based predominately on district property taxes, failed to provide free public schools and equal protection of the laws under the Missouri Constitution.<sup>108</sup> The lower court then declared that the General Assembly must remedy the funding formula’s violation of the Missouri Constitution by providing adequate funds and delivered the unusual

101. *Id.* at 557.

102. *Id.* at 559.

103. *Id.* at 562.

104. *Id.* at 559-60 (citing *State ex rel. Roberts v. Wilson*, 297 S.W. 419, 420 (Mo. Ct. App. 1927)). The majority in the instant case did not consider the *Roberts* and *Concerned Parents’* conclusion that education is a fundamental right and instead will focus on whether adequate or equal funding is mandated by the Missouri Constitution. See *infra* notes 230-232 and accompanying text.

105. 878 S.W.2d 446, 448 (Mo. 1994) (en banc) [hereinafter *Comm. for Educ. Equal. I*]. While the plaintiffs in this case include the same named advocacy group as the instant case, the members are not the same. Compare *id.* at 448 with *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 481 (Mo. 2009) (en banc). The plaintiffs in the 1994 case included CEE representing eighty-nine individual school districts, thirty-seven other individually named school districts, fifty-one students from the school districts, and two taxpayers. *Comm. for Educ. Equal. I*, 878 S.W.2d at 448. This case actually began its journey up to the Supreme Court of Missouri in 1990, when several different school districts, taxpayers, and students each filed lawsuits to challenge the constitutionality of the existing school funding scheme. *Id.* Eventually, the plaintiffs consolidated their claims asserting that the state school financing system violated the equal protection and education guarantees of the Missouri Constitution. *Id.* Before the case reached the Supreme Court of Missouri, the state legislature made significant changes to the school funding scheme targeted by the legal challenges. See *infra* notes 113-115 and accompanying text.

106. *Comm. for Educ. Equal. I*, 878 S.W.2d at 448.

107. MO. REV. STAT. § 163.031 (1986).

108. *Comm. for Educ. Equal. I*, 878 S.W.2d at 448-49.

order to stay the judgment pending action by the legislature to remedy the funding errors.<sup>109</sup> Given no final judgment upon which the plaintiffs could appeal, the Supreme Court of Missouri dismissed the appeal for lack of jurisdiction.<sup>110</sup> Thus, *CEE I* provides no precedential commentary regarding the nature and meaning of the education provisions of the Missouri Constitution.<sup>111</sup> But precedential effect was not completely necessary, as the Missouri General Assembly had already taken matters into its own hands by enacting the Outstanding Schools Act of 1993.<sup>112</sup>

The Outstanding Schools Act of 1993 included key provisions clearly designed to remedy the constitutional deficiencies discussed in the 1994 *Committee for Educational Equality* case.<sup>113</sup> Chief among these corrections was a provision moving public funding of schools away from straight property taxes and toward a formula that established funding levels based on overall equality and adequacy of funding.<sup>114</sup> While there were several legal challenges to the Outstanding Schools Act between its enactment and the plaintiffs' initial lawsuits in the instant case, none of these challenges were significant enough to note in further detail here.<sup>115</sup> It is from this legal background that the instant decision follows.

#### IV. THE INSTANT DECISION

##### A. *The Majority Opinion*

The Supreme Court of Missouri first reviewed issues of standing and defendant third-party intervener.<sup>116</sup> The State challenged CEE and the other plaintiffs' standing on three grounds: as school district organizations, as taxpayers, and as students.<sup>117</sup> First, the State argued that the plaintiff school districts and representative organizations lacked standing to litigate constitutional claims concerning individual rights because none of their individual

109. *Id.* at 449.

110. *Id.* at 454-55.

111. However, the practical effect was to allow the judgment of the lower court to stand, supporting the enactments of the legislature in 1993 that fell in between the timing of the trial court decision and the supreme court's ruling.

112. S.B. 380, 87th Gen. Assem., 1st Reg. Sess. (Mo. 1993) [hereinafter SB 380].

113. *See id.* §§ 3-4.

114. *Id.* § 10. Note the parallels between this legislation and the other legal challenges to school funding formulas from that time period. *See supra* notes 63-66 and accompanying text.

115. *See Thompson v. Hunter*, 119 S.W.3d 95 (Mo. 2003) (en banc); *Comm. for Educ. Equal. v. State*, 967 S.W.2d 62 (Mo. 1998) (en banc); *Akin v. Dir. of Revenue*, 934 S.W.2d 295 (Mo. 1996) (en banc).

116. *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 484 (Mo. 2009) (en banc).

117. *Id.* at 484-86.

members had standing and none of the interests sought for protection in the suit were germane to any of the organizations' purposes.<sup>118</sup> Conversely, the plaintiff school districts<sup>119</sup> contended that their duties "'to protect and preserve school funds and property'" were central to their authorized purpose and that entitlement to more school funds under article IX, section 1(a) of the Missouri Constitution established standing.<sup>120</sup> The court agreed with the plaintiff school districts' argument.<sup>121</sup> Additionally, the court determined that, insofar as inaccurate tax assessments negatively impact the school districts' ability to fulfill their duties, they also have standing to challenge the tax assessments used in the SB287 formula.<sup>122</sup>

However, because the school districts and representative organizations are not "persons," they lacked the guarantees of equal protection and due process of law and, thus, did not have standing to challenge SB287 on equal protections grounds.<sup>123</sup> Furthermore, because article X, section 23 of the Missouri Constitution explicitly grants standing only to taxpayers, the school districts and other representative organizations did not have standing to challenge SB287 as a violation of the Hancock Amendment.<sup>124</sup> Therefore, the school districts and representative organizations were granted standing for the claims that the SB287 formula violated article IX by wrongly relying upon inaccurate tax assessments, but they were denied standing to challenge the formula as violating equal protection rights or the Hancock Amendment.<sup>125</sup>

Having resolved the issue of school district and organizational standing, the court considered whether the plaintiff taxpayers had standing.<sup>126</sup> The State argued that individual taxpayers lacked standing to bring challenges to other taxpayers' property assessments because they did not suffer personal injury from the alleged errors.<sup>127</sup> Rejecting that argument, the court cited *Ste. Genevieve School District R-II v. Board of Aldermen*<sup>128</sup> and held that so long as the allegation involved the improper spending of tax revenue under articles IX and X of the Missouri Constitution, the plaintiff taxpayers had standing.<sup>129</sup> However, as was the case with the plaintiff school districts, the taxpayers did

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118. *Id.* at 484-85.

119. Note that only the plaintiff school districts had to defend against this particular standing challenge. *Id.* at 485.

120. *Id.* (quoting *State ex rel. Sch. Dist. of Independence v. Jones*, 653 S.W.2d 178, 185 (Mo. 1983) (en banc)).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. 66 S.W.3d 6, 11 (Mo. 2002) (en banc).

129. *Comm. for Educ. Equal.*, 294 S.W.3d at 485-86.



not have standing to make equal protection claims on behalf of students generally.<sup>130</sup>

In considering whether plaintiff students had standing to bring the claims before the court, the State argued that the students' cases were moot because some were not currently enrolled in school.<sup>131</sup> The court once again rejected the State's argument and held instead that, if at least some of the students would remain in the public school system, their case was not moot.<sup>132</sup> Additionally, the court reasoned that because the students' claims were capable of repetition that otherwise might evade review, the claims were not moot.<sup>133</sup> Furthermore, because some plaintiff students had standing to bring each of the claims alleged by the plaintiffs as a whole, each of these challenges could be addressed on the merits.<sup>134</sup>

Before addressing the merits of the case, the court considered another procedural challenge to the permissive intervention of three taxpayers to the State's case.<sup>135</sup> Over the objections of the plaintiffs and general ambivalence of the State, the trial court allowed the third-party defendants to intervene, even while acknowledging that the State's interests were already adequately represented.<sup>136</sup> In reviewing the permissive intervention allowed by the lower court,<sup>137</sup> the Supreme Court of Missouri held that because none of the circumstances<sup>138</sup> necessary to allow the intervention were present in this case, the lower court erred in allowing the intervention.<sup>139</sup> However, the intervention did not require reversal unless the plaintiffs were harmed by the inclusion of the additional defendant parties.<sup>140</sup> In this case, because the plaintiffs did not demonstrate "specific harm or litigation costs caused by Defendant-Intervenors' presence," the court found that the trial court's error did not require reversal.<sup>141</sup>

Addressing the plaintiffs' first substantive claims, the court considered whether the SB287 formula violated article IX of the Missouri Constitu-

130. *Id.* at 486.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (citing *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007) ("stating the rule that only one of the plaintiffs needs standing to permit consideration of a claim")).

135. *Id.* The taxpayers were W. Bevis Schock, Rex Sinquefield, and Menlo Smith. *Id.* at 487 n.14.

136. *Id.* at 487.

137. *Id.*

138. Rule 52.12(b) allows for permissive intervention of defendants in three circumstances: (1) when allowed by statute, (2) when there is a claim or defense that relies on a common question of fact or law, and (3) when the state is seeking intervention for a case raising a constitutional or statutory challenge. MO. R. CIV. P. 52.12(b).

139. *Comm. for Educ. Equal.*, 294 S.W.3d at 487.

140. *Id.*

141. *Id.* at 487-88.

tion.<sup>142</sup> The court noted that the plaintiffs did not allege that the SB287 formula failed to fund schools at levels required by article IX, section 3(b) but that failure to fund beyond this base level violated article IX, section 1(a) because the SB287 formula did not “adequately provide [for] the general diffusion of knowledge and intelligence” required by section 1(a).<sup>143</sup>

The court rejected this reasoning on three grounds.<sup>144</sup> First, the introductory clause of section 1(a) provides no specific directive for accomplishing a “diffusion of knowledge” and the plaintiffs’ attempt to interpret adequacy of funding as a separate requirement of section 1(a) was unpersuasive.<sup>145</sup> Second, the court noted that the lack of specificity of the introductory sentence contrasted with the language of the remainder of the section, further gainsaying the claim that the introductory language was to be interpreted literally as a mandate for adequate education funding.<sup>146</sup> Following its reasoning in *Concerned Parents v. Caruthersville School District*,<sup>147</sup> the court concluded that the introductory language of section 1(a) was “purely aspirational” and could not be given direct effect as the plaintiffs demanded.<sup>148</sup> Third, the court explained that reading section 1(a) as including a further constraint on school funding “would be contrary to the specific flexibility” built into section 3(b).<sup>149</sup> The general aspirational language of section 1(a) should not be read to contravene the flexible funding mandate of section 3(b).<sup>150</sup> The court concluded that the plaintiffs’ claim that the SB287 funding formula was unconstitutional because it failed to provide the level of funding required by the Missouri Constitution was without merit.<sup>151</sup> Specifically, the court held that the aspirations for a “general diffusion of knowledge and intelligence” outlined in section 1(a) were questions of policy and as such were “political choices [properly] left to the discretion of the other branches of government.”<sup>152</sup>

After disposing of the plaintiffs’ article IX constitutional claim, the court considered whether the SB287 formula violated Missouri’s equal pro-

142. *Id.* at 488-89. Missouri Constitution, article IX, section 3(b) provides, *inter alia*, that the state fund public schools with no less than twenty-five percent of state revenue. See *infra* note 149 and accompanying text.

143. *Comm. for Educ. Equal.*, 294 S.W.3d at 488; see *supra* note 74-75 and accompanying text.

144. *Comm. for Educ. Equal.*, 294 S.W.3d at 488-89.

145. *Id.* at 488.

146. *Id.*

147. 548 S.W.2d 554, 559 (Mo. 1977) (en banc); see *supra* notes 100-04 and accompanying text.

148. *Comm. for Educ. Equal.*, 294 S.W.3d at 488-89.

149. *Id.* at 489. Section 3(b) sets a base level of public funding for schools of at least twenty-five percent of the state revenue but allows for the state to provide additional funds above this mark. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

tection provision.<sup>153</sup> The plaintiffs claimed that the SB287 formula resulted in “‘inadequate’ funding to certain school districts” and disparate funding per pupil across the state.<sup>154</sup> Furthermore, the “[p]laintiffs contend[ed] that school funding ‘adequacy’ and per-pupil expenditure [equality were] fundamental rights . . . based on the article IX, section 1(a)’s” directive to fund public schools for the “‘general diffusion of knowledge.’”<sup>155</sup> The court noted that “[f]undamental rights are those ‘deeply rooted in the nation’s history’”<sup>156</sup> but also acknowledged that the U.S. Supreme Court has ruled that education is not a fundamental right under federal law.<sup>157</sup>

Looking to article IX, section 1(a), the language states neither an express right to adequate or equitable funding nor a mandate for equitable funding per pupil.<sup>158</sup> Because the education article of the Missouri Constitution contains neither an “adequacy” requirement nor a mandate to equalize funding, the court ruled that the plaintiffs failed to show that the SB287 funding formula impacts a fundamental right.<sup>159</sup> As such, rational basis review, and not strict scrutiny, was appropriate.<sup>160</sup> Using this lower standard of review, the court found that funding Missouri public schools is a legitimate end and, thus, that the SB287 funding formula passes a rational basis test for constitutionality.<sup>161</sup> Because the court could not conclude that combining state and local funds to achieve the purpose of providing free public schools is an irrational means to this legitimate end, it rejected the plaintiffs’ argument that SB287 violates Missouri’s equal protection provision.<sup>162</sup>

The plaintiffs’ last two arguments were not as cogent as were the first two; accordingly, the court disposed of them with greater ease. In the first of these arguments, the plaintiffs claimed that the SB287 formula violated the Hancock Amendment of the Missouri Constitution,<sup>163</sup> given that the formula amounted to an unfunded mandate, which is prohibited by the amendment.<sup>164</sup> The court denied this claim on the grounds that the Hancock Amendment was

153. *Id.* The equal protection provision is found in article I, section 2 of the Missouri Constitution.

154. *Comm. for Educ. Equal.*, 294 S.W.3d at 489.

155. *Comm. for Educ. Equal.*, 294 S.W.3d at 490; MO. CONST., art. IX, § 1(a).

156. *Comm. for Educ. Equal.*, 294 S.W.3d at 490 (citing *State ex rel. Nixon v. Powell*, 167 S.W.3d 702, 705 (Mo. 2005) (en banc)).

157. *Id.*; see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); see also *supra* notes 33-44 and accompanying text.

158. *Comm. for Educ. Equal.*, 294 S.W.3d at 490. The court also noted that the Missouri Constitution of 1865 contained language regarding equitable funding, but that language was removed and the present constitution does not contain such language. *Id.*

159. *Id.*

160. *Id.* at 490-91.

161. *Id.* at 491.

162. *Id.*

163. MO. CONST. art. X, §§ 16-24; see *supra* note 28.

164. *Comm. for Educ. Equal.*, 294 S.W.3d at 491.

designed to *limit* government expenditures rather than increase them, and to allow taxpayers access to declaratory relief where this purpose was not observed.<sup>165</sup> Since the plaintiffs desired an *increase* in government funding, their claim was not covered by the Hancock Amendment.<sup>166</sup> Because the plaintiffs were not seeking to be released from an unfunded government requirement, no remedy was available under the Hancock Amendment.<sup>167</sup> Therefore, the plaintiffs' claim that the SB287 formula violated the Hancock Amendment was denied.<sup>168</sup>

The final claim considered by the court concerned whether freezing the State Tax Commission's property tax assessments from 2004 into the SB287 formula violated article X of the Missouri Constitution and other statutes.<sup>169</sup> The specific challenge was that the allegedly flawed 2004 assessments resulted in an incorrect evaluation of the "local effort" required from certain districts.<sup>170</sup> If the local effort calculations were incorrect, CEE argued, then the state would distribute funds improperly in violation of article X of the Missouri Constitution.<sup>171</sup>

However, the specific claim before the court was that the SB287 formula itself was unconstitutional. While it might be the case that the State Tax Commission's assessments do not meet the standards outlined in the Missouri Constitution, that issue was not a question presented to the court.<sup>172</sup> Instead, the plaintiffs needed to show that the legislature unlawfully relied on the Commission's 2004 assessments, which the plaintiffs did not do.<sup>173</sup> The court distinguished the present case from *State ex rel. School District of the City of Independence v. Jones*,<sup>174</sup> in which unconstitutionally disparate taxation was disallowed.<sup>175</sup> In that case, unlike the present one, the State Tax Commission was joined as a party necessary to the suit, and its actions were scrutinized for compliance with Missouri law.<sup>176</sup> In the instant case, the State Tax Commission was not joined as a necessary party and thus its actions were not scrutinized by the trial court.<sup>177</sup> By failing to show that the legislature

165. *Id.*

166. *Id.* at 491-92.

167. *Id.* at 492.

168. *Id.*

169. *Id.*

170. *Id.* at 492-93.

171. *Id.* at 493. For example, article X, section 3 provides that taxes shall be "uniform upon the same class or subclass of persons" and article X, section 14 requires that the State Tax Commissioner "equalize assessments as between the counties." See *supra* note 86 and accompanying text; *infra* note 256 and accompanying text.

172. *Comm. for Educ. Equal.*, 294 S.W.3d at 493.

173. *Id.* at 493-94.

174. 653 S.W.2d 178 (Mo. 1983) (en banc).

175. *Comm. for Educ. Equal.*, 294 S.W.3d at 493.

176. *Id.*

177. *Id.*

violated Missouri law in relying on the Tax Commission's 2004 assessments, CEE's claims that the SB287 formula violated sections of article X and other statutes were without merit.<sup>178</sup>

Before concluding its opinion, the court noted that the question of equalizing tax assessments across the state for the purposes of determining school funding levels was not one presently before it but intimated that perhaps this would be an issue in the future.<sup>179</sup> It is this issue of the constitutionality of using tax assessment data in the SB287 funding formula that Judge Michael A. Wolff considered at length in his dissenting opinion.

### *B. The Dissenting Opinion*

Judge Wolff began his analysis with an exposition of the majority opinion's primary error in upholding the constitutionality of the SB287 formula.<sup>180</sup> While he agreed with the court's holding that the Missouri Constitution neither mandates equality nor requires allocating more than twenty-five percent of state revenue to public school funding, he nevertheless disagreed with the majority in their denial of a remedy to CEE for violation of specific constitutional requirements pertaining to property tax assessments.<sup>181</sup>

In contrast to the majority, Judge Wolff stressed in his dissent that education is a fundamental purpose of the Missouri state government, as mandated by the state's constitution.<sup>182</sup> Distinguishing the present case from the federal analysis of this issue, Wolff noted that, while the federal Constitution does not have an education article, the Missouri Constitution includes one with multiple sections outlining the creation and maintenance of a state public school system.<sup>183</sup> Unlike the federal government, Wolff concluded that providing education is a primary function of state governments, and the right to that education is often established and deemed fundamental by state constitutions.<sup>184</sup> Furthermore, failure to enforce specific provisions within the education article ensures inequality of opportunities that are guaranteed by the constitution and contravenes the purposes and intentions of those who enacted it.<sup>185</sup>

Noting the difficulties other states have experienced in attempting to provide equal resources to all public schools, Judge Wolff discussed the move from equality-based school funding systems to adequacy-based systems.<sup>186</sup> In Missouri, the struggle against inequitable funding was marked by 1993

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178. *Id.*

179. *Id.*

180. *Id.* at 495 (Wolff, J., concurring in part and dissenting in part).

181. *Id.*

182. *Id.* at 496.

183. *Id.*

184. *Id.*

185. *Id.* at 498.

186. *Id.* at 499.

legislation that sought to remedy large discrepancies in school funding across the state by decoupling property wealth of the school district from the amount of funds available for schools.<sup>187</sup> Since then, school funding challenges have focused increasingly on the adequacy of education provided and called for reforms that guarantee certain levels of quality for all rather than equal funding for all.<sup>188</sup> In Missouri, an adequacy of funding approach was enacted in 2005, and the specific level of adequate funding has been set by law at \$6,117 per student.<sup>189</sup>

In the remaining sections of the dissent, Wolff outlined two distinct problems with the SB287 formula: (1) non-uniform tax assessments yield unconstitutional injury to some school children across the state,<sup>190</sup> and (2) freezing assessment values at 2004 levels ensures that some properties will be valued incorrectly and school children will suffer injury due to lack of school funds.<sup>191</sup> Regarding the first issue, if assessments are not uniformly calculated throughout the state, the districts in which property is undervalued will not yield the level of taxes that they should and children in those districts will suffer the injury of having fewer funds per pupil for public education.<sup>192</sup> School districts that would prefer to fund their students above the state adequacy level but that have deficient assessments will be prevented from doing so.<sup>193</sup> Students in these districts have an identifiable injury caused by the state school funding scheme and thus have standing to raise this point.<sup>194</sup>

While one suggestion is to raise the property tax rates in a district so as to generate more revenue for its schools, this approach assumes two important points. First, it assumes that property tax evaluations are “uniformly low” rather than low in only some areas, high in others, and accurate in others.<sup>195</sup> Those who prefer their property tax assessments low or who live in counties where the funding levels seem appropriate to the majority may have no incentive to raise rates.<sup>196</sup> Also, arguing that voters can raise rates assumes that those who are affected most by this phenomenon are sufficiently informed “to understand the relationship between tax rates and valuations.”<sup>197</sup>

187. *Id.*; see also *supra* notes 113-115 and accompanying text.

188. *Comm. for Educ. Equal.*, 294 S.W.3d at 499; see also *supra* note 115.

189. *Comm. for Educ. Equal.*, 294 S.W.3d at 499 n.15. Section 163.011(18) contains the calculation rubric for this “adequacy target.” MO. REV. STAT. § 163.011(18) (Supp. 2009); see *supra* note 8 and accompanying text.

190. *Comm. for Educ. Equal.*, 294 S.W.3d at 505-06.

191. *Id.* at 506.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* Furthermore, for areas where state funding of schools is most needed, it is reasonable to believe that persons living there would not have the means to pay higher property taxes even if the taxes were voted in.

The second issue raised by Judge Wolff concerns the Missouri General Assembly's usage of historical assessment figures to determine current funding levels.<sup>198</sup> Freezing values at 2004 assessment levels and not on current market evaluations, ensured that some districts and their school children would receive less money than they should for public education because the property values are held at levels different than their current market value.<sup>199</sup> Because the state bases its apportionment of school funds as an addition to the "local effort" funds collected via property taxation, some districts with undervalued property (at 2004 assessment levels) receive more funds from the state than they should.<sup>200</sup> Children in select school districts across the state suffer injury annually as a result of the enforcement of the SB287 formula, which prevents them from receiving the levels of funding required by law.<sup>201</sup> By locking in the 2004 assessment data until 2013, many of the children affected will have graduated before the situation can be remedied.<sup>202</sup>

Judge Wolff concluded that a school funding system based on property tax ultimately confines local districts to funding amounts deemed adequate by SB287 and precludes a district from receiving funds beyond this amount.<sup>203</sup> While well-meaning and laudable, the General Assembly's attempts to express adequacy of education in funding dollars has run afoul of specific Missouri constitutional principles.<sup>204</sup> The SB287 formula ensures that state school children "will receive an inadequately funded education based on the [legislature's] own definition[s] of adequate funding."<sup>205</sup> Furthermore, the SB287 formula prevents districts that want to go beyond adequately funding their schools from doing so.<sup>206</sup> These defects violate principles set out in the Missouri Constitution, and, therefore, the Supreme Court of Missouri has the duty to enforce judicial remedies in reviewing the issue.<sup>207</sup> Judge Wolff concluded that the majority failed in this duty by upholding the funding formula found in SB287.<sup>208</sup>

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198. *Id.*

199. *Id.*

200. *Id.* at 506-07.

201. *See* PPRC, *supra* note 19 at 25, 27.

202. *Comm. for Educ. Equal.*, 294 S.W.3d at 508 (Wolff, J., concurring in part and dissenting in part).

203. *Id.* at 510.

204. *Id.* at 512.

205. *Id.*

206. *Id.*

207. *Id.* at 513.

208. *Id.*

## V. COMMENT

This section begins with a disclaimer regarding its principle focus. The argument presented in this Comment is *not* that the state's improvements in funding public education are not an improvement from previous school funding proposals<sup>209</sup> or that the SB287 law violates the requirements for the base-line levels of funding required by the Missouri Constitution in article IX, section 3(b).<sup>210</sup> Instead, the central arguments contained in this section *are* that (1) the Supreme Court of Missouri failed to consider CEE's strongest equal protection claim because it failed to consider the correct fundamental right at the foundation of that claim and (2) the manner in which this funding is determined, i.e., that it is based on disparately calculated and out-of-date tax assessments, violates constitutional and statutory requirements. The SB287 scheme is consistent with some constitutional requirements while simultaneously violating other equally mandatory requirements. It is commendable that the legislature attempted to improve the previous funding scheme in order to improve public education in the state. However, attempting to improve the scheme does not guarantee the result will be consistent with constitutional principles.

Before reviewing the equal protection and tax assessment criticisms, this Comment first considers the peculiar role of the disputed defendant-intervenors to the case.<sup>211</sup> These intervenors allegedly joined in order to ensure that the Attorney General's office was adequately defending the government on each of the constitutional challenges to SB287.<sup>212</sup> Unprecedentedly, they provided significant amounts of material support to the State's defense of SB287.<sup>213</sup> The defendant-intervenors hired an experienced trial attorney who employed several experts on school finance from around the country to testify on the State's behalf.<sup>214</sup> Through the assistance of this added legal defense, the trial court heard arguments regarding the efficiency and remedies provided by the school funding formula that would not have been presented by the Attorney General's counsel.<sup>215</sup>

Given this factual background, it is curious how the Supreme Court of Missouri handled the plaintiffs' challenge to the presence of the defendant-

209. *See supra* Part III.F.

210. *See* MO CONST. art. IX, § 3(b); *supra* notes 76, 142 and accompanying text.

211. Three taxpayers, W. Bevis Schock, Rex Sinquefield, and Menlo Smith, were allowed to join the case shortly before trial. *Comm. for Educ. Equal.*, 294 S.W.3d at 486 n.14; *see also supra* notes 135-41 and accompanying text.

212. Michael Podgursky et al., *A New Defendant at the Table: An Overview of Missouri School Finance and Recent Litigation*, 83 PEABODY J. EDUC. 174, 180-81 (2008).

213. *Id.*

214. *Id.* at 181.

215. *Id.*



intervenor in the case. The court could find no adequate grounds to allow the intervenors standing in the case and as such held that the trial court in fact erred in allowing the intervenors to join the defense.<sup>216</sup> However, the court concluded that no specific harm to CEE was proven.<sup>217</sup> This conclusion, combined with the fact that the defendant-intervenors had abandoned their claim to legal costs against CEE, led the court to hold that no damages for the wrongful intervention would be forthcoming.<sup>218</sup> It is true that the plaintiffs' contention in their brief regarding the impact of the intervenors rested with a claim that they incurred "additional costs" as a consequence of the intervenors presence in the case.<sup>219</sup> Nonetheless, it seems odd that the matter simply ends at that point without even a mention of the actual costs incurred by the plaintiffs. Regardless of whether the plaintiffs sought specific relief beyond a dismissal of the intervenors' claims against them, it is undeniable that they were forced to spend more money to defend the case.<sup>220</sup> The actual harm done to the plaintiffs is that they faced a significantly more prepared and experienced defense as a result of the defendant-intervenors' presence in the case. The court could have at least acknowledged this fact, rather than simply stating that no harm was proven by the plaintiffs.<sup>221</sup>

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216. *Comm. for Educ. Equal.*, 294 S.W.3d at 487.

217. *Id.* at 487-88.

218. *Id.*

219. Brief of Appellants Committee for Educational Equality et al. at 152, *Comm. for Educ. Equal.*, 294 S.W.3d 477 (No. SC89010), 2009 WL 1465459 [hereinafter Appellants' Brief].

220. See Matthew Franck, *Taxpayers Pay the Tab in School-funding Suit*, ST. LOUIS POST DISPATCH, Oct. 10, 2007, at C11 (noting that \$800,000 of the total \$2.2 million in legal fees paid by the state to defend the school funding formula were provided by the defendant-intervenors).

221. The court noted approvingly the defendant's greater pool of tax assessment evidence. *Comm. for Educ. Equal.*, 294 S.W.3d at 494. This is the type of data that Podgursky et al. refer to when they claim that the defense was significantly improved by the presence and, more importantly, material influence of the defendant-intervenors. Podgursky et al., *supra* note 212, at 181. Perhaps the court could have stated explicitly here that CEE incurred no "legal harm" by the inclusion of the defendant-intervenors and that a robust defense is a desideratum of our legal system, rather than simply ruling that no harm occurred from their inclusion in the case.

### A. Equal Protection and the SB287 Formula

Missouri courts have taken an approach similar to that taken by the U.S. Supreme Court in *Washington v. Glucksberg*<sup>222</sup> with regard to the fundamental rights requiring equal protection under the law.<sup>223</sup> Under the *Glucksberg* approach, fundamental rights and liberties are those that are “deeply rooted in the nation’s history and traditions” and “implicit in the concept of ordered liberty.”<sup>224</sup> Furthermore, such rights and liberties must be carefully described.<sup>225</sup> The Supreme Court of Missouri cited *In re Marriage of Woodson* to establish this reasoning on equal protection claims.<sup>226</sup> In *Woodson*, the fundamental right claimed was the right to spousal retirement benefits in divorce.<sup>227</sup> The court held this right *not* to be fundamental because unlike the right to an education, which has occupied its own article of the Missouri Constitution since 1865,<sup>228</sup> the right to divide marital property was not observed until 1973.<sup>229</sup> While the right to divide marital property may not be rooted in the history and traditions of Missouri, the promotion of a “general diffusion of knowledge and intelligence” has been a constitutionally mandated desideratum for the people of Missouri since 1865.<sup>230</sup> As such, *Woodson* is inapposite to the present case with respect to the court’s fundamental rights analysis. The reason the distinction between *Woodson* and the instant case was not made is most likely the result of the court’s *considering the wrong putative right* rather than a misjudgment regarding the historical focus on a right to education. Rather than focus on a fundamental right to education, which was the explicit claim made by CEE,<sup>231</sup> the court determined instead that the right to equitable funding is not found in article IX.<sup>232</sup>

With the focus shifted from a fundamental right to education to a fundamental right to equitable funding, the court determined further that there is

222. 521 U.S. 702 (1997). Admittedly, the Court in *Glucksberg* considered a due process challenge rather than an equal protection one. *Id.* at 710. However, in explaining its fundamental rights analysis, the majority in the present case cites *Glucksberg* as indicative of Missouri’s approach to fundamental rights. *Comm. for Educ. Equal.*, 294 S.W.3d at 490.

223. *Comm. for Educ. Equal.*, 294 S.W.3d at 490.

224. *Id.* (citing *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. 2003) (en banc) (quoting *Glucksberg*, 521 U.S. at 720-21)).

225. *Woodson*, 92 S.W.3d at 783 (citing *Glucksberg*, 521 U.S. at 721).

226. *Comm. for Educ. Equal.*, 294 S.W.3d at 490.

227. *Woodson*, 92 S.W.3d at 783.

228. See MO. CONST. art. IX (1865); see also *supra* note 96 and accompanying text.

229. *Woodson*, 92 S.W.3d at 783.

230. MO. CONST. art. IX, § 1(a) (1865). See also *supra* notes 69-75 and accompanying text.

231. See *infra* note 239 and accompanying text.

232. *Comm. for Educ. Equal.*, 294 S.W.3d at 490.

no mandate for equitable expenditures per pupil.<sup>233</sup> On this point, the majority added the explanation that measures requiring equitable funding in the 1865 constitution were removed in the 1875 constitution but did not pause to consider the reasoning for this deletion.<sup>234</sup> The canon of statutory construction interpreting deletions as affirmative statements of public will is inappropriate in this particular situation. Before enactment of the 1875 education clause, the constitutional mandate to equally fund schools extended to all schools, no matter what the racial or social class makeup.<sup>235</sup> However, until 1875, there was no requirement that there be public funding of schools for racial minorities *at all*.<sup>236</sup> Once schools for all races were required in 1875, the Missouri legislature backed away from the constitutional commitment to equal funding for all schools as evidenced by the change in language from 1865 to 1875.<sup>237</sup> That the 1875 Missourians did not want to equally fund separate schools for white and black children should not impinge upon the contemporary discussion of whether equal funding is required in order to guarantee an equal protection of the “general diffusion of intelligence and knowledge” for all Missouri children up to the age of twenty-one. The court nonetheless concludes that since the plaintiffs cannot show that the Missouri Constitution requires equal funding as a constitutionally guaranteed right, strict scrutiny of the legislature’s action does not apply.<sup>238</sup>

But this conclusion simply highlights the central flaw in the court’s equal protection analysis. The plaintiff’s argument is not that *equal funding* is a constitutional right under Missouri law, but that *education* is a fundamental right that requires adequate or equal funding in order to be protected as a constitutionally guaranteed right.<sup>239</sup> The court does not reject the claim that education is a right under the Missouri Constitution, citing the provisions requiring a free education going back to 1865.<sup>240</sup> Like the U.S. Supreme Court majority in *Glucksberg*, the Supreme Court of Missouri erred in considering the wrong fundamental right for review. In *Glucksberg*, the majority determined that the “right to suicide” was not a fundamental right deeply rooted in the traditions of our nation and thus a law condemning suicide did not require strict scrutiny.<sup>241</sup> The majority concluded that the plaintiffs in *Glucksberg* could not prove that the country had a history of protecting suicide as a right, thus the law should only be judged under the rational basis standard of review.<sup>242</sup> Chief Justice Rehnquist’s opinion was unquestionably

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233. *Id.*

234. *Id.*

235. MO. CONST. art IX, § 2 (1865).

236. *Id.*

237. See *supra* notes 69-80 and accompanying text.

238. *Comm. for Educ. Equal.*, 294 S.W.3d at 490.

239. Appellants’ Brief, *supra* note 219, at 126-32.

240. *Comm. for Educ. Equal.*, 294 S.W.3d at 490.

241. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

242. *Id.*

correct that suicide had not been historically protected in our country and thus a law outlawing it was subject only to a rational basis test.<sup>243</sup> However, the right to commit suicide was not the actual right claimed as fundamental by the plaintiffs in *Glucksberg*.<sup>244</sup> Instead, the plaintiffs in that case desired the right to choose the manner of their imminent death and to avoid “unnecessary and severe physical suffering” – they desired the right “to die with dignity.”<sup>245</sup>

In the instant case, the court dismissed the plaintiffs’ equal protection claim without addressing the right they claimed was fundamental. The plaintiffs’ claim was that legislation enacted to provide the right to education requires strict scrutiny by the court to ensure equal protection of the laws because *education is a fundamental right guaranteed to all school-age citizens under the age of twenty-one*.<sup>246</sup> As such, the court should have given more careful consideration to whether education, not equal or adequate funding, was a fundamental right in Missouri for the equal protection issue raised by CEE. Because the court did not do so, the plaintiffs’ claim regarding equal protection requirements and SB287 was left unanswered. Upon consideration, the court might have found that SB287 serves compelling state interests and is narrowly tailored to meet those interests such that the legislation is constitutionally valid even under strict scrutiny review. Instead, the court altogether avoided the question of a fundamental right to education when it failed to consider this specific point on appeal. This avoidance leaves the question open, and a future challenge to the school funding formula should revive the equal protection claim based on the fundamental right to education in Missouri.

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243. *See id.*

244. *Id.* at 790 (Breyer, J., concurring).

245. *Id.*

246. The appellant’s brief lists the respective points on appeal:

The trial court erred in dismissing the school finance claims . . . inasmuch as the record in this case established violations of the provisions of article IX, section 1(a), of the Missouri Constitution which requires the general assembly, and hence the state of Missouri, to maintain a system of free public schools which will provide for the ‘general diffusion of knowledge and intelligence’ which is necessary in this era to preserve the ‘rights and liberties of the people’ and the state has not done so.

Appellant’s Brief, *supra* note 219, at 67. “The trial court erred in dismissing the claims predicated upon the provisions of article I, section 2, of the Missouri Constitution relating to equal opportunities inasmuch as *education is a fundamental right* in Missouri and the record reflects that school funding in Missouri is disparate and violates section 2.” *Id.* at 126 (emphasis added); *see also supra* note 102-04 and accompanying text.

### B. Property Tax Assessments and the SB287 Formula

The central claims of the tax assessment challenge to the SB287 formula were presented by Judge Wolff in his dissent.<sup>247</sup> Judge Wolff outlined two distinct problems with the SB287 formula: (1) reliance on non-uniform tax assessments yields unconstitutional injury to some school children across the state,<sup>248</sup> and (2) freezing assessment values at 2004 levels ensures that some properties are incorrectly valued and that school children suffer injury resulting from a lack of school funds.<sup>249</sup> The underlying issue of both claims is whether or not the use of property tax assessment data was or can be adequately equalized in order to ensure compliance with constitutional principles. If the tax assessments cannot be adequately equalized, then it stands to reason that the SB287 funding formula (and presumably any other formula that determines levels of funding based upon property tax revenue) ensures that districts in which property is undervalued will not yield the level of taxes that they should when compared to another district that is correctly valued or overvalued. The result will be that children in those undervalued districts will suffer the injury of having incorrect (and perhaps insufficient) levels of funding per pupil for public education under the current formula.<sup>250</sup>

However, this may not be the strongest possible challenge to SB287 regarding its reliance on tax assessment data for funding allocation. Whether ongoing tax assessments can be equalized precisely may either be virtually unanswerable or may reveal that, with respect to the SB287 formula, the assessments produce roughly equitable funding levels across the state as was intended by enacting SB287.<sup>251</sup> If either of these are the case, then a future challenge to the disparate nature of property tax assessments in Missouri should fail because no constitutional provisions would be violated. In such a situation, a future challenge to SB287's use of property tax assessments would need to follow the second prong of Judge Wolff's criticism.

The more compelling challenge to the tax assessment data of the SB287 formula is that locking in the 2004 data for eight years ensures that some districts will necessarily receive less funds than required by the formula itself. As property taxes fluctuate between the 2004 assessments and the present, there are likely to be districts in which the average assessed property value is significantly less than that value in 2004. For example, consider a hypothetical district in which property values fell by 15% following the 2004 assessments. In that district, the "local effort" amount of funding for public schools expected by SB287 would be based on 100% of the assessed property tax

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247. See generally *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 495-513 (Mo. 2009) (en banc) (Wolff, J., concurring in part and dissenting in part).

248. *Id.* at 505-06.

249. *Id.* at 506.

250. *Id.* at 505-06.

251. More research data than is currently available is necessary to move forward definitely with either of these claims.

value from 2004.<sup>252</sup> However, in 2009, with that district's collected property taxes at only 85% of the 2004 level, the amount of funds available for the required "local effort" would be significantly lower than what was expected in 2004. The result is that in districts like the hypothetical one above, the amount of property taxes collected in 2009 would not add up to the amount expected by the SB287 formula, and the state money offered as a balance would not be enough to reach the target adequacy level of funding per pupil.<sup>253</sup> Because the state expects the district to collect more property tax funds than it does (because it expects 2004 property tax levels), the state funding provided by the SB287 formula fails to add up to the target level required by statute. For districts in which the property tax values have fallen since 2004 and the result is an inability to reach the adequacy target level of funding per pupil, the challenge to the use of the 2004 tax assessment data is relatively simple: by using the 2004 tax assessment data the SB287 formula fails to meet its own requirements of funding per student in that district.

To the majority's credit on the tax assessment issue generally, it is not clear that the plaintiffs presented the question in such a way that encouraged the court to rule in its favor. By claiming that the legislature was wrong to rely on the tax commission data, the plaintiffs merely challenged the rationality of the legislature's reliance on the State Tax Commission to adequately perform commission duties in accord with constitutional mandates.<sup>254</sup> The majority intimates that what the plaintiffs should have claimed is that the SB287 formula relies upon taxes that are non-uniform and thus violates constitutional provisions<sup>255</sup> or that the tax assessments themselves (and not merely the legislature's reliance upon them) violate the constitutional requirement that the Tax Commission equalize assessments.<sup>256</sup> As the majority insinuates, a challenge to the equalization process for tax assessments itself and its effect on the apportionment of state school funds could yield a different result.<sup>257</sup> Future legal challenges to the constitutionality of the SB287 formula should at the very least focus on this opening offered by the court.

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252. *Comm. for Educ. Equal.*, 294 S.W.3d at 482 & n.11 (setting out the SB287 school funding formula); *see also* MO. REV. STAT. § 163.011(10) (Supp. 2009) (providing the calculation for "local effort").

253. The adequacy number is a per-pupil spending target defined by section 163.011(18). For 2007 and 2008, the state adequacy target was set at \$6,117. *Comm. for Educ. Equal.*, 294 S.W.3d at 482 n.9.

254. *Comm. for Educ. Equal.*, 294 S.W.3d at 493.

255. MO. CONST. art. X, § 3 ("Taxes . . . shall be uniform upon the same class or subclass or subjects . . .").

256. MO. CONST. art. X, § 14 ("The general assembly shall establish a commission . . . to equalize assessments as between counties . . .").

257. *Comm. for Educ. Equal.*, 294 S.W.3d at 493.

## VI. CONCLUSION

The Supreme Court of Missouri erred in its decision to uphold the circuit court's decision against the Committee for Educational Equality. On both the equal protection and inequality of tax assessment claims, the SB287 funding formula violates provisions of both the Missouri Constitution and related statutory provisions. A future challenge to the SB287 formula should address one or more of the questions left unanswered by the court in the instant case: (1) whether education is a fundamental right guaranteed by the education and equal protection clauses of the Missouri Constitution, (2) whether reliance on non-uniform tax assessments yields unconstitutional injury to some school children across the state, and (3) whether freezing assessment values at 2004 levels ensures that some properties are inaccurately valued and that school children suffer injury as a result of lack of school funds.

Millions of dollars have already been spent litigating this issue much to the chagrin of Missouri taxpayers and legislators.<sup>258</sup> The court's inability to answer the equal protection claim and unwillingness to answer the tax assessment claim will certainly lead to thousands, if not millions, more in legal fees for the State of Missouri. Meanwhile, the children of Missouri will have to wait several more years for the good intentions and efforts of the state legislators to blossom into the fairness and equality guaranteed by the state's constitution.

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258. See Franck, *supra* note 220.